



OUTER HOUSE, COURT OF SESSION

[2018] CSOH 129

A240/16

OPINION OF LADY PATON

in the cause

ALISTAIR JOHNSTONE and DUNEDIN DESIGN LIMITED

Pursuers

against

DR SUSAN MARJORY SHEPHERD

Defender

**Pursuer: Party**

**Defender: Duthie; Davidson Chalmers**

13 December 2018

[1] Alistair Johnstone is the first pursuer, and a limited company of which he is the director, Dunedin Design Limited, is the second pursuer. The pursuers seek payment averring work done in relation to a property in Edinburgh. Today's hearing is a legal debate on the defender's first plea-in-law directed to the relevance and specification of the averments.

[2] The first pursuer Mr Johnstone appears as a party litigant. There is no representation for Dunedin Design Limited, the second pursuer. In terms of section 97 of the Courts Reform (Scotland) Act 2014 and the Act of Sederunt (Lay Representation for Non-Natural Persons) 2016 (SSI 2016 No 243), it is open to Mr Johnstone to apply to the court for

permission to conduct the proceedings on behalf of Dunedin Design Limited. In terms of paragraph 3(1) of the Act of Sederunt, such an application "is to be made" in the form set out in the schedule.

[3] At the beginning of today's hearing, after some debate, the court adjourned to allow the defender's agents and the clerk of court to compile the necessary form on Mr Johnstone's behalf. He has approved of the terms of the application and has signed and initialled it and it is lodged now as number 35 of process. In that application the following matters become clear. Dunedin Design Limited are in a position to pay for legal representation.

Mr Johnstone himself has a personal interest in the proceedings as he is the first pursuer, hence his deletion of a paragraph in the declaration part of the form. As Mr Johnstone explained to the court, his position is that certain papers have been removed from his possession which makes it very difficult for him to prove his case and that is why he is without legal representation.

[4] In my opinion, insurmountable obstacles arise from Mr Johnstone's application. First, in terms of section 97(3)(a) the court must be satisfied that Dunedin Design Limited is unable to pay for lawyers to conduct these proceedings. That is not the case here as Mr Johnstone has frankly acknowledged.

[5] Secondly, the court must be satisfied that Mr Johnstone is a "suitable person" to conduct the proceedings, see section 97(3)(b), section 97(4)(d) and also section 97(5). These provisions emphasise that he must not have a "personal interest" in the subject matter of the proceedings and, as the legislation and the Act of Sederunt make clear, Mr Johnstone does have a personal interest in the present case as he is the first pursuer. Had he not been the first pursuer he would have been eligible to make an application to the court to represent

Dunedin Design Limited but he is, as it happens, the first pursuer and he is not therefore a suitable person.

[6] A third matter, which is perhaps less important and more easily remediable, is that in terms of section 97(4)(c), the court must be satisfied that “the lay representative is authorised by [Dunedin Design Limited] to conduct the proceedings”. In this case, however, there is no authorising document signed on behalf of Dunedin Design Limited. This is a matter which could no doubt be rectified, but the other two matters cannot.

[7] In all the circumstances therefore it would not be competent for the court to grant permission to Mr Johnstone to act on behalf of Dunedin Design Limited in today’s debate, and so the application is refused.

[8] Following upon this ruling Mr Duthie, counsel for the defender, moved the court to dismiss the action at the instance of the second pursuer, Dunedin Design Limited, in respect that the company failed to appear at today’s procedure roll hearing and accordingly is in default. Reference was made to Rule of Court 20.1(1)(b) and 20.1(3). The matter is ultimately one for the discretion of the court.

[9] Having given Mr Johnstone an hour to consider his position, the following submissions were made by him. He contended that the matter of being unable to represent Dunedin Design Limited had only been brought to his attention in the last few days. Had he known earlier, say some three or four weeks earlier, he would have put things in action before now. In relation to the difficulty in finding legal representation, Mr Johnstone pointed out that one new lawyer approached had indicated that it might be best to seek another commission in an endeavour to recover documents and thus obtain the evidence that he required.

[10] In response to Mr Johnstone's submissions, Mr Duthie pointed out that when appearing before Lord Brailsford on 11 October 2018 Mr Johnstone made it plain to the court that he was seeking legal representation. As a result the defender's agents were working on the assumption that Mr Johnstone would be successful in that search. It was only on 11 December 2018, when Mr Johnstone sent the defender's agents an email, that it became apparent that he had not managed to achieve legal representation and that he would be representing himself and by inference representing the limited company. Having received that email, the defender's agents then responded with an email dated 11 December 2018 to make it plain that they could not agree to his representation of the limited company. The agents noted that Mr Johnstone had indicated to the court that he had been trying for months to get legal representation.

[11] Taking these submissions into account, I turn to the question for the court today, which is whether the court should exercise its discretion and dismiss the proceedings so far as raised by Dunedin Design Limited. When exercising that discretion I take into account, *inter alia*, the following matters. By email dated 11 December 2018, time 12.20, the defender's agents advised Mr Johnstone as follows:

"You should be on notice that, as you cannot represent the company at any hearing, my instructions are to seek that the action against Dr Shepherd which is brought by Dunedin Design Limited be dismissed if that company is not represented by a solicitor when this matter calls on Thursday. Expenses against the company for that dismissal will be sought."

By email dated 12 December 2018, time 14.29, the defender's agents further advised

Mr Johnstone as follows:

"Further to Lady Paton's request at the opposed motion hearing today for the defender to research whether it is competent for you to also represent the second pursuer, I attach a copy of the relevant legislation: section 97 of the Courts Reform (Scotland) Act 2014. Please take this email as advance notice ahead of the debate tomorrow that any application you may make to represent the second pursuer

tomorrow in terms of that section will be opposed by the defender on the basis that you are not a suitable person for the purposes of that section of the Act.”

A copy of the terms of section 97 was attached to the email.

[12] Turning to the procedural history of the case, Mr Johnstone and Dunedin Design Limited raised the present action in mid-2016. Considerable adjustment of the pleadings took place. The record eventually closed on 2 August 2017. At a By Order (Adjustment) Roll hearing on 13 October 2017, Lord Woolman stated that the pleadings required “radical surgery” and pointed out (a) that there was no specification in the pleadings of the work done, and (b) the length of the pleadings obfuscated the parties’ dispute. A minute of amendment on behalf of the pursuers was subsequently lodged (albeit late) in late November, early December 2017. A long period of answers and adjustments followed. Some six months later at a further By Order (Adjustment) Roll before Lady Wolffe, Mr Dawson for the pursuers indicated that he would not be moving the minute of amendment. A procedure roll diet was then fixed for 20 June 2018. On Friday 15 June 2018, (ie the Friday before the week in which the procedure roll diet was to take place) the pursuers’ agents withdrew from acting. The Rule 30 procedure was then followed. At a hearing before Lord Brailsford on 28 August 2018 Mr Johnstone appeared in person. He indicated that he was unable to get legal representation and sought time to do so. Time was duly given. On 11 October 2018 the case called again before Lord Brailsford. A procedure roll diet was fixed for 13 December 2018, that is today.

[13] I note that Mr Johnstone advises that he has sought assistance from other lawyers, without success. He explained to the court today that his main problem focuses upon the absence of certain papers which makes it difficult to prove his case. That is the view which his previous lawyers took and it also appears to be the view which other lawyers he has

consulted have reached (albeit that one suggested a further, which would be a fourth, commission to recover documents).

[14] In the exercise of my discretion and taking all these considerations into account, it is my view that any further postponement would not succeed in resolving the difficulties faced by Mr Johnstone. I accordingly grant the defender's motion for dismissal of the case so far as at the instance of the second pursuer, that is Dunedin Design Limited.