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Time for a broader approach?

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# Agency Law in the Scottish Courts: Time for a Broader Approach?

## A. INTRODUCTION

Given the small flow of case law in Scotland, it is not surprising that certain issues in agency law remain unresolved. The recent Outer House case of *Gray v Baird Logistics (UK) Ltd*<sup>1</sup> provided Lord Bannatyne with an important opportunity to consider unresolved issues in the law of ratification in Scotland. Whilst the decision has provided welcome clarity, the method used to reach the decision is perhaps more controversial.

## A. LEGAL LANDSCAPE

Essentially, this Outer House case allowed the court to consider and apply a classic and controversial English case, *Bolton Partners v Lambert*.<sup>2</sup> Before now, *Bolton* had, as far as the author can tell, only been discussed in two Scottish cases.<sup>3</sup> In neither was the Scottish court willing to accept or reject it as an authority to be applied in Scotland.

In *Bolton* a third party, (T), made an offer to the agent, (A), where A was acting for a principal, (P). The offer was accepted by A, but at that time A had no authority to accept the offer. T was not aware of A's lack of authority. T later withdrew his offer. It is worth pausing here to note that, in theory, there was nothing to prevent T from withdrawing his offer at this stage. A, as an unauthorised agent, had no power to conclude a binding contract between T and P. *After* T had purported to withdraw his offer, P ratified A's previously unauthorised acceptance of T's offer. When the principal raised an action for specific performance the Court of Appeal held that, because ratification is retrospective in effect, P's ratification of A's acceptance validated that acceptance with effect from the date that A had purported to make the acceptance. Essentially, ratification had fully retrospective effect, rendering T's earlier 'withdrawal' nugatory. P's successful ratification created a binding contract between T and P.

It is easy to see why this decision is controversial. Ratification, because it is retrospective, prevents T from withdrawing an offer which, at the time of withdrawal, he was

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<sup>1</sup> [2017] CSOH 44.

<sup>2</sup> (1889) LR 41 Ch D 295.

<sup>3</sup> *Licences Insurance Corporation & Guarantee Fund v Shearer* 1906 14 SLT 345, *Goodall v Bilsland* 1909 SC 1152.

perfectly free to withdraw. The outcome fails to respect contract law's adherence to *consensus in idem*. At no point in this sequence of events does consensus exist between T and P. Arguably it is unfair to T, holding him to a contract which he did not want, and which he finds he is bound to because of a later ratification. It allows P to 'play the market', observing whether prices increase or decrease, and making his decision whether or not to ratify depending upon fluctuations in price. The balance of power seems to lie in P's favour and against T.

*Bolton* has been "severely criticised".<sup>4</sup> Peter Watts and Francis Reynolds, writing about English law,<sup>5</sup> and Gino Dal Pont, writing about Australian law<sup>6</sup> adopt a similar approach, identifying the difficulties with the case and focussing on applying limits to ratification. The difficulties raised by the case have been recognised by the Privy Council,<sup>7</sup> and it was rejected by the authors of the U.S. Restatement (Third) Agency.<sup>8</sup> Professor Tan, whose book, *The Law of Agency*, is reviewed in this issue, stated "[i]f the issue should arise for determination in Singapore, it is suggested that a Singapore court should consider not following *Bolton Partners v Lambert*".<sup>9</sup> The current author reached the same conclusion in relation to Scots law in *The Law of Agency in Scotland*.<sup>10</sup> Analysis of the Outer House decision in *Gray* should be made against this backdrop of collective concern over *Bolton*.

## B. THE FACTS

The pursuer, Mr Gray, was the managing director of Braid Logistics (UK) Ltd, the defenders, under a contract of employment. The defenders are a wholly owned subsidiary of a parent company now known as "Braid Group (Holdings) Limited". The pursuer averred that certain other directors concocted a scheme to render him a "bad leaver" in terms of his contract of employment. The impact on him was the loss of benefits which would otherwise be payable to him on leaving his employment. In effect there would be a forced sale of his shareholding at a lower than market price.

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<sup>4</sup> Cheng Han Tan, *The Law of Agency* (2<sup>nd</sup> edn, 2017) para 6-050.

<sup>5</sup> P Watts and F M B Reynolds, *Bowstead & Reynolds on Agency*, (2018, 21<sup>st</sup> edn), para 2-090.

<sup>6</sup> *Law of Agency*, (3<sup>rd</sup> edn, 2014) para 5-48.

<sup>7</sup> *Fleming v Bank of New Zealand* [1900] AC 577, at 587 per Lord Lindley.

<sup>8</sup> § 4.05.

<sup>9</sup> Cheng Han Tan, *The Law of Agency* (2<sup>nd</sup> edn, 2017) para 6-059.

<sup>10</sup> (2013) para 11-34.

The defender's rights in relation to the pursuer's dismissal were governed by Clause 13.1 of his contract of employment. Broadly stated, dismissal could take place in the event of his material breach of the terms and conditions of his employment contract, or where he committed any act of gross misconduct or conduct which would, in the reasonable opinion of the Board, bring any company in the group into disrepute or prejudicially affect the interests of any company in the group. The Board was defined as the Board of Directors of the parent company, including any committee of the Board duly appointed by it. Clause 13.3 provided that the pursuer could be suspended on full pay for as long as necessary to carry out a proper investigation and to hold a disciplinary hearing. The contract also set out (in Clause 16) a Disciplinary and Grievance Procedure. This clause left the final decision on any issue to the Chairman of the Board, who at the time these events took place was, in fact, the pursuer.

The pursuer was dismissed through a combination of events concerning two other directors: Shane Watson and Andrew Watson.<sup>11</sup> At a meeting of the Board of the parent company, a Mr Leddra and both Mr Watsons were appointed to a committee of directors to investigate the conduct of the pursuer. The results of that committee's enquiries were reported to a meeting of the parent company. The pursuer argued that at a meeting, and by their own votes, Shane and Andrew Watson and Mr Leddra appointed themselves as members of the Board of Directors of the defenders.

Shortly thereafter, the pursuer received a letter from Shane Watson, as a member of the Board of Directors, indicating that an investigation was going to be made into the pursuer's conduct, and that the pursuer was suspended from his post forthwith. The pursuer had been accused of misusing a client expense account. When another employee suggested that Shane Watson was personally involved in the misuse of the account, the Board, in effect, switched the positions of Shane and Andrew Watson in relation to the allegations against the pursuer. Andrew Watson considered the evidence, including a witness statement from himself, and Shane Watson was to consider any disciplinary proceedings. It was averred that Andrew Watson purported to decide that disciplinary proceedings should be initiated against the pursuer. Shane Watson purported to conduct the disciplinary proceedings, deciding that the pursuer should be dismissed, and this fact was intimated to the pursuer by letter. All of this took place under protest by the pursuer. The pursuer's right to appeal was set out in a letter to him. He averred that he was never offered an Appeal Tribunal which was properly constituted in terms of his contract of employment.

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<sup>11</sup> The relationship between these people is not made clear in the case report.

The pursuer raised different proceedings in response to this sequence of events: a petition for judicial review of the decision and a reclaiming motion relating to a decision of the Lord Ordinary to grant interim orders. The Inner House held that the petition for judicial review should be dismissed.<sup>12</sup> The pursuer also raised a petition under sections 994 and 996 Companies Act 2006 in respect of the parent company,<sup>13</sup> and a reclaiming motion for the section 994 proceedings.<sup>14</sup>

## C. DECISION

### (1) Implied Ratification

Given constraints of space, only issues relevant to agency law are considered here. The first issue discussed by Lord Bannatyne, namely the competency of the proceedings, will not be discussed. The first agency issue related to the dismissal of Mr Gray. It was argued on his behalf that the act of dismissal was performed without authority and was not properly ratified. This necessitated discussion of whether ratification had *impliedly* taken place. Counsel for the defenders argued that there was ‘multiple ratification’ by the defenders by means of the position taken by them in the various litigations. Counsel for Mr Gray focussed instead on the mechanics of ratification itself. The defenders had not stipulated in the pleadings who had authorised the act of dismissal. The Board acted as agents of the company, and therefore the defenders needed to identify the Board meeting or meetings which were the basis of the ratification. The defenders had produced minutes of a Board Meeting, but crucially Mr Gray had been forced to leave this Board Meeting. His exclusion was not required by the Articles of Association. In relation to the various litigations, the defenders had been unable to provide a Minute authorising the conduct of the litigation.

The defenders, in response, sought to rely on what appears to the current author to be a ‘blanket’, all-encompassing authorisation possessed by counsel when appearing in litigation for a litigant. Counsel’s mandate, they argued, “could not be looked behind”.<sup>15</sup> In Lord Bannatyne’s view this argument was overstated. He characterised counsel’s appearance as involving a *presumption* of authority to act which could be rebutted through leading evidence to the contrary.<sup>16</sup> Lord Bannatyne characterised the pursuer’s position, not as challenging

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<sup>12</sup> *Gray v Andrew Watson and ors* 2016 [CSIH] 68.

<sup>13</sup> For the opinion of the Lord Ordinary in this case, see *Nigel Gray and ors* 2015 [CSOH] 946.

<sup>14</sup> *Gray and ors* [2016] CSIH 68.

<sup>15</sup> Para [59].

<sup>16</sup> Para [62], relying on *Fischer & Co v Andersen* (1896) 23 R 395 at 399.

counsel's mandate, but rather as challenging the underlying basis of this part of the defender's defence to the action, namely, the foundation of the defence of implied ratification.<sup>17</sup> The challenge had not, in a sense, been met by the defenders, given that they had failed to provide any further details. Nor was it a problem that no challenge had been made by the pursuers in the context of the other litigation. This was the first occasion upon which reliance was placed upon implied ratification.<sup>18</sup> The pursuers were therefore entitled to make the challenge in this particular litigation. The defenders had not raised any issue of personal bar.

Moving to the substantive issues surrounding implied ratification, Lord Bannatyne indicated that in a context such as this (a dispute between shareholders and directors) where the Board is not unanimous, the will of the company is expressed through resolutions of the Board which are validly passed at regularly constituted meetings of the Board. The pursuer characterised what had happened as a case of factions meeting in private and agreeing to act in a particular way. This being the case, a valid Board Resolution was required in order to found the actings which the defenders relied on. It was not enough that generally things were done which were known to the Board and done with their consent.

Lord Bannatyne concluded that, in the absence of Board resolutions to show that the defenders validly instructed the line of defence relied on, he was not persuaded of the irrelevance of the pursuer's challenge.<sup>19</sup> He proceeded to consider the one resolution of the Board that had been produced and concluded that, because the pursuer had been excluded from that meeting, it was invalid. The defenders' attack on the relevancy of this part of the pursuer's case therefore failed.

## **(2) Express Ratification**

It is in this context that *Bolton* becomes relevant. In essence, the pursuer argued that he had validly resigned. It followed that his benefits would be intact, and he would not be treated as a "bad leaver". Having resigned, he could not *later* be dismissed by the Board. However, an invalid dismissal pre-dated his resignation. Ratification operates retrospectively, turning previously invalid acts lacking authority into valid ones. Thus, after ratification the invalid dismissal became valid, 'trumping' the resignation. Lord Bannatyne explained: "...the Board resolution although it comes after the resignation relates back to the dismissal and therefore

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<sup>17</sup> Para [63].

<sup>18</sup> Para [65].

<sup>19</sup> Para [67].

the resignation is inoperative. The dismissal was valid subject to ratification”.<sup>20</sup> In essence this is to apply *Bolton*: “To have held the resolution ineffective would be to deprive it of its retrospective effect”.<sup>21</sup> The pursuer therefore lost on this point.

Scottish courts have refused to allow ratification to take place where it would undermine a legally relevant time limit: *Goodall v Bilsland*.<sup>22</sup> Lord Bannatyne stated: “[i]n the instant case there is no time fixed by agreement or by other means of a type identified above for doing the act, namely: dismissal for gross misconduct, which would be extended by finding the express ratification ineffective”.<sup>23</sup>

In relation to the second agency point, the pursuer argued that ratification would cause him prejudice, relying on an English Court of Appeal case from 2003, *The Borvigilant*.<sup>24</sup> Essentially, Lord Bannatyne was persuaded that ratification would have been unfairly prejudicial to the pursuer on the facts of the case. In order to reach his decision on this point, he relied on a number of factors.<sup>25</sup> The defenders could have expressly ratified, and they failed to do so for a significant length of time. Because they did not expressly ratify, the pursuer proceeded to act in a certain way, namely to raise proceedings. He would not have done this had there been express ratification at an earlier stage. Express ratification would, Lord Doherty held, be unfairly prejudicial. Overall, Mr Gray’s action was held to be incompetent on grounds not discussed here. Lord Bannatyne stated that, had he been with Mr Gray on competency, Mr Gray’s case on ratification would have passed the test of relevancy.

#### D. CONCLUSIONS

In relation to the first agency issue, there is now clarity: *Bolton* is authoritative in Scots law. There is no indication from the case report that the controversy surrounding *Bolton* was aired in court. It may have been: it is impossible for those not present in the court that day to tell. If the controversy was not discussed in *Gray*, this is unsatisfactory. It is, of course, difficult for a court to consider theoretical arguments on a point of agency law. The judge must rely on the authorities cited to him or her. The controversy is, however, well-documented in the leading text on English agency law, *Bowstead and Reynolds on Agency*, and in all of the

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<sup>20</sup> Para [107].

<sup>21</sup> Para [109].

<sup>22</sup> 1909 SC 1152.

<sup>23</sup> Para [105].

<sup>24</sup> *Owners of the Borvigilant v Owners of the Romina G, The Borvigilant*, [2003] EWCA Civ 935, [2003] 2 All ER (Comm) 736.

<sup>25</sup> Para [118].

other excellent textbooks on agency from other common law countries, some of which have been referred to here. In other Scottish agency cases, a broader approach has been taken. An example is *Halifax v DLA Piper LLP*, in which Lord Hodge, sitting in the Outer House, used precedents from Australia and New Zealand to reach a commercially sensible solution to a problem involving a non-existent principal.<sup>26</sup> By contrast, in this case, the court seems to have rather blindly followed English law.

All is not lost, however. In relation to the second agency point, the development of an unfairly prejudicial rule will mitigate the potential of *Bolton* to cause unfairness. The adoption of an unfairly prejudicial rule is entirely welcome. The need for such a rule was recognised by the current author in *The Law of Agency in Scotland*, published in 2013. The relevant part of that book identified that the Scottish institutional writers, Erskine and Bell,<sup>27</sup> expressed a need for protection. The current author also pointed to protective rules in the Principles of European Contract Law and the Draft Common Frame of Reference.<sup>28</sup> Judging from the case report in *Gray*, (although again, one cannot be sure on this point) *The Law of Agency in Scotland* was not cited to the court. Rather, the Outer House applied the English case, *The Borvigilant*.

Taken together, Lord Bannatyne's decisions on the two agency points are welcome. Nor is it surprising to see a Scottish court apply an English Court of Appeal precedent in this way. It is concerning, however, to see the court apparently unaware that the English case in question (*Bolton*) has been subject to criticism throughout the common law world. Issues of principle should be discussed when important decisions on the future direction of Scots law are made. Whilst the outcome is a good one in this context, that may not always be the case. Some English agency solutions or remedies will be shaped by the law of equity, or by the doctrine of consideration. Those solutions are not likely to be suitable for Scots law. Only by considering a broader range of sources, including those from outside the UK, are we likely to forge fair and useful solutions for Scottish agency problems.

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<sup>26</sup> [2009] CSOH 74.

<sup>27</sup> *The Law of Agency in Scotland*, (SULI, 2013), para 11-36; Erskine, *Institutes*, III,3,49; and Bell, *Commentaries*, II,141.

<sup>28</sup> Art 3:207(2) and Book 2, 5:111(2) respectively.