[2017] SAC (Civ) 33
DUN-F574-16

Sheriff Principal M W Lewis
Sheriff Principal C D Turnbull
Sheriff N C Stewart

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal by

MJ

Pursuer and Appellant

against

KJ

Defender and Respondent

Pursuer & Appellant: Robb, Stevenson & Marshall
Defender & Respondent: No appearance

19 September 2017

[1] On 19 September 2017 the court allowed the pursuer and appellant's appeal in this action against a decision of the sheriff whereby the action was dismissed. In light of the issues that arose in the appeal, it is appropriate that we set out in writing our reasons for so doing.

[2] The pursuer and appellant seeks contact with the parties' daughter, EJ, who is now 6 years old. Proceedings were commenced in December 2016. The defender and respondent entered appearance and a timetable was issued assigning a child welfare hearing for 16 February 2017 and an options hearing for 6 April 2017. At the child welfare hearing the

sheriff made no order regarding contact and re-scheduled the options hearing to 4 April 2017 in order that the case call before him, he having had the benefit of the discussion at the child welfare hearing.

[3] In a note appended to the interlocutor of 16 February 2017, the sheriff identified what he viewed as the critical issue in the case. He recorded that parties were agreed that there was no possibility of compromise or agreement on this matter and that a third party report would be unlikely to assist. Notably, the sheriff stated the matter should proceed to proof as quickly as possible.

[4] The re-scheduled options hearing proceeded before the same sheriff on 4 April 2017. At that time, on the face of the interlocutor, all the sheriff did was assign a case management hearing. The courses of action open to a sheriff at an options hearing are set out in rule 9.12.(3) of Schedule 1 to the Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 ("OCR 1993"). In this case, having regard to the terms of the sheriff's note of 16 February 2017 and the terms of the sheriff's interlocutor of 4 April 2017, we infer that the intention of the sheriff was to close the record and appoint the cause to a proof under rule 9.12.(3)(a) (neither party having lodged a note under rule 22.1). Had he done so, having regard to the nature of the proceedings, rule 9.12.(3)(f) would apply and a case management hearing would be assigned. Notwithstanding the omission, on the joint motion of the parties the sheriff assigned a case management hearing

[5] Schedule 1 to the OCR 1993 at Chapter 33AA provides rules for the expeditious resolution of certain causes. These rules have been in effect since June 2013 and apply where a cause is proceeding to proof or proof before answer in respect of a crave for an order under section 11 of the Children (Scotland) Act 1995 (see rule 33AA.1).

[6] It is appropriate to observe that s.11(7) of the Children (Scotland) Act 1995 provides that:

> "… in considering whether or not to make an order under subsection (1) … and what order to make, the court—
> (a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all"

[7] In terms of rule 33AA.3.(1), the parties must hold a pre-hearing conference in advance of the case management hearing. In this case, that conference ought to have taken place by 8 May 2017. At the pre-hearing conference parties must discuss settlement of the action; agree, so far as is possible, the matters which are not in dispute between them; and discuss the information referred to in rule 33AA.4.(1).

[8] Rule 33AA.3.(2) requires the pursuer to lodge with the court a joint minute of the pre-hearing conference prior to the case management hearing or explain to the sheriff why such a minute has not been lodged. Whilst the obligation to lodge rests with the pursuer, it is a joint minute that requires to be lodged.

[9] A case management hearing may, on cause shown, be continued to a further case management hearing. For the purposes of rule 33.37 (that which deals with decree by default in family actions), a case management hearing is a "diet".

[10] The case management hearing was assigned for 8 May 2017. A pre-hearing conference had taken place on 3 May 2017. A draft joint minute was prepared by the agents for the pursuer and appellant. It was forwarded to the agents for the defender and respondent on 8 May 2017, following the case management hearing. On the motion of the pursuer, and of consent, the case management hearing was continued to 5 June 2017. Due to

agents' holiday commitments, that case management hearing was subsequently discharged by unopposed motion, with a new hearing being assigned for 19 June 2017.

[11] The second case management hearing on 19 June 2017 was presided over by the sheriff who had dealt with the child welfare hearing on 16 February 2017 and the options hearing on 4 April 2017. The case management hearing on 19 June 2017 was continued to a further case management hearing, before the same sheriff, on 26 June 2017. The interlocutor in respect of the hearing on 19 June stipulated that a pre-hearing conference minute required to be lodged prior to the next calling of the case.

[12] In a note appended to the interlocutor of 19 June 2017, the sheriff recorded that the pursuer and appellant's agent had sought a discharge of the case management hearing and had invited the court to assign a child welfare hearing, at which pursuer and appellant would seek supervised contact. That motion was opposed by the defender and respondent and refused by the sheriff. The sheriff again noted what he saw as a discrete issue between parties which could and should be resolved by the court before the question of contact was determined. This was the same issue as had been identified at the child welfare hearing on 16 February 2017. The sheriff observed that the resolution of that issue against the pursuer and appellant may have a bearing on the nature and extent of any contact. The sheriff went on to record that he had been advised that a pre-hearing conference had taken place, however, no minute of that conference had been lodged. He states that no good explanation for that was forthcoming, without specifying what actually was said on this issue. The sheriff anticipated fixing a preliminary proof on the discrete issue and offered a number of helpful observations as to the matters parties should address. He expressed the hope that the matter could be sufficiently focused that the preliminary proof would last no more than one day. He expected parties to work to seek to achieve this.

[13] The court was advised that at the case management hearing on 19 June 2017 the presiding sheriff had been advised that the requisite joint minute had been drafted and forwarded to the agent for the defender and respondent, however, no comments had been made upon it. The court was also advised that the draft was then of limited value due to the passage of time. The defender and respondent elected not to participate in this appeal and therefore did not answer the grounds of appeal.

[14] A third case management hearing took place on 26 June 2017. Following a change in programming, the sheriff who had conducted the child welfare hearing on 16 February 2017; the options hearing on 4 April 2017; and the case management hearing on 19 June 2017 was not available. The case management hearing called before a sheriff who appears to have had no previous involvement in the case. The joint minute of the pre-hearing conference had still not been lodged.

[15] This failure was addressed by the parties and their explanations recorded by the presiding sheriff in his note. In short the agent for the pursuer and appellant seemed to be blaming the agents for the defender and respondent for refusing to approve the draft, whereas the agent for the defender and respondent complained that the draft did not reflect all matters of importance.

[16] The grounds of appeal state that correspondence had passed between parties' agents, addressing the central issues which would have been contained within a joint minute, that by the morning of 26 June 2017 parties were very close to an agreed position, and that an "*abbreviated*" joint minute was "*available to be submitted to the court, albeit the defender and respondent's agent was … reluctant to sign*" it. This was explained to the presiding sheriff.

[17] Based on the information before him and the explanation given to him and in the context of sluggish progress, the sheriff decided that the failure to lodge the long awaited

joint minute was "intolerable" and he dismissed that action. The sheriff formed the view that the pursuer's failure to lodge a joint minute of the pre-hearing conference constituted a default. He dismissed the action and found no expenses due to or by either party. It is against that the decision that this appeal lies.

[18] Before this court, the pursuer and appellant argued that the sheriff had erred in the exercise of his discretion. He contends that the presiding sheriff's failure to have regard to the reasons why a joint minute was not available amounted to a wholly unreasonable exercise of discretion.

[19] The first question for determination is whether or not the pursuer and respondent was in default at the hearing on 26 June 2017. This is not a matter which appears to have been appropriately considered by either the sheriff or those acting on behalf of the pursuer and appellant.

[20] In his note, the sheriff refers, in error, to rule 16. The present action is a "family action". As such, rule 33.37 applies and rule 16 does not (see rule 16.1(a)).

[21] Insofar as relevant, rule 33.37 provides as follows:

> (1) In a family action in which the defender has lodged a notice of intention to defend, where a party fails-
>
> (a) …
>
> (b) to implement an order of the sheriff within a specified period,
>
> (c) …
>
> (d) otherwise to comply with any requirement imposed upon that party by these Rules
>
> that party shall be in default.
>
> (2) Where a party is in default under paragraph (1), the sheriff may-
>
> …
>
> (d) dismiss the family action or any claim made or order sought;
>
> …
>
> (4) In a family action, the sheriff may, on cause shown, prorogate the time for lodging any production or part of process, or for intimating or implementing any order.

[22] To consider whether or not the pursuer and appellant is in default , one must have regard to the precise terms of rule 33AA.3.(2) which provides that:

> Prior to the case management hearing the pursuer shall lodge with the court a joint minute of the pre-hearing conference or explain to the sheriff why such a minute has not been lodged.

[23] The requirement imposed upon the pursuer by rule 33AA.3.(2) is not simply to lodge a joint minute of the pre-hearing conference. The rule envisages that this may not be possible. If the joint minute is not lodged, the pursuer requires to explain to the sheriff why that is so.

[24] Whilst rule 33AA.3.(2) imposes an obligation upon a pursuer, it seems to us that that pre-supposes there being an agreed joint minute to lodge. In our opinion, a default can only arise under rule 33.37 if no joint minute is lodged and no explanation is tendered to the court. In this case, an explanation was offered to the sheriff. From the terms of the sheriff's note, it would appear that a fuller explanation has been offered to this court, nonetheless, the sheriff was told that parties had been unable to agree the terms of a joint minute. If agreement cannot be reached on its terms, that is not necessarily down to the pursuer alone. For only the pursuer to be in default in circumstances where it is the defender who refuses to agree a joint minute would clearly be a perverse interpretation of the rule in question.

[25] Whilst it might be argued that in this case there was also a default in terms of rule 33.37.(1)(b) (failure to implement an order of the sheriff within a specified period), the default is one and the same, namely, the failure to lodge a joint minute. The requirement in the interlocutor of 19 June 2017 regarding the lodging of the joint minute was unnecessary, although we do not criticise the sheriff for including it. By doing so, however, he did not exclude the alternative contemplated by rule 33AA.3.(2), namely, the provision of an

explanation where there is no joint minute. For the avoidance of any doubt, there is nothing before us to suggest that was his intention.

[26] Irrespective of the proper interpretation of the rules considered above, the sheriff proceeded on the basis that he was entitled to exercise his discretion and dismiss the case. In our view, this is a clear example of the erroneous exercise of discretion such that this court would be entitled to interfere had that been the only course open to it.

[27] Lord President (Hope) in *DTZ Debenham Thorpe* v *Henderson Transport Services* 1995 SC 282 at 285 observed that, in relation to matters of discretion, the question for an appellate court:

> "… is whether it has been shown that she misdirected herself in law, failed to take into account a relevant and material factor, left some relevant and material factor out of account or reached a result which was wholly unreasonable."

[28] For the reasons set out above, the sheriff misdirected himself in law. There was no default. He failed to have the welfare of the child concerned as his paramount consideration. Such reasoning as there is in this regard proceeds on a misunderstanding of the history of the case and the reasons for the delay in progressing matters. He appears to have failed to have regard to what had been said previously by the sheriff who had predominantly managed the case. The net effect of the foregoing is that the decision taken was, in the words of Lord Hope, wholly unreasonable.

[29] In *McKelvie* v *Scottish Steel Scaffolding Co* 1938 SC 278 at 281, albeit in the context of default by a defender, Lord Moncrieff observed:

> "I also would be most reluctant, in any case in which prima facie there appeared to be a proper defence put forward, to allow decree to pass against the defender without investigation of that defence. Even if carelessness on the part of the defender or others for whom he had been responsible had delayed the course of the procedure of the action, I should, in such a case, always be willing to entertain an application for relief."

[30] Such observations apply equally to the case of the pursuer and appellant here. The delay noted by the sheriff was most regrettable, particularly when it had been identified some four months earlier that the case needed to proceed to proof. Both parties could and should have progressed matters far quicker. A joint minute required to be lodged. If there were matters upon which parties could not agree, their respective positions ought to have been included in the joint minute.

[31] In light of the circumstances set out in paragraph [4] above, and in particular the failure to close the record, it is appropriate to note the observation of Lord Sumption in *Prest* v *Petrodel Resources Ltd* [2013] 2 AC 415 at paragraph [37] that courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different. In the context of a family action that requires a proof, the closing of the record is an essential step. Whilst the welfare of the child concerned is the paramount consideration in an action such as this one that does not permit parties, or the court, to disregard the proper procedure.

[32] Equally, in light of the position adopted by the defender and respondent in this appeal, it is regrettable that a further three months passed and a bench required to be convened to deal with an appeal that could have been dealt with under the procedure envisaged by either paragraph 65 or paragraph 66 of the Sheriff Appeal Court (Civil) Practice Note No. 1 of 2016.

[33] In the foregoing circumstances, on 19 September 2017, we allowed the appeal; recalled the interlocutors of 4 April and 26 June 2017; closed the record and allowed parties a proof of their respective averments on a date to be afterwards fixed; remitted to the sheriff to proceed as accords; assigned a case management hearing to take place before the sheriff who conducted the child welfare hearing on 16 February 2017; the options hearing on 4 April

2017; and the case management hearing on 19 June 2017 on a date to be afterwards fixed; and found no expenses due to or by either party.