SHERIFF APPEAL COURT

[2017] SAC (Civ) 34
LIV-SF34-15

OPINION OF THE COURT

delivered by APPEAL SHERIFF ANDREW M CUBIE

in appeal by

DAVID BROWN

Appellant and Pursuer

against

AVIVA INSURANCE LIMITED

Respondent and Defender

Appellant and Pursuer: Smith QC, Crawford;
Respondent: No appearance

25 October 2017

Introduction

[1] This is an appeal against the decision of the sheriff at Livingston issued on the 7 December 2016 to refuse the pursuer's motion for sanction for the employment of counsel. The sheriff found for the pursuer at proof in a summary cause action arising from a road traffic accident. Both parties had instructed counsel. When the sheriff came to consider the pursuer's motion in terms of s 108 of the Courts Reform (Scotland) Act 2014, he refused to grant sanction. A customarily comprehensive and thoughtful note was produced.

[2] The appellant sought to challenge the sheriff's approach and decision in relation to the grant of sanction. The pursuer was represented by Andrew Smith QC. The defenders were unrepresented as more fully explained below.

Preliminary matters

Appeals against Expenses

[3] Appeals against expenses are not encouraged; that is clear from a variety of authorities, the most recent expression of which came from Sheriff Principal Turnbull in this court in *Ahmed* v *QBE Insurance (Europe) Limited* [2017] SAC (Civ) 22

> [1] It is well understood that questions of liability for expenses are for the discretion of the court (see Macphail Sheriff Court Practice 3rd edition at 19.03). An appellate court will only interfere with a discretionary decision in certain defined classes of case (see Macphail op. cit. at 18.111). The consequence of the relationship between these two well established principles is that appeals on questions of expenses only are severely discouraged and are only entertained in limited circumstances. This is one such case.

The matter is addressed in *Cumming* v *SSE* [2017] SAC (Civ) 17 to which I will return. I endorse these observations.

[4] Mr Smith submitted that there was a question of principle. The provisions of s 108 which on one view restates the existing practice, had given rise to difficulties in identifying the appropriate approach. I recognise that the provisions relating to the Sanction for Counsel are relatively new, important and frequently considered.

[5] Mr Smith advised me that the sheriff's decision at first instance had considerable currency around Scotland and was being referred to regularly in relation to opposed applications for sanction. He indicated that Faculty of Advocates had considered seeking to intervene in these proceedings but were content on learning that the matter was to be dealt with by senior counsel on behalf of the pursuer.

[6] Accordingly there was interest in determining the general approach to be taken.

Concession by Respondent

[7] A further issue arose when Mr Smith produced a letter sent to his instructing solicitors from the defenders' solicitors saying that the appeal was being conceded. The letter was in the following terms:-

> "We write to confirm that we concede the appeal.
> For the avoidance of doubt we do not intend to take part in any appeal proceedings and will not be responsible for any fees incurred in that regard."

[8] Accordingly there was no appearance for the defenders and respondents. I was told that the matter had been resolved by payment of the account of junior counsel for the proof; but I was urged to deal with the matter as having more than an academic interest.

[9] As Mr Smith recognised, the concession does not necessarily resolve the matter; in the event of non-appearance, or even concession, an appellate court may still require to be satisfied that the appeal should be granted. *Macphail Sheriff Court Practice* (3rd edition) provides at paragraph 18.100:

> *Burden on appellant*
>
> On an appeal from the sheriff principal or the sheriff, the appellate court, whether it is the Inner House of the Court of Session or the sheriff principal, regards the interlocutor complained of as a valid and correct judgment which must remain so until the appellant shows cause why it should be altered. Thus, where the respondent does not appear at the hearing to support the judgment, the court will not on that ground sustain the appeal, but will call on the appellant to show cause why the appeal should be sustained. If the court is not satisfied that the court below was wrong, it will refuse the appeal.

[10] The authority for that proposition is found in *Dunbar* v *Macadam* (1884) 11 R 652, where the Lord Justice Clerk said:

> "…the rule was laid down that the court will not sustain an appeal merely because the respondent does not appear, but will in such a case call on the appellant to shew cause why the Sheriff's judgment should be altered."

[11] I consider that this has application even in the case of a concession, if the appellant contends that the sheriff at first instance has erred.

[12] In fairness to counsel, this argument was not particularly developed by him; I was prepared to proceed for the reasons given in paragraph [6] above.

[13] But what is the position in the appeal court in relation to what might be seen to be an academic appeal? The views expressed here are tentative in the absence of a developed argument and a contradictor, but I recognise that there may be circumstances where, even in the event of a concession, an appeal court should proceed to consider the merits of the appeal.

[14] A recent English authority is of some assistance, although the decision proceeded within the context of the Civil Procedure Rules (CPR). The relevant rule is in the following terms

> Section 6 of CPR PD 52A:
> Allowing unopposed appeals or applications on paper
> 6.4 The appeal court will not normally make an order allowing an appeal unless satisfied that the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity. The appeal court may, however, set aside or vary the order of the lower court by consent and without determining the merits of the appeal if it is satisfied that there are good and sufficient reasons for so doing..."

[15] In *Rochdale MBC* v *KW* [2015] EWCA Civ 1054, the Court of Appeal considered the role of the appellate court in an appeal which proceeded of consent. The first instance judge, to whom the case had been returned by the Court of Appeal, declined to follow the order made, because there had been no determination on the merits.

[16] The Appeal Court judgement, delivered by the Master of the Rolls (then Lord Dyson), recorded the sentiment of the first instance judge, who said:

> "[T]he judge whose decision is being impugned is surely entitled to no less [than a hearing and a judgement] and there is a plain need to expose error so that later legal confusion does not arise".

The Court of Appeal disagreed, asserting that there was no reason to restrict the discretion conferred by the rules which allowed an appeal by consent. They rejected the notion that a judge had any entitlement to a decision saying, at paragraph 27:

> "[T]he appeal court is only concerned with the interest of the parties and the public interest. The interests of the judge are irrelevant."

The Court went on to say:

> "28. We accept, however, that there will be cases where it may be in the interest of the parties or the public interest for the court to make a decision on the merits after a hearing even where the parties agree that the appeal should be allowed."

The Court gave examples, in a family case (*Bokor-Ingram* v *Bokor-Ingram* 2009 2 FLR 922) and, in the patent court (*Halliburton Energy Services* v *Smith International (North Sea)* [2006] RPC 26).

[17] I take from these decisions that, even in a case of concession or agreement, an appeal court may consider the merits of the first instance decision if there is wider interest. I accepted from Mr Smith that the decision from the lower court had a currency beyond the parties in this case and was informing the application of s 108 in courts throughout Scotland. For that reason, despite the narrow scope of the appeal and the concession made by the respondent, I have considered the merits.

Submissions

[18] A helpful note of arguments had been prepared. Mr Smith did not rehearse it in full; the thrust is as follows.

[19] He submitted that in general terms the test which is now contained in s 108 is the same as the previous approach taken by courts; there may have been a slight difference in emphasis, in that the court "must" grant sanction in certain circumstances. Essentially however, the issue remains one of an exercise of discretion.

[20] The sheriff posed only one question for the Sheriff Appeal Court as follows:-

> "Did I err in law in taking the view that it was not reasonable to sanction the employment of counsel by the pursuer for the purpose of the proceedings?"

Mr Smith submitted that the question should be answered in the affirmative.

[21] He submitted in the first place that the sheriff had erred because he had applied a subjective rather than an objective test. The sheriff misdirected himself in relation to the test to be applied. That error vitiated the decision made.

[22] If the court disagreed with that analysis, his secondary position was that the sheriff had reached an unreasonable or unwarranted decision having regard to the material before him; because of the manifest importance, a matter acknowledged by the sheriff, the employment of counsel should have been sanctioned.

[23] He submitted that in approaching the matter in the way in which he did the sheriff showed a failure to understand the dynamic nature of litigation, where decisions and reasons for decisions can change on a frequent basis. Decisions made by parties and those representing them might be made for one or more reasons. Positions might change or develop; factors influencing the decision making can be overtaken or superseded by other considerations.

[24] In this case, he submitted, the sheriff erred by relegating the importance of the matter to the pursuer because it had not been the trigger for the instructing of counsel. The sheriff himself had described the matter as being "of considerable importance to the pursuer";

having recognised that factor objectively, the sheriff was not precluded from considering that as a factor.

[25] Similarly the issue of equality of arms was not because of complexity, but rather because of the important of the matter to the pursuer, arising from the gravity of the allegations against the pursuer.

[26] He referred to *Cumming* v *SSE* (which was decided after the sheriff's decision in this case) and to which reference is made later in this judgement.

[27] This court should intervene because of this error. He submitted that it was not simply a question of whether a solicitor could conduct the proof. He made reference to *McAllister* v *Scottish Legal Aid Board* 2011 SLT 163 at p 173. In considering an application for judicial review of a decision of SLAB, Lady Stacey had occasion to consider the approach which Scottish Legal Aid Board took towards applications for sanction for counsel. He submitted that this afforded support to his proposition that it was not enough to assert that a solicitor could have conducted the case against counsel on an equal basis.

[28] Lady Stacey said the following (emphasis added):

> "It seemed to me clear that the power given to SLAB, which had previously resided with the central legal aid committee, was to grant legal aid consisting of representation by a qualified lawyer, including sanction for counsel where it was appropriate so to do. I accept that the clause does give a definition of legal aid. It seems to me that it also sets a test, in very wide terms, which has to be satisfied in order that SLAB gives sanction for counsel. I am of the view that the words of the act and the extracts from Hansard show that it was intended that this would be governed by normal legal usage. That I hold to be a reference to existing practice of granting sanction for counsel in cases in the sheriff court, and to the practice of the court granting expenses in civil cases with sanction for the employment of counsel in the sheriff court. Neither counsel argued that anything turned on this being criminal legal aid rather than civil legal aid. It appears that no difference was made by the legislature between civil and criminal legal aid in this regard. **It seems to me tolerably clear from the correspondence that SLAB considered the question of whether or not the case was beyond the capabilities or competence of a solicitor in deciding whether a grant of sanction would be appropriate. That was the wrong test. They were required rather to consider whether or not it was appropriate in all**

> **the circumstances to sanction counsel.** It also seems to me clear that the applications were at least initially presented on the basis that the reason it would be appropriate to sanction the employment of counsel was that the work was beyond the capabilities of a solicitor."

[29] He submitted that the fact that a case may fall within the capabilities or competence of a solicitor was a factor, but not a decisive factor, against sanction; similarly the instruction of counsel by the other side was a factor of considerable weight, but not decisive in favour of sanction.

[30] Looking at the question of error, he submitted that the sheriff failed to give due weight to the fact that the other side instructed counsel, especially as no explanation was given for such instruction. It was disingenuous for the defenders to fail to acknowledge that the attack upon the credibility of pursuer had prompted the instruction of counsel. He moved that the appeal be granted.

The Sheriff's Note

[31] After a careful analysis of the statutory provisions and the decision in *J's Parent and Guardian* v *M&D leisure ltd* 2016 SLT (Sh Ct) 185, the sheriff says:

> "[14] …[I]t was not possible to escape the fact that the defenders' denial that the accident caused any injury involved, at least indirectly, an attack on the pursuer's credibility. I have no doubt therefore that, despite the small value of the claim, this summary cause action turned out to be of considerable importance to the pursuer.
>
> [15] The trouble for the pursuer is, however, that the importance of the claim was not the reason why the pursuer or his agents chose to instruct Counsel. As the pursuer's Counsel candidly, and properly, admitted, they chose to instruct Counsel because the defenders had advised them shortly before the proof that they had instructed counsel to conduct the proof on their behalf. Until that point as I understand it, the pursuer was content to be represented by a solicitor. I therefore do not find that the importance of the proceedings to the pursuer is sufficient to justify certifying the case as suitable for counsel."

[32] The sheriff considers s 108(3)(b) as follows:

> "[17] …[T]he court is directed to ensure only that no party gains an *unfair* advantage by virtue of the employment of Counsel. While a party with sufficient resources in a complicated and specialist case might gain an unfair advantage by employing specialist counsel where the other side could not do so, that was not the position in the present case…Although for their own reasons the defenders chose to instruct an experienced counsel, that in my view is not something which would have given them an unfair advantage. I think that while some solicitors might not have relished having experienced counsel appearing against them, nevertheless it would have been possible for a solicitor to have conducted a straightforward case like this one on behalf of the pursuer on an equal basis. In the event the pursuer instructed counsel but I am not persuaded that it is appropriate for the defenders as the losing party to pay for the expense of this."

[33] These paragraphs are from the sheriff's judgement about the issue of sanction. In his stated case he supplemented that note by adding:

> "5. It is said that I did not give sufficient weight to the importance of the cause. This was a case where for some time prior to the proof the pursuer must have been aware of the fact that an adverse credibility finding might have had an effect on his career. Despite that he did not instruct counsel until the last minute and did so only on discovering that the defenders had instructed counsel. The view must have been taken throughout the proceedings and until just before the proof that his interests were sufficiently protected by having a solicitor represent him. I found it difficult in those circumstances where the pursuer himself had been content to be represented by a solicitor until shortly before the proof was due to commence, to take the view that the importance of the action justified sanction for counsel."

[34] I take from this that the sheriff felt himself precluded from considering importance as a factor because it had not triggered the instruction, that he recognised that the defenders' assertion that they were not attacking the pursuer's credibility was slightly disingenuous, and that it would have been within the competence of a solicitor to have conducted the proof.

The Decision

[35] The only question posed by the sheriff is:

> "Did I err in law in taking the view that it was not reasonable to sanction the employment of counsel by the Pursuer for the purpose of the proceedings?"

[36] The relevant parts of Section 108 are as follows:

> **"108 Sanction for counsel in the sheriff court and Sheriff Appeal Court**
>
> (1) This section applies in civil proceedings in the sheriff court or the Sheriff Appeal Court where the court is deciding, for the purposes of any relevant expenses rule, whether to sanction the employment of counsel by a party for the purposes of the proceedings.
>
> (2) The court must sanction the employment of counsel if the court considers, in all the circumstances of the case, that it is reasonable to do so.
>
> (3) In considering that matter, the court must have regard to—
>
> (a) whether the proceedings are such as to merit the employment of counsel, having particular regard to—
> (i) the difficulty or complexity, or likely difficulty or complexity, of the proceedings,
>
> (ii) the importance or value of any claim in the proceedings, and
>
> (b) the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel.
>
> (4) The court may have regard to such other matters as it considers appropriate."

[37] Section 108 displaced the common law position in relation to sanction for counsel; it has been subject to some judicial comment already.

[38] The sheriff has approached the matter carefully reiterating the confusion expressed by Sheriff Braid in *J's Parent and Guardian (*and approved in *Cumming)* about the wording of the provision. The Sheriff Appeal Court considered the approach to be taken in *Cumming* as follows:

> "[13] Section 108 has already been considered by a sheriff exercising his All Scotland jurisdiction in a personal injury action (*J's Parent and Guardian* v *M & D (Leisure) limited* 2016 SLT (Sh Ct) 185). We agree that the statutory provision broadly follows the common law position set out in Macphail 12.25 except that "appropriateness" gives way to the test of whether it is "reasonable" to sanction counsel's involvement in all the circumstances of the case. We approve the approach taken by the sheriff in *J's Parent and Guardian* that "the test is one of objective reasonableness considered at the time of the motion" in all the circumstances of the case. The introduction of the requirement to sanction by virtue of the expression "must" adds little to the test. It is difficult to envisage circumstances where the court having reached the conclusion

that it is reasonable to sanction the employment of counsel did not then proceed to do so. We refer to this requirement as a "positive duty". It is a matter to which we will return.

[14] Whether or not to sanction the employment of counsel remains quintessentially within the judgement or discretion of the sheriff who is likely to be better placed than an appellate court to come to a judgement as to the nature of the cause; any difficulty or complexity arising; and its importance. The function of the appellate court where an appeal is taken against a decision involving the exercise of judicial discretion is well known and is conveniently set out in Macphail at 18.110 onwards. Absent misdirection it is not open to the appellate court to interfere and reach its own decision as to sanction. The appeal court may interfere with the conclusion reached by the sheriff if it is one which in the circumstances is plainly wrong. In *Henderson* v *Foxworth Investments Limited* 2014 SC UKSC 203, Lord Reed explained what the expression "plainly wrong" means. It is whether the decision under appeal is one that no reasonable judge could have reached. The test for review of a decision on a discretionary matter is set out in *Thomson* v *Corporation of Glasgow* [1962 SC (HL) 36]. That test has more recently been applied and approved in *Moran* v *Freysinnet Limited [[2015] CSIH 76]*.

[15] It is well recognised that appeals solely on a question or aspect of expenses are severely discouraged (*Caldwell v Dykes* supra; *Miller* v *Chivas Brothers Limited* 2015 SC 85), however, we accept that this appeal raises a point of general importance on sanction for counsel in the sheriff court with its new and extended privative limit. This involves the application of section 108 of the 2014 Act."

[39] And later:

"[20] Section 108 requires the court to consider whether it is reasonable to sanction the employment of counsel in all the circumstances of the case. If the court considers it reasonable it must grant sanction. Accordingly, the court has discretion to consider each case on its own merits. When the test is broadly formulated, which, in our view, it must be to allow the court to exercise its discretion properly, then it is not for an appellate court to set down principles upon which either this court or the sheriff court should approach motions for sanction. However, we do recognise that the statutory compulsitor requiring the court to grant sanction, if it is reasonable, (section 108(2)) is curiously otiose for the reasons we give at paragraph [13]. It may simply be emphasis signifying the intention that counsel would play a real and meaningful role in the work of the sheriff court in its new and expanded jurisdiction."

[40] Accordingly the test is one of objective reasonableness, remaining within the judgement or discretion of the sheriff. This court will only intervene in the event that the sheriff has erred. The test is a high one, still based upon Lord Reid's observations in the

well-known passage from *Thomson v Glasgow Corporation*, about when an appeal court might overturn a discretionary decision:

> "We might do so if some irrelevant factor had been taken into account, or some important relevant factor left out of account, or if the decision was unreasonable, and we would no doubt do so if the decision could be said to be unjudicial."

The discretion vested in the sheriff is exercised improperly if the sheriff fails to take account of a relevant factor. The sheriff must give due weight to each relevant factor. By giving due weight to a factor, the sheriff must not give either excessive or inadequate weight.

[41] In connection with sanction for counsel, s 108 specifies some matters to which the sheriff must have regard (or particular regard), being the difficulty or complexity, or likely difficulty or complexity, of the proceedings, the importance or value of any claim in the proceedings, and the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel, but reserving to the court that it may have regard to such other matters as it considers appropriate.

[42] In connection with the test for sanction, the sheriff must apply an objective test. The sheriff is not, in exercising this function, bound by the views of parties, even where a joint approach is taken; the question of sanction is peculiarly within the discretion of the sheriff.

[43] So the views of the parties are not decisive or determinative, not even presumptively so; the agreement of parties is a factor, but not a decisive factor; the fact that the case could be competently dealt with by a solicitor is a factor, but not a decisive factor; the fact that each party has instructed counsel is a factor, perhaps even a powerful factor, but not decisive (not a "rubber stamp" as Mr Smith put it). The court must apply its own judgement on the issue of sanction, informed, but not determined, by the submissions made. It is at large for the sheriff.

[44] The parties' positions do not circumscribe or limit the sheriff's assessment of the objective reasonableness of the employment of counsel. A relevant factor is not rendered irrelevant because it did not of itself trigger the employment of counsel. It may be different if a party expressly disavows a factor, but otherwise the sheriff must take account of each relevant factor and afford due weight to that factor.

[45] Although apparently arising from one factor, the decision to instruct counsel, and therefore the consideration about whether it was reasonable, may be a more multifaceted matter.

[46] So factors need not be considered in isolation; there may be an accumulation of reasons (none of which individually would justify the grant of sanction) which culminate in the decision to employ counsel, reacting to the dynamics of litigation. As long as the appropriate consideration is given to the relevant factors, whether alone or in combination, the sheriff's discretion will not lightly be interfered with.

[47] Against that background, I now consider the sheriff's approach. He considered two factors; broadly, equality of arms and importance.

[48] Dealing firstly with the issue of "equality of arms", I do not accept Mr Smith's submission that the sheriff erred; the sheriff recognised that the statute makes reference to "unfair advantage". The sheriff has assessed whether there would have been any unfairness arising from the positon and has concluded that there was not. There is no fault in that decision-making process; although others might have reached a different view, that is not the test. *MacAllister* dealt with different provisions; in particular the word "unfair" undermines any comparison in the context of s 108.

[49] However, in relation to issue of "importance", I consider that the sheriff did fall into error by giving inadequate weight to a relevant factor. The sheriff says:

> "[15] The trouble for the pursuer is, however, that the importance of the claim was not the reason why the pursuer or his agents chose to instruct counsel…I therefore do not find that the importance of the proceedings to the pursuer is sufficient to justify the case as suitable for counsel."

The sheriff was in error in determining that he was precluded from taking into account "importance" as a relevant factor, a matter I infer by the sheriff's use of the word "therefore," (meaning "as a result of").

[50] In my judgement, he took too narrow a view of the relevant factors by excluding, or at least marginalising, the issue of "importance", a matter he recognises as "considerable". The sheriff has rejected or minimised the importance of the matter to the pursuer, because that had not, of itself, triggered the instruction of counsel. But it was plainly a factor which informed the decision. The sheriff has been unduly influenced by the fact that the pursuer's decision to instruct counsel was apparently provoked by the defenders' decision to do so.

[51] Whatever the particular trigger was, the court should look at the statutory factors, using its own judgement to determine whether in terms of the statue, sanction should be granted, asking "Do I think objectively that it was reasonable to instruct counsel in this case?".

[52] Standing the error I have identified, the matter is at large for this court. Given the terms of the statute and on an objective consideration of the case including; the acknowledged importance to the pursuer; the sheriff's view that, despite the defenders' denial of an attack on the pursuer's credibility, that is what in fact happened; and the employment of counsel by the defenders, which, although not giving rise to an unfair advantage, is a factor to which the court may have regard in terms of s108(4), I consider that in all the circumstances of the case, it was reasonable for the pursuer to employ counsel. That being the case, I must grant sanction.

[53] I accordingly answer the one question posed in the affirmative, recall the sheriff's interlocutor of 7 December 2016 *quoad* sanction, grant sanction for the employment of Counsel and remit the cause to Livingston to proceed as accords.

Expenses

[54] I have reserved all questions of expenses. Notwithstanding the terms of the letter from the defenders conceding the appeal, Mr Smith moved for expenses, on the basis that the appeal process had been protracted by the defenders' acting. If that motion is to be insisted upon, parties should liaise with the Civil Office Manager at Edinburgh to identify an appropriate date for a hearing.