SHERIFFDOM OF LOTHIAN AND BORDERS

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2018] SC EDIN 25

PN649/17

NOTE BY SHERIFF KENNETH J McGOWAN

in the cause

LOUISE HALLIGAN

Pursuer

against

(FIRST) SUTHERLAND'S FRUIT AND VEG LTD; AND
(SECOND) WILKO STORES LTD

Defenders

First Defenders: MacKinnon; Weightmans
Second Defenders and Pursuer: McDougall; BLM

Edinburgh, 13 April 2018

Introduction

[1] In this claim for damages for personal injuries, the action settled and a final decree was granted. The case came before me on the second defenders' opposed motion to have that interlocutor treated as *pro non scripto*.

[2] I was referred to the following authorities:

a. Sheriff Court Practice, MacPhail, paragraphs 5.87 – 5.89 and 17.14;

b. Ordinary Cause Rules, Chapter 12;

c. *MBR* v *The Secretary of State for the Home Department* [2013] CSIH 66;

d. *Laing* v *Scottish Arts Council 2001* SC 493;

e. *McFarlane* v *Scottish Borders Council* 2006 SLT 721.

The sequence of events

[3] The action having been raised, the initial procedure was unremarkable. The sequence of events, so far as relevant to the matter before me, was as follows:

2017

November 17 – second defenders lodge Williamson Tender offering to share liability to the pursuer with the first defenders to the extent of 50% each;

November 30 – PIAS form lodged; standard interlocutor pronounced discharging all diets and putting case out By Order on 15 January in event that a joint minute is not lodged;

December 5 – first defenders lodge acceptance of second defenders' tender and opposed motion "to accept the second defenders' minute of tender";

December 7 - hearing of foregoing motion fixed for 15 January;

December 21 – Joint Minute signed by all parties lodged along with pursuer's unopposed motion, 7/5 of process, for decree in terms thereof;

December 22 – in light of foregoing, enquiry made by sheriff clerk's office of parties as to whether the hearing on 15 January was still required; second defenders' agents confirm that the opposed motion "still requires to call as it is in respect of a separate matter between the defenders";

December 29 – final interlocutor prepared reflecting joint minute and decree granted;

2018

January 12 – following negotiations between the defenders as to the terms of the motion, amended motion lodged; motion rejected by court on basis that final interlocutor granted and hearing discharged on 29 December.

Submissions for second defenders

[4] The court should treat the interlocutor of 29 December 2017 as *pro non scripto*; find the first defenders liable to the second defenders in the expenses of process from the date of the second defenders' tender; and thereafter, of new, grant the pursuer's motion interponing authority to the joint minute.

[5] The power to correct an interlocutor did exist: *Laing.* The present case could be distinguished from *Laing*. No mistake had been made by the agents for the second defenders. It was appropriate for the court to exercise its power in the present case. The court should look to the intentions of all parties. It was clear that the first defenders had accepted that there was some liability to the second defenders in the expenses occasioned by the late acceptance of the tender. The only effect of the first defenders' opposition to the present motion would be to block the taxation of the second defenders' account of expenses. The first defenders had sought to accept the second defenders' tender, albeit late.

[6] The pursuer would not be prejudiced by this course of action and had no objection to it.

Submissions for first defenders

[7] The motion was opposed. There was no procedure which allowed the interlocutor to be treated as *pro non scripto*.

[8] The interlocutor of 29 December 2017 had in effect been obtained by all parties. The pursuer had acted on the terms of that interlocutor and the taxation of the pursuer's account was due to take place today.

[9] A court only had limited powers to change its own interlocutors: *MBR*. The proper procedure would be for an appeal to be marked.

Discussion

[10] This is an example of the unfortunate effects which can accrue when cases begin to go off the rails procedurally.

[11] It appears to me that a number of things have gone wrong.

[12] The first matter to deal with is the apparent misapprehension as to the nature and effect of Williamson tenders. Such a tender may be described as a formal offer made by one party who has a potential liability in a case (usually a defender but it may be a third party) to agree with another party who has a potential liability, the basis on which the first party is prepared, in conjunction with the second party, to settle (or attempt to settle) such liability as may be found to exist. In addition to the foregoing, it is implicit in a Williamson tender that the party making the offer to settle on one basis or another is in effect saying to the other potentially liable party "if you reject this offer and it turns out that in due course liability is established against you to a greater extent than I am prepared to share with you (as expressed in the tender), I will found that as regards expenses".

[13] A number of things may happen where a Williamson tender is lodged. It may be accepted – thereby opening the way for (joint) negotiations with a pursuer. It may be rejected (either expressly or by being ignored) in which case it simply sits in the process. Its future relevance in that situation will depend on the final disposal of the case, either by negotiation or judgement.

[14] But a Williamson tender cannot generate a decree. In this respect it is quite different from a minute of tender or a pursuer's offer.

[15] Turning to the present case, the first defenders' motion lodged on 5 December was unnecessary and inept. No motion is required where a Williamson tender is being accepted.

All the accepting party needs to do is to lodge a minute of acceptance and intimate it. That then creates a binding contractual agreement between the offeror and the acceptor. It does not settle the case; and it does not create or require a decree or other order. As already noted, it simply generates a basis on which the parties with a potential liability will share that liability.

[16] Moving on procedurally brings us to the second matter which has gone wrong. As I understood it, while the first and second defenders were negotiating *inter se*, negotiations were also going on with the pursuer. These bore fruit and a settlement was reached. The appropriate time for dealing with any argument as between the defenders arising from the Williamson tender was when the issue of expenses in the case was being dealt with.

[17] Accordingly, the appropriate step was for the pursuer's motion for decree in terms of the joint minute to be opposed by the second defenders, with a view to ventilating issues about expenses between the defenders before a final decree was granted. (No doubt the scope of the argument to be presented could have been explained to the pursuer's agents, thereby avoiding the need for them to be represented thereat.)

[18] The next thing that went wrong was that although knowing of the ongoing argument between the two defenders (and hence the request to retain the hearing fixed for 15 January) the sheriff clerk's office nevertheless processed the unopposed motion which gave rise to the final interlocutor. It appears that at that stage, the significance and effect of the final interlocutor (in the sense of rendering the court functus) was not appreciated.

[19] In these circumstances, it appears to me to be appropriate for me to ask myself what I would have done had I known that there was, as at 29 December, still a live issue about expenses between the defenders?

[20] It seems to me likely that had I been aware of that, I would at the least have arranged for a communication to be sent to the defenders' agents to ensure that they were content that final decree be granted; or I may simply have continued consideration of the unopposed motion to 15 January. Either way, I do not think that a final interlocutor would have been granted at that stage.

[21] Accordingly, the situation has been brought about by a number of factors. The question then is whether, in the circumstances, I have the power to treat that interlocutor as *pro non scripto* and secondly whether, in the circumstances, I should do so.

[22] From my reading of the authorities, it appears to me that the following points arise.

[23] First, the power of the Court of Session to alter its own interlocutors is not necessarily a reliable guide to proper practice in the Sheriff Court: MacPhail, paragraph 5.88.

[24] Second, the circumstances in which a sheriff may alter his own interlocutor appear to be limited to four situations namely (i) clerical error (ii) incidental error (iii) *de recenti* in the presence of parties; (iv) *de recenti* of consent parties: MacPhail paragraphs 5.87 and 5.89.

[25] It is necessary then to discuss each of these situations in more detail.

Clerical error

[26] A clerical error is an error made in copying or writing: MacPhail, paragraph 5.87. An example would be where, for example, the name of a person who had been certified as a skilled witness had been misspelled. In my opinion, that does not cover the present circumstance.

Incidental error

[27] An incidental error is one where the connection would not alter the interlocutor in substance such as an error in expression or an inadvertent failure to record part of the sheriff's decision. An example would be where there was a motion to find one party liable in the expenses of process and to sanction the cause as suitable for the employment of counsel, where the sheriff, having heard parties granted that motion by the interlocutor did not record sanction. In such a case, interlocutor could properly be corrected to reflect the decision made.

[28] In my opinion, that again does not cover the present circumstance.

De recenti in the presence of parties; de recenti of consent parties

[29] Although it is not entirely clear, I suspect that there is no real distinction between these categories. The reason for parties being "present" would presumably be to establish their consent.

[30] Assuming that is correct, there are two difficulties. First, the motion to have the interlocutor treated *pro non scripto* and altered was not lodged until mid-February, though to be fair to the second defenders' agents, the circumstances in which the hearing of the first defenders' motion to "accept" the second defenders' Williamson tender had been cancelled were queried earlier than that. I would have been prepared to overlook the delay in making the present motion had it not been for the next issue.

[31] While accepting that there would appear to be no difficulty in putting forward a practical objection to the court making a correction to an interlocutor where it had been pronounced in error, it is clear that the consent of parties is an essential prerequisite to such a step. For example, in *Scott* v *Mills's Trustees*, 1923 SC 726 (cited in Macphail, paragraph 5.89

at footnote 36) judgement had been pronounced after the death of the pursuer, the fact of death being unknown to the court, counsel and agents. On the motion of the pursuer's executrix, the court sisted her as a party and repeated the judgement. That motion was not opposed by the defenders who concurred that the case should be disposed of without a re-hearing. (See also *Murrie* v *The Distillers Company (Bottling Services) Ltd*, unreported, 23 March 1990, Lord McCluskey).

[32] In the present case, no such consent or concurrence was forthcoming.

Disposal

[33] In these circumstances, I have come to the view that the second defenders' motion must be refused, since the circumstances here do not fall within any of the limited categories where the court may alter its own interlocutor.

[34] I am bound to say that I have reached that conclusion with great reluctance. Firstly, the interlocutor of 29 December was granted in circumstances caused in part (though not wholly) by an administrative failure by the court. Second, it is clear from the correspondence passing between parties and the court and what I was told that the first defenders had accepted that they have some liability for expenses occasioned by the late acceptance of the Williamson tender. Indeed, as I understand it the motion which the defenders had anticipated would call on 15 January was ultimately to be unopposed, a concession having been made in relation to expenses as between the defenders. In particular, I have seen an email from the first defenders' agents to the second defenders' agents dated 12 January 2018 which states:

> "… I consider that the account presented is excessive however, we accept that the first defenders are liable to the second defenders in respect of expenses in the date of

> the tender and that it will be for the auditor to determine the reasonableness for the first defenders to have responded and also the reasonableness of the charges."

[35] Thus, as I understand it, the first defenders have accepted in principle liability to the second defenders in expenses; an account of expenses has been prepared and intimated but the parties are unable to agree the final liability. An impasse having been reached, the second defenders would ordinarily be entitled to have their account taxed but are unable to do as there is no interlocutor dealing with expenses as between the defenders.

[36] Accordingly, it appears that the first defenders are resisting alteration of the interlocutor of 29 December 2017 to block the second defenders' access to taxation. (The pursuer would be unaffected by the alteration sought by the second defenders and as I understood it had no objection to that step being taken.)

[37] I am bound to say that I find the position being adopted by the first defenders both puzzling and disappointing, given the concession which they have otherwise made on the issue of expenses.

[38] While the question of any future procedure is not a matter for me, I did point out to Mr MacKinnon that the position being adopted on behalf of the first defenders had the potential to generate additional and unnecessary procedure: MacPhail, paragraph 17.14. However, he insisted on maintaining the first defenders' opposition.

[39] In the circumstances, the second defenders' motion is refused. I reserve all questions of expenses.