



SHERIFF APPEAL COURT

**[2020] SAC (Civ) 19
ABE-CA18-17**

Sheriff Principal C D Turnbull

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in appeal by

RIVERS LEASING LIMITED

Pursuer and Respondent

against

PAUL PATRICK

Defender and Appellant

**Pursuer and respondent: No appearance
Defender and appellant: Party**

20 February 2018

[1] On 16 November 2017 decree was granted against the appellant for delivery to the respondent of certain items of garage equipment; and for payment by the appellant to the respondent of the sum of £4,531.98, with interest.

[2] This matter called on 5 February 2018 in respect of the appellant's motion to allow his note of appeal to be received, although late. The respondent did not appear at the hearing of the motion. The respondent's solicitors did, however, write to the court indicating that the motion was not consented to.

[3] By the time the appellant's note of appeal (which was in proper form, unlike that in *KS, Applicant* [2017] CSIH 68) had reached the Sheriff Appeal Court in Edinburgh, an extract had been issued by Aberdeen Sheriff Court.

[4] The last day for lodging a note of appeal was 14 December 2017. On the preceding day, as submitted by the appellant on the hearing of his motion, and as is vouched by the Royal Mail proof of delivery receipt lodged with the court, the appellant's note of appeal was posted to the Sheriff Appeal Court using the Royal Mail Signed For service which aims to deliver the next working day. For reasons unexplained, the appellant's note of appeal was not delivered to the Sheriff Appeal Court until 27 December 2017. An extract was issued by Aberdeen Sheriff Court on 15 December 2017.

[5] The issue of motions to allow late appeals in the face of an extracted interlocutors is one which has been considered on a number of occasions by the Sheriff Appeal Court. See, for example, *Hamilton v Glasgow Community & Safety Services* [2016] SAC (Civ) 3; and *MacGuire v Grant & Wilson Property Management Ltd* [2017] SAC (Civ) 20. In *JM v JW* [2017] SAC (Civ) 3, Sheriff Principal Murray addressed the issue of an extract being issued by the local court after a motion to allow a note of appeal to be received although late was before the Sheriff Appeal Court. The issue before the court in this case is not one that appears to have been previously considered.

[6] As noted by Lady Clark of Calton in *KS, Applicant*, at para [9], the general rule which the courts require to apply is that set out by the Inner House in *Alloa Brewery Company Ltd v Parker* 1991 SCLR 70. In terms of that decision, there is generally no appeal against an extracted judgment. An appeal can only be considered if there is some impropriety in the issuing of the extract decree.

[7] In the present case, on the date the extract was issued, the note of appeal was somewhere between Aboyne and Edinburgh, having been sent by a form of postal service that aimed to deliver it to the Sheriff Appeal Court within the time limit for the marking of appeal and, of course, before the extract was issued.

[8] *Alloa Brewery Company Ltd* was decided more than 25 years ago, prior to the introduction (in 1993) of the current Ordinary Cause Rules. The advent of the Sheriff Appeal Court materially changed the manner in which appeals against decisions of sheriffs are processed. The previous position is set out in *Macphail* (3rd ed) at paragraph 18.57. Under that procedure, the appeal was lodged at the court of first instance.

[9] Following the commencement of the civil jurisdiction of the Sheriff Appeal Court, the note of appeal now requires to be lodged with the clerk of the Sheriff Appeal Court at Parliament House (see rules 6.2.(1) and 5.7.(1) of the Act of Sederunt (Sheriff Appeal Court Rules 2015). For parties furth of the jurisdiction of Edinburgh Sheriff Court, the requirements of the rules of the Sheriff Appeal Court give rise to an issue which simply did not exist under the former procedure.

[10] It is not possible to identify any impropriety in the issuing of the extract decree in this case. At the time of issuing the extract, there was no means by which the sheriff clerk at Aberdeen could have known that a note of appeal had been posted to the Sheriff Appeal Court. However, the court cannot overlook the fact that the sole reason for the lateness of this appeal was the vagaries of the postal system which a party from outwith Edinburgh is, to all intents and purposes, compelled to use. This gives rise to a clear and obvious issue in relation to access to justice.

[11] As it is a decision predicated upon rules of court that have long since ceased to be force; and one in which the instant problem simply did not exist, in the unique and,

crucially, readily verifiable circumstances of this case, I am of the view that *Alloa Brewery Company Ltd* can be distinguished.

[12] In the foregoing circumstances, I will exercise the dispensing power in rule 2.1 in the appellant's favour; recall the extract decree issued on 15 December 2017; and grant the appellant's motion to allow his note of appeal to be received although late. As the respondent did not appear, I will find no expenses due to or by either party in relation to the appellant's motion. I will make a provisional procedural order in terms of rule 6.6.(2)(b) appointing the appeal to the accelerated appeal procedure.