SHERIFFDOM OF LOTHIAN AND BORDERS AT SELKIRK

[2024] SC SEL 12

SEL-B26-21

JUDGMENT OF SHERIFF PETER PATERSON

in the cause

MOORBROOK TEXTILES LIMITED

Pursuer

against

THE SCOTTISH MINISTERS

Defenders

Pursuer: Barnes KC
Defenders: Way

SELKIRK, 21 September 2022

The sheriff having resumed consideration of the cause finds the defenders liable to the pursuer in the expenses of the action from 26 January 2022, of the cause as taxed, allows an account thereof to be given in, and remits same, when lodged, to the Auditor of Court to tax and report: *quoad ultra* finds no expenses due to or by either party except as herein before awarded

Introduction

[1] As a consequence of my judgement of 19 May 2022 I continued consideration of the question of expenses to 15 June 2022, when the pursuer made a motion seeking to find the defenders liable to the pursuer in expenses of the action. I continued consideration of the question to the court of 13 July 2022. Given the importance of the matter to parties and the

unavailability of parties' respective counsel, I invited written submissions and continued the case to 24 August 2022.

[2] There is a secondary question that the court requires to consider and that is if the defenders are liable in expenses, from which date that liability should commence.

[3] I have received written submissions and supplementary submissions for both sides which I have found both interesting and helpful. The submissions were further amplified at the hearing on 24 September 2022.

[4] I have been invited to write on the subject given the lack of authorities on the matter, in relation to the 2003 Act.

Background

[5] Before considering the question of whether the current proceeding are administrative or judicial in nature, which, as I understand it, is the critical question, it is appropriate that I make certain observations.

[6] In my opinion part of the difficulty for the court is the lack of any real consistent and coherent jurisprudence in Scotland on the question of expenses in appeals from decisions of public bodies. Much appears to be based on practice. The pursuer identifies a number of such cases - appeals under the Town and Country Planning Act (Scotland) 1997; appeals against decisions of the Scottish Legal Complaints Commission under section 21 of the Legal Profession and Legal Aid (Scotland) Act 2007; appeals against decisions of the Scottish Information Commissioner under section 56 of the Freedom of Information (Scotland) Act 2002 – where expenses are awarded. By way of contrast the practice appears to have grown up that no expenses are awarded is successful firearms appeals despite the courts holding that this type of case involves *lis.*

[7] Further, in my opinion, the use of the expression "administrative" is not necessarily helpful. It is an adjective which is variously defined, for example in the concise Oxford English Dictionary, as "carrying out administration which in turn it defines as "the organising or running of business." Viewed from this narrow perspective little the court does falls within that definition.

[8] There are certain types of work done by the court which involves checking and processing, with little or no judicial involvement. Perhaps the most obvious example of this is executor work. There is no judicial involvement in confirmations. Dative petitions require only a signature. Another example of this are summary warrants in relation to Council Tax where again all that is required is a signature. Equally, some may start out as administrative, but can very rapidly become highly contentions, in terms of both fact and law, eg Adults with Incapacity which like this case take the form of summary applications. There is no defenders as such in these cases but parties can lodge answers and as far as I know there has never been any question that any of parties to the application can be liable for expenses. This appears to be the case whether the pursuer is a local authority or an individual.

[9] That said while I remain unclear as to the exact origins of the separation, I am clearly bound by the authorities on the subject.

Submissions

[10] As I have observed I have had the benefit of detailed written submissions and it appears to be the case that the pursuer accepts that if the proceedings are administrative, then only if the defenders' conduct was vexatious would it be entitled to expenses.

[11] Equally, both parties appear to agree that to determine whether the case is of an administrative or judicial nature, regard has as to be had to the nature of the question to be determined and the procedure required.

[12] The pursuer's starting point is to consider the nature of the court's jurisdiction. The pursuer places significant reliance on the observations of both Lord Eassie at paragraph 75 and Lord Malcom at paragraphs 84 and 97 of their respective decisions in the case of *Pairc Crofters Ltd* v *Scottish Ministers* 2013 SLT 308. The pursuer's conclusion being that this renders the "Resolution of these issues gives rise to a litigation- or a *lis* to use the language found in some authorities."

[13] At paragraph 9 of its written submissions the pursuer highlights certain additional features of the 2003 Act which point to the courts function being judicial. The first of these is the importance of the rights conferred and obligation imposed. The second point is that given the restrictions on who can appeal suggests the case is more akin to a private law dispute. Third contention is that it was open to the defenders not to lodge answers but allow it to the community body to resist the pursuer's appeal. The last argument advanced makes reference to section 97Z1 of the 2003 Act which talks of mediation, which is only appropriate if there is an underlying *lis.*

[14] The pursuer's case that the present case is truly litigation and therefore the court is not acting in an administrative capacity is summarised at paragraph 20 of its written submissions in the following terms:

> "20. In light of the authorities discussed in this and the previous section of this Note, it is submitted that the following factors point towards the existence of a litigation or lis in the present case:
>
> 20.1. The Sheriff's jurisdiction extends to determining matters of law and fact.
>
> 20.2. The Sheriff determines parties' rights and obligations.

> 20.3. It is an open appeal. The Sheriff's jurisdiction is unconstrained and does not involve the application of a specified test, e.g. whether the decision-maker has acted arbitrarily or capriciously.
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> 20.4. Parties have a right to be heard. (See F v Management Committee and Managers, Ravenscraig Hospital 1988 SC 158.)
>
> 20.5. But only certain parties can enter process.
>
> 20.6. The Sheriff's determination results in 'winners' and 'losers' in terms of which important rights are vindicated.
>
> 20.7. The procedure – i.e. the requirement for written pleadings, pleas-in-law and the production of a decision in writing – is indicative of the existence of a lis"

[15] In my note of 22 July I asked parties to consider what constitutes litigation. Both parties have been good enough to consider this question and both have referred the court to a line of cases in relation to rights of appeal. The relevance being that if the court function was judicial this would suggest a right of appeal.

[16] In relation to the pursuer's observations on this, I respectfully agree that the authorities are difficult to reconcile. For example the pursuer refers to a observations of Lord Copper in *Acari* v *Dunbartonshire County Council* 1948 SC 62 in which the Lord President Cooper talks of assertion of rights rendering the case "in a real sense a true *lis"*. By way of contrast Lord President Clyde in *Kaye* v *Hunter* 1958 SC 208 quotes with approval Lord Low in *Allen & Son Billposting* v *Corporation of Edinburgh* who appears to suggest that if what is provided is "machinery to protect the ordinary citizen from a capricious or arbitrary exercise of power of a discretion conferred on an official or on a public authority", then this would suggest it is not true *lis.* On the face of it is difficult to read these together.

[17] In my note I also asked for submissions on the significance of this being an appeal from a public body. The pursuer maintains that it is irrelevant that the appeal is from a public body, the key to the question is whether the sheriff is fulfilling a judicial or administrative function.

[18] The defenders take a different view of matters. They rely heavily on the decision of Lord Gill in *Milton* v *Argyll and Clyde Health Board* 1997 SLT 565. It is said it is the leading case on the subject of expenses in summary applications.

[19] From paragraph 9 to 25 the defenders analysis a series of cases where the administrative/judicial dichotomy has been considered. Again it is difficult to divine a consistent approach. For example in *Rodenhurst* v *Chief Constable of Grampian Police* 1992 SC 1 the courts function was judicial yet in *Evans* v *Chief Constable, Central Scotland Police* 2022 SLT (Sh Ct) 152 and *Cameron* v *Chief Constable Police Scotland* 2018 SLT (Sh Ct) 75 there is no reference to *Rodenhurst.* In *Evans* the Sheriff Principal appears to have decided expenses on an equitable basis, while in *Cameron* Sheriff Taylor's QC approach, while without reference to authority, suggests he treated his function as administrative. I say this because of his reference to such things as bad faith and improper motives at paragraph 31 of his decision.

[20] In my opinion the most helpful of the authorities referred to by the defenders is that of *Allen* and the observations of Lord Low at paragraph 75 where he observes:

> "The nature of the jurisdiction conferred seems to me to point very strongly in the same direction. The Sheriff is not to act in a judicial capacity in the ordinary sense; he is not to decide a question of law between the parties; he is not to review the determination of the Magistrates, in the sense of weighing considerations for and against, and deciding to which side the balance inclines. He is not entitled to interfere except in the one case when he is satisfied that the Corporation have not reasonably exercised their discretion under the Act."

[21] The defenders also point to the case of *Edinburgh Society of Accountants* v *Lord Advocate* 1924 and what Lord Constable had to say on the matter when he decided that the proceedings were judicial as the case turned either on a point of law or fact and there was no element of discretion.

[22] From paragraph 31 to 36 the defenders' consider the decision of Lord Gill in the *Milton* case. Specifically at paragraph 33 the defenders identifies what they say are the similarities between the present case and the *Milton* case. The paragraph is in the following terms:

> "[33] This provision is similar to s.61 of the Land Reform (Scotland) Act 2003 ('2003 Act'), in the following ways:
>
> a. the right of appeal is conferred upon a wide class of interested parties (cf 'any person aggrieved' in s.3(3) 1938 Act vs 'owner of land', 'community body' or 'person who is a member of a community' in s.61(1)-(3) 2003 Act);
>
> b. the appeal right has to be exercised in a limited time period following the relevant decision (cf 14 days in s.3(3) 1938 Act vs 28 days in s.61(4) 2003 Act);
>
> c. the appeal is directed to 'the sheriff' in both s.3(3) 1938 Act and s.61(5) 2003 Act; 13
>
> d. the decision of the Sheriff is final in both s.3(3) 1938 Act and s.61(7) 2003 Act"

[23] The defenders also submit finality is a factor to be taken into account in deciding the nature of the proceedings. They refer to Sheriff Mundy's decision in *Safdar* v *Falkirk Council* 2006 SLT (Sh Ct) 79.

[24] The defenders also consider what has been termed the "chilling Effect" of awarding expenses against public bodies who are exercising their powers. The defenders quite properly acknowledge that in *CMA* v *Flynn Pharma Ltd* [2022] UKSC 14 it was said that there was no general rule on the point but highlight that it is an important factor that the court must bear in mind.

Discussion/Decision

[25] As is clear from both parties' submissions it is necessary to consider the nature of the proceedings. However in my opinion it is necessary to go back one stage further and consider the terms of the 2003 Act. The effect of a successful application under section 38 is to create right of pre-emption in favour of the community body. This represents a significant innovation on the property rights of the land owner. It should also be remembered that the pursuer acquired their title long before, such interference was contemplated. The consequence of the pre-emption may not be as profound in remote rural locations, but the position is quite different in the urban environment, where there is an active market and the right may have a considerable financial impact on the land owner.

[26] The other important feature of proceedings is that it has its origins not in an administrative decision of a public body, but in the actions of a community body. It is the community body that makes the application to have its interest registered. It is the function of the defenders to consider the application and in this case objections. As the pursuer correctly observes there is no need for the defenders to enter the process they could, if they so wished, left it to PCT to defend the appeal, after all, they are the beneficiaries of the defenders' decision.

[27] Against this background, the present case is clearly distinguishable from many of the earlier cases relied on by the defenders. In *White* v *Magistrates of Rutherglen* (1897) 24 R 446 the court was concerned with the approval of a by-law, not a fundamental interference with a property right. *Dumbartonshire County Council* v *Clydebank Borough Council* (1901) 4 F 111 was another by-law case. *Liddall* v *Ballingry Parish Council* 1908 SC 1082 is slightly closer in that it involves property but only indirectly, in that, the appeal was brought by a

neighbouring proprietor to a proposed grave yard. The case of *Lornie* v *Highland District Council of Perthshire* 1909 25 St Ct Rep 124 involves a street lighting scheme. It appears the point of contention was whether the lighting scheme should be for Birnam alone of Dunkeld and Birnam. The case involved no loss of a right. *Allen & Sons Billposting Ltd* v *Corporation of Edinburgh* 1909 SC 70 involved no loss of a right either, rather it was the failure to allow street adverts. It was a question of someone's status that occupied the court in *Edinburgh Society of Accountants* v *Lord Advocate* 1924 SLT 194. The status was not something already vested that was being removed. Notwithstanding this Lord Constable was of the opinion that the courts function was not administrative in nature and the case involved *lis* to be reolved. In *Butler* v *Glasgow Corporation* (1930) 47 Sh Ct Rep 72 the court was again concerned with a failure to award a right not the removal of it. The same applies in *Tobermory Magistrates* v *Capaldi* 1938 SLT Sh Ct 38. Again the case of *Classic Cinema Ltd* v *Motherwell District Council* 1977 SLT (Sh Ct) 69 the court was concerned with conditions attached to a right that was being granted.

[28] In my opinion it becomes even clearer that the above authorities do not assist the defenders when the terms of section 61 are considered. I have already alluded to the observations of Lords Eassie and Malcolm in the *Pairc* but it is worth setting them out in detail. At paragraph 84 Lord Malcolm states:

> "[84] An appeal under s.61 [of the 2003 Act] is not limited to issues of law nor to traditional judicial review principles. The sheriff can hear and decide an appeal in relation to matters of fact and/or the applicability of the relevant statutory criteria (which are much the same as those arising in Pt 3). For example, with reference to the terms of s.51(3)(c) and (d), the sheriff has a jurisdiction to decide whether the proposals are compatible with 'furthering the achievement of sustainable development' and whether the purchase of the land 'is in the public interest'. The annotator in Current Law Statutes comments that evidence may be led before the sheriff in support of a claim that an order should not have been made because it is not in the public interest, '… although there may be an argument that whether or not something is in the

public interest is a matter for the discretion of Ministers and that the Courts should be slow to interfere with such a decision'".

[29] Later at paragraph 97 he continues:

"[97] In respect of Pt 2 buy outs, by way of a summary application under s.61 the sheriff is given a wide appellate jurisdiction to deal with all aspects of a decision by Scottish Ministers, including on issues of fact; compatibility with sustainable development; and whether a buy out is in the public interest. Against this background, it is difficult to justify a narrow construction of the Land Court's powers in Pt 3 of the Act by reference to an argument that Parliament must have intended that the consideration of issues such as the public interest and compliance with sustainable development should be reserved to the sole jurisdiction of the Scottish Ministers."

[30] As previously observed at paragraph 75 of his judgement Lord Eassie agrees with Lord Malcom's observations.

[31] The defenders maintain that the leading case in this field is *Milton* and as such the court should follow it. The defenders helpfully set out the appropriate provision of the Nursing Homes Registration (Scotland) Act 1938, namely section 3(3) which is as follows

"3.— Notice of refusal or of cancellation of registration.

(1) Before making an order refusing an application for registration or an order cancelling any registration, the Health Board shall give to the applicant or to the person registered, as the case may be, not less than fourteen days' notice of their intention to make such an order, and every such notice shall state the grounds on which the Board intend to make the order and shall contain an intimation that, if within fourteen days after the receipt of the notice the applicant or person registered informs the Board in writing that he desires so to do, the Board will, before making the order, give him an opportunity of showing cause, in person or by a representative, why the order should not be made.

(2) Where a Health Board have made an order refusing an application for registration or cancelling any registration, they shall cause a copy of the order to be sent to the applicant or the person registered.

(3) Any person aggrieved by an order refusing an application for registration or cancelling any registration may, within fourteen days after the date on which the copy of the order was sent to him, appeal against it to the sheriff, whose decision shall be final and shall be given effect to by the Health Board.

> (4) No such order shall come into force until the expiration of fourteen days from the date on which it was made, or, where notice of appeal is given against it, until the appeal has been decided or withdrawn."

[32] In my opinion the case of *Milton* does not assist the defenders. As the pursuer correctly observed it was conceded by the appellant that the court at first instance was acting in administrative capacity. It follows that the court was not concerned with determining the nature of the proceedings.

[33] The pursuer did attempt to argue that the case involved "litigious pugnacity" which in effect took it into the realm of contentious litigation. Lord Gill does not reject the notion but is of the opinion that in the particulars of the case, the proceedings were administrative. As can be seen from the following passage the pursuer created an almost insurmountable barrier by accepting that the proceedings were administrative:

> "I agree with senior counsel for the petitioners that the proceedings that followed had the features of a litigation. The parties lodged pleadings and productions and each led witnesses who were examined and cross examined on the facts. Nevertheless, I do not accept that by reason of that procedure the respondents put themselves in the position of a contentious litigant in the sense in which that expression was used in *Liddall*. If the argument for the petitioners was correct there would be no distinction, so far as expenses were concerned, between judicial proceedings before a sheriff and administrative proceedings L which took the form of a proof.
>
> I can find no warrant in the case law for the awarding of expenses against a public body which defends its decision with propriety when that decision is challenged in an administrative appeal. While I take a different approach from the sheriff to the authorities on this question, I agree with him in the result that he has reached,"

[34] The function of the court in *Milton* is different. In *Milton* the court is reviewing a decision of the local authority exercising its regulatory function. As is clear from Lord Gill's summary of the sheriff's decision at page 566 H-K, the court was in effect applying the classic principle of judicial review. In the present action the court is considering a decision

of the defenders in relation to an application from a third party. I have already identified the observations of Lords Eassie and Malcom on wide jurisdiction of court. Quite clearly the position of the defenders and the powers of the court are quite different from that *Milton*. Accordingly, I have come to the conclusion that *Milton* does not provide assistance to the defenders contention that the court was acting in its administrative capacity.

[35] That said, Lord Gill acknowledges that the case has features of contentious litigation, but he reasons, that because it has been acknowledged the courts function is administrative, these features cannot render a party liable in expenses, otherwise he argues that the distinction between administrative and judicial function would collapse. That does not mean true *lis* is not highly relevant, if not decisive, where the question is before the court.

[36] The present litigation has potentially all the features referred to by Lord Gill. In addition the court's jurisdiction in the present case goes well beyond the function performed in *Milton,* which as I have observed in effect is akin to judicial review. Accordingly, I have come to the conclusion that the present case has the features of true *lis*.

[37] Given the factors identified in paragraphs 25, 26, 28, 29 and 30 and the conclusion I have reached that the case contains the features of litigation, I am of the opinion that the courts function is judicial and not administrative.

[38] Both parties have refereed the court to the Supreme court case of *Compensation and Markets Authority* v *Flynn Pharma Ltd* [2022] 1 WLR 2972. The pursuer relies on the observations of Lady Rose that there should be no assumption that the "chilling effect" of awarding costs against a public body exists. The defenders emphasis the point that the court considered that the chilling effect was an important factor in considering the question of cost awards.

[39] A number of points require to be made in relation to the *Flynn Pharma*. Firstly, the law and procedure on costs in England is quite distinct from how expenses are dealt with in this jurisdiction. Accordingly I have considerable reservations about importing English case law into Scots Law in relation to expenses. Secondly, in both *Flynn Pharma* and in the case of *Bradford City MDC* v *Booth* (2000) 164 JP 485 the public body had chosen to intervene which is not the case in the present case. In this case the defenders are not defending its own actions, but rather its decision. The defenders had no need to defend their decision, they could have left that to the PCT. Given that the defenders is required to make a decision whether to register or not, there can be no "chilling effect" on it carrying out its function. Finally, it should be observed that if the "chilling effect" was a factor to be taken into account it has to be balanced by the opposite effect of no award of expenses, in that it would discourage the individual from asserting their rights against the state.

[40] Therefore having concluded that the case involves the court performing a judicial function it is open to the court to award expenses.

[41] As I observed at the outset it is difficult to reconcile all various decisions which touch on this area of law and firearm appeals is certainly one of them. I agree with the pursuer when it observes that given it is accepted such cases involve true litigation it would be open to the court to award expenses. It may be that the "chilling effect" may lie at the route of the decisions in this area but it is not clear to me it has been expressed as such.

[42] Having found that the courts function is judicial in my opinion the normal rule should apply and expenses should follow success. That only leaves the question of when expenses should run from.

When should expense run from?

[43] The defenders maintain that if an award of expenses is to be made then it should run from 26 January 2022. The pursuer maintains that the normal rule should apply, namely expenses should follow success. In any event expenses should run from 5 November 2021.

[44] In my opinion the court should be reluctant to become involved in a detailed analysis of how a case has progressed in terms of the pleadings when it comes to the question of expenses. However certain observations are required. Firstly, the focus of the case initially was the question of the late lodging of the appeal. Secondly, the state of the pleadings in the initial writ, as lodged, was not appropriate. The pleadings may not have rendered the writ incompetent but they certainly offend against the principle of good pleading. To incorporate 1000 pages into its pleadings presented the defenders with an impossible task. For whatever reason that remained the case until at least 12 January 2022, when the court expressed surprise and displeasure at the state of the pleading. In fairness I would observe that the pleading were not those of the pursuer's current counsel.

[45] In view of the state of the pursuer's pleading and the impossibility of the defenders being able to effectively reply, expenses should only run from 26 January 2022, the date when the pleadings were effectively rendered intelligible.

Authorities

Case Law

1. *White v Magistrates of Rutherglen* (1897) 24 R 446;

2. *Dunbartonshire CC v Clydebank Comms* (1901) 4 F 111;

3. *Liddall v Ballingry Parish Council* 1908 SC 1082 ;

4. *Society of Accountants in Edinburgh v Lord Advocate* 1924 SLT 194;

5. *Acari v Dunbartonshire County Council* 1948 SC 62;

6. *Kaye v H*unter 1958 SC 208;

7. *F v Management Committee and Managers, Ravenscraig Hospital* 1988 SC 158;

8. *Rodenhurst v Chief Constable of Grampian Police* 1992 SC 1;

9. *Milton v Argyll and Clyde Health Board* 1997 SLT 565;

10. *Bradford City MDC v Booth* (2000) 164 J.P. 485;

11. *Pairc Crofters Ltd v The Scottish Ministers* 2013 SLT 308;

12. *Cameron v Chief Constable of the Police Service of Scotland* 2018 SLT (SH. CT. 75);

13. *Competition and Markets Authority v Flynn Pharma Ltd* [2022] 1 WLR 2972;

14. *East Kilbride DC v King* 1996 SLT 30 11.

15 *Evans v Chief Constable, Central Scotland Police* 2002 SLT (Sh Ct) 152

16. *Safdar v Falkirk Council* 2013 SLT (Sh Ct) 127

17. *Dr Sloan's Trust v OSCR* 2019 WL 05310110

1. *Regina (Perinpanathan) v City of Westminster Magistrates' Court and another* [2010] 1 W.L.R. 1508

Legislation

1. Town and Country Planning (Scotland) Act 1997 Part XIV, "Local Inquiries and Other Hearings";

2. Land Reform (Scotland) Act 2003, section 61 and section 97Z1;

3. Public Services Reform (Scotland) Act 2010, section 65;

4. Unemployment Insurance Act 1920, s.10

5. Nursing Homes Registration (Scotland) Act 1938, s.3

6 The First-tier Tribunal for Scotland General Regulatory Chamber Charity Appeals (Procedure) Regulations 2017, r.24

Guidance

11. Planning Circular 6/1990;

Textbooks McLaren,

1 Expenses in the Supreme and Sheriff Courts, chapter XII (Award);

2. Dobie's Sheriff Court Practice pp310-311 and 636-637

3. Jamieson's Summary Application and Suspensions 37-02 to 37-05

4. Stair Memorial Encyclopaedia, Civil Procedure (Reissue) – Sheriff Court: Summary Applications and Statutory Applications at 866

5. MacPhail's Sheriff Court Practice (4th Ed) 26.108 – 26.111 and 27.45

6. Collar, Planning (4th Ed) at 8.03, 8.28, 8.29 and 8.5