SHERIFF APPEAL COURT

[2025] SAC (Civ) 11
PAI-A71-22

Sheriff Principal Pyle

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL PYLE

in the appeal in the cause

JAMES RODGERS

Pursuer and Appellant

against

MOTONOVO FINANCE LIMITED

Defender and First Respondent

ARNOLD CLARK AUTOMOBILES LIMITED

Third Party and Second Respondent

Pursuer and Appellant: Skelly; Skelly & Co
Defender and First Respondent: Tosh, adv; Brodies LLP
Third Party and Second Respondent: Vaughan, sol adv; Morton Fraser MacRoberts LLP

7 April 2025

[1] In this action, the appellant moved the court to allow the note of appeal to be received late. The solicitor for the appellant, Mr Kelly, advised that the appeal was lodged only one day late and was caused by him inserting the wrong date in his diary. In normal circumstances such an administrative failure might be excusable. However, counsel for the respondent (and the solicitor advocate for the third party who was content to adopt the

respondent's submissions) submitted that the motion should be refused because the grounds of appeal were so plainly without merit.

[2] For obvious reasons, there was no note available from the sheriff, the action having been dismissed at the diet of proof. Again in normal circumstances, it would not be open to this court to proceed without the sheriff's detailed reasons – and indeed without study of the history of the action, including the written pleadings and the interlocutors. Nevertheless, counsel submitted that it was still open to me to consider the grounds of appeal and what actually happened on the day of the proof.

[3] During the course of the hearing of the motion, I was able to interrogate the solicitor for the appellant about the salient points put before me. He was able to agree with much that was said by counsel, such that I was able to decide that the motion should be refused. I indicated that I would set out my reasons in writing.

[4] The first ground of appeal is in the following terms:

> "The Sheriff has erred in law by dismissing the action. It is accepted that the Pursuer was not in a position to proceed to proof. The Pursuer was unavailable due to being called into a Child Protection meeting on the day of the proof, due to an incident which occurred the night before. An award of expenses in relation to the abortive expenses of the preparation and attendance at proof would have been the correct course. If the action is re raised, which it will if this appeal is unsuccessful, virtually all of the procedure prior to proof will have to duplicated, giving a windfall award of expenses to both the defenders and third party. It will increase the time taken to resolve the action and will not be an appropriate use of court time."

[5] That ground did not explain the whole circumstances. On the morning of the proof, the solicitor for the appellant moved the sheriff to allow amendment of the pleadings. He did not produce a minute of amendment. He accepted that the possibility of a minute of amendment had been mooted at a pre-proof hearing some weeks before, but that he had done nothing about it, although at one point he appeared to suggest that the arithmetical calculations which were required had not been available.

[6] In any event, the important point was, as the solicitor admitted, that he had not told his client to attend the proof, had not instructed a shorthand writer and had not cited the relevant expert witness (although counsel disputed that this witness was properly an expert). Thus he imperilled the action on the sheriff agreeing to a discharge of the diet of proof for a minute of amendment to be lodged at some future date. It appeared that the sheriff did not immediately dismiss the action because the solicitor seemed to have attempted to take steps to proceed with the proof after the motion to discharge had been refused. He said that he had been able to secure the services of a shorthand writer but it was at that point that the so-called child protection issue apparently prevented the attendance by the appellant. The position of the expert witness was obscure, although at one point the solicitor seemed to be saying that there was a medical reason for the failure of the expert witness to be present and that he had in his possession a medical certificate but that it was not 'soul and conscience' because the medical practitioner was not prepared so to certify. That explanation however flew in the face of the solicitor's admission that he had not prepared for the proof.

[7] In these circumstances, the ground of appeal is unsatisfactory in its terms. It suggests that the sheriff dismissed the action because of the non-attendance of the appellant for what might be a proper reason. Instead, the ground is not candid, as it should have been, about the true reasons for the failure, namely the irresponsible decision of the solicitor simply not to prepare for the proof and to proceed merely in the hope that the sheriff would allow the discharge.

[8] The law is clear: a discharge of a diet of proof, particularly on the day, to allow amendment of pleadings will be granted in only highly exceptional circumstances (*Dryburgh* v *National Coal Board* 1962 SC 485; *Strachan* v *Caledonian Fish-selling and Marine*

Stores Co 1963 SC 157). It is one thing to seek a discharge where something occurs which could not be reasonably anticipated; it is quite another for a solicitor to proceed in a reckless manner without regard to the interests of the other parties, never mind the public interest, both being matters of which the sheriff is bound to take account in the interests of justice in its widest sense. As counsel pointed out, the circumstances of this case are similar to those in *Skiponian Ltd* v *Barratt Developments Scotland Ltd* 1983 SLT 313, in which the Second Division supported the sheriff's decision to grant decree of absolvitor (an option which was available to the sheriff in this case).

[9] As the ground of appeal recognises, it is still open to the appellant to raise another action. The fact that he will be involved in additional expense is a consequence of the cavalier conduct of his solicitor.

[10] The second ground of appeal is in the following terms:

> "The Sheriff erred in law departing from standard practice in awarding expenses beyond those referred to above to the Third Party (TP). The pursuer raised the action as a consumer under the Consumer Rights Act 2015 (the Act). The Act dictates the trader, in this case the finance company, not the supplier of goods to the trader is sued. The trader can seek indemnity against the supplier of the goods. If the Sheriffs decision is correct the consumer would have to bare [*sic*] two sets of expenses."

Appeals against awards of expenses are severely discouraged unless there has been an obvious miscarriage of justice, the expenses have become a great deal more valuable than the merits or a question of principle is involved (see, eg, *McNeil* v *National Coal Board* 1966 SC 72). Counsel cited *Prospect Healthcare (Hairmyres) Ltd* v *Kier Build Ltd* 2018 SC 569 where the Inner House expressly discusses (at paras [25]-[27]) the very situation which counsel said arises in this case. In his submissions, the solicitor for the appellant did not address that issue and, in particular, did not suggest that this case was other than all fours with the example discussed in that case. Even if that point is discounted, a court would be well

entitled, as I can presume the sheriff did in this case, to regard the conduct of the solicitor to be so egregious as of itself to be the deciding factor in dismissing the action and finding the appellant liable in the expenses of the other parties.

[11] The same point can be made in the decision for this court. While a mistake in a diary can always be excused, the fact is that even at best the solicitor decided to leave everything to the eleventh hour. That of itself is characteristic of a slapdash attitude to the conduct of the action up to and at the diet of proof.