SHERIFF APPEAL COURT

[2024] SAC (Civ) 10
DBN-A167-22

Sheriff Principal Murphy KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL S F MURPHY KC

in appeal by

PORTMAN MOTORS

Defender and Appellant

in the cause

NORMAN CHRISTIE

Pursuer and Respondent

against

PORTMAN MOTORS

Defender and Appellant: Mr Whyte, solicitor; Whyte Fraser and Co Ltd
Pursuer and Respondent: TC Young, solicitors; for Skelly & Co

8 March 2024

Introduction

[1] The pursuer and respondent ("respondent") purchased a motorcycle from the defender and appellant ("appellant") in April 2022 for the sum of £15,295. In August 2022 he intimated to the appellant that the machine was faulty. Later that month he left it at the appellant's premises. He raised an action craving:

- declarator that the motorcycle was not of satisfactory quality so that the appellant was in breach of contract;
- repayment of the purchase price of £15,295;
- payment of £1,000 for inconvenience; and
- expenses.

Some settlement discussions took place without reaching a conclusion. The appellant subsequently reimbursed the purchase price of the motorcycle to the respondent on 10 March 2023.

[2] The record had been closed on 21 February 2023 and proof before answer was assigned for 24 July 2023. At a pre-proof hearing on 27 June 2023 the sheriff allowed the respondent's opposed motion to abandon to be made at the bar of the court and assoilzied the defender and appellant from craves 1 to 3 inclusive of the initial writ and assigned a hearing on expenses. At the subsequent hearing on expenses on 24 July 2023 the sheriff found the defender and appellant liable to the pursuer and respondent in the expenses of the cause as taxed but limited to 60% of judicial expenses. These two decisions are the subject of the present appeal.

Grounds of Appeal

[3] The sheriff is said to have erred in law in her interlocutor of 27 June 2023 by allowing the respondent to make an oral motion to abandon at the bar in the absence of a written motion to abandon and in the absence of confirmation of the legal basis for that motion. Had the respondent sought to abandon in terms of Rule 23.1(1)(b) he would have been required to pay the defender's taxed expenses. The appellant was materially prejudiced by

not being allowed to proceed to proof before answer. The sheriff erred in law by assoilzing the respondent from the "crave" rather than "craves" of the initial writ.

[4] The sheriff is said to have erred in law in her interlocutor of 24 July 2023 by finding the appellant liable to the respondent for the taxed expenses of the cause. The respondent had failed properly to address the position regarding craves 1 and 3 of the initial writ and the sheriff had allowed him to do so. He should have carried on with the action in respect of craves 1 and 3; he had been allowed to do so knowing that he did not intend to insist on those two craves. The sheriff had allowed the respondent to carry on with his action after March 2023, without penalty, after he had formed the view that the principal financial crave had been satisfied. He could not accept the purchase price in satisfaction of all sums sought and also continue with the action.

[5] The sheriff is said to have further erred in law by fixing the appellant's liability to the respondent in expenses at 60% of the judicial expenses. She had further erred by failing to clarify that the award excluded all expenses otherwise found in favour of the appellant against the respondent. She had misdirected herself in finding the appellant liable in the expenses of the cause *per se* and in any event had set the expenses at 60% of judicial expenses in a wholly unreasonable manner.

[6] Once the respondent had deemed receipt of the purchase price to be settlement in relation to his second crave, he ought to have remitted the action to the simple procedure roll. Had he done so, expenses could only have been awarded on the simple procedure scale.

Submissions for the appellant

[7] The sheriff ought to have granted the appellant's motion for summary decree on 20 June 2023 because the respondent had failed timeously to oppose it, and she ought to have granted decree by default by virtue of the respondent's failure to lodge a list of witnesses, notice of non-admission or to prepare properly for proof.

[8] The sheriff erred in law and acted unreasonably by recommending to the respondent's agent that he may wish to move for abandonment and by assuming that abandonment was being made in one of the usual ways.

[9] Her decision on 24 July 2023 that the respondent had enjoyed significant success in the action and should be entitled to abandon was plainly wrong as was her decision on expenses *(SSE Generation* v *Hochtief Solutions AG* [2018] CSIH 26). She erred in law, acted unreasonably and was plainly wrong by determining that the transfer of an interim payment pending proof was success or had resolved the principal matters in dispute; and she took into account matters which she should not have taken into account (*Miller* v *Chivas Brothers Ltd* 2015 SC 85). She further erred in law and was plainly wrong in determining that the payment was a final step which would result in the respondent's first crave falling away, whereas it was the heart of the whole dispute: had the court decided after proof that the respondent had not been entitled to reject the motorcycle, he would not have been entitled to recover the price and expenses would have been awarded to the appellant.

[10] The sheriff exercised her discretion over expenses in such a way as to cause an obvious miscarriage of justice: *Miller* v *Chivas Brothers Ltd; Ramm* v *Lothian and Borders Fire Board* 1994 SC 226. Expenses following abandonment are usually awarded to the defender. The sheriff failed to take account of the respondent had continued with the action so that she had failed to award expenses of the action to the appellant from March 2023 onwards or to

the respondent for the same period. There are no recorded cases of expenses being awarded against a defender after abandonment except in circumstances where the defender was being censured for his actions during the court process. The sheriff made it clear that was not the case here and she wrongly focussed on the receipt of a "without prejudice" payment as if that resolved the matter in a dispute which had not been determined. In that respect her decision was plainly wrong.

Submissions for the respondent

[11] Abandonment at the Bar is competent: MacPhail, *Sheriff Court Practice*, 4th edn, at paragraph 14.23; *Reynolds* v *Mackenzie,* unreported, 30 May 1986; *Hare* v *Stein* [1882] 9 R 910.

[12] The appellant was not materially prejudiced by not being allowed to proceed to proof for the reasons stated by the sheriff at paragraph 9 of her Note. Her decision is supported by the statements in MacPhail at paragraph 14.22. In any event, the sheriff's decision was within her discretion. No error of law has been made.

[13] The respondent settled for ninety four per cent of the sum sued for which cannot be considered as failure. The respondent was successful in the action and was accordingly entitled to expenses.

[14] The appellant cannot rely on privilege attaching to settlement discussions because he expressly waived that right in the course of his written submissions to the court. Under Scots Law the "without prejudice" protection does not prevent correspondence being considered in relation to expenses: *O'Donnell* v *A M & G Robertson* 1985 SLT 155.

[15] The appellant's extrajudicial, pre-litigation offer was in the sum of £14,293; the action ultimately settled for £15,295.

[16] No error of law has been identified and the appellant merely disagreed with the sheriff's decision. The sheriff's dispensing power permitted abandonment of the action by motion at the bar of the court. The respondent received about 94 per cent of the sum sued for which could only be regarded as success. Expenses usually followed success and were a matter for the court of first instance, in relation to which an appellate court should only interfere where there had been an obvious miscarriage of justice.

Decision – abandonment

[17] The general principle of abandonment is stated in Macphail *(op cit*) at paragraph 14.20:

> "It is a general principle of the adversarial system of civil procedure that the jurisdiction of the court must be invoked by a party; and it follows that, in the absence of any special rule to the contrary, such a party may abandon his litigation at any time, subject to such conditions as the court may lawfully impose upon him. A pursuer may abandon the action at common law (although this is unusual in modern practice) or more frequently in terms of r23.1."

The learned author subsequently considers abandonment at common law at paragraph 14.22. Usually this is done by lodging a minute in clear terms, but that is not the only way which is identified. The following paragraph 14-23, ends:

> "It is also possible for there to be constructive abandonment, as where the pursuer lodges a minute which is not quire accurately framed, or where the pursuer intimates at the bar that he does not intend to proceed further in the action and moves the sheriff to assoilzie the defender."

[18] In *Hare* v *Stein* (1882) 9 R 910 the pursuer raised an action for payment. At the procedure roll his counsel advised the court that the pursuer did not insist further in the action. The Lord Ordinary assoilzied the defender and found the pursuer liable to the defender for the expenses of the cause which he modified to the sum of ten guineas. The

defender reclaimed, on the basis that payment of the full amount of expenses, as taxed, was a condition of abandonment.

> "What happened here was that when the case reached the Procedure Roll the pursuer made up his mind that he would not insist further in the action, and the Lord Ordinary accordingly immediately assoilzied the defender, and fixed a sum which, in his opinion, would cover all the expenses. His Lordship so acted to prevent the further expense which would necessarily be incurred in a taxation before the Auditor. I know no rule to prevent the Lord Ordinary thus dealing with the matter of expenses."
> – Lord President (Inglis) at pp. 910-11.

This case confirms that abandonment at the bar is competent where there is a statutory procedure available (as there also was in 1882) and that the question of expenses is a discretionary one for the court at first instance.

[19] The sheriff indicates in her Note that the appellant's motion for summary decree had been withdrawn. Thereafter the respondent sought to abandon at the bar because the principal sum sought in terms of his second crave in the initial writ had been paid. Craves 1 and 3 were ancillary to crave 2 and were not to be insisted on. He was content that absolvitor be granted and asked that a hearing on expenses be fixed. The appellant argued that he would be prejudiced by the motion at the bar principally on the basis that a written motion would have required that the respondent concede expenses and because he would be prevented from leading evidence of his substantive defence that the machine had been fit for purpose. His decision to reach a commercial settlement over crave 2 did not mean that the action should not be allowed to proceed otherwise.

[20] The sheriff did not err in law by allowing the respondent to abandon his action. The motion was competent and she correctly interpreted paragraph 14.23 of Macphail. She correctly identified that the core of the action was crave 2 and that settlement had been effected in relation to that matter. The other matters were secondary and the respondent,

who had raised the action, accepted that the appellant should be assoilzied on relation to craves 1 and 3. The appellant's assertion that he should be allowed to proceed in relation to the remaining craves sits uneasily with his decision to settle the principal financial claim made by the respondent. To proceed further would have been pointless and a waste of the court's time and resources: the appellant had been assoilzied in relation to the remaining craves. Accordingly the sheriff's reasoning within paras [9] to [13] of her Note displays no error of law. She assigned a hearing on expenses to consider the position in detail which prevented prejudice on that question arising for the appellant.

[21] Accordingly I shall refuse the appeal insofar as it relates to the issue of abandonment and adhere to the sheriff's interlocutor of 27 June 2023.

Decision – expenses

[22] In his written submissions the appellant makes reference to the case of *SSE Generation Ltd* v *Hochtief Solutions AG.* Within paras [313] to [315] the Lord President (Carloway) sets out the general principles which apply in relation to appeal regarding the award of expenses:

- an award of expenses is a matter for the discretionary judgment of the court of first instance;
- appeals regarding expenses only are "severely discouraged" (*Caldwell* v *Dykes* (1906) 8 F 840);
- the appellate court will only interfere where the lower court has taken into account something which it ought not to have or has left a material matter out of account or has reached a decision which was plainly wrong (*Ramm* v *Lothian and Borders Fire Board* 1994 SC 227);

- expenses generally follow success, usually measured by determining if the pursuer has succeeded in obtaining an award in his favour, the defender being able to lodge an appropriate tender if concerned about expenses; although expenses may be refused or modified if the successful party's evidence or conduct has been unsatisfactory (*Ramm*);
- even where a party has been successful, expenses may be refused or modified or a contra award may be appropriate in all the circumstances (*Howitt* v *Alexander & Sons Ltd* 1948 SC 154; the judge at first instance is in the best place to assess those matters.

It follows, as was recognised, that an appellant seeking to overturn an award of expenses has a high bar to surmount.

[23] In *Miller* v *Chivas Bros* the Inner House did overturn the sheriff on a question of expenses where he had addressed the wrong question in relation to the leading of additional evidence. In the present case the appellant contends that the sheriff was plainly wrong to consider that the making of what is described as "an interim payment" by the appellant to the respondent constituted success. I cannot accept that proposition. The respondent effectively received the principal sum sued for which can only be regarded as a favourable settlement and he declined to press the ancillary parts of his claim. The sheriff did not address matters in the wrong way by reaching such a conclusion in this case.

[24] Normally a pursuer who abandons his action concedes expenses to the defender but, as the sheriff points out at para [29] of her Note, it is competent to abandon without doing so and, correctly, no issue of competency has been taken in this appeal. Abandonment commonly takes place where a pursuer decides that he cannot continue with the case because of some difficulty. In the present case the pursuer abandoned because he had

received the principal sum sued for and decided not to continue with the lesser, ancillary parts of his case. The sheriff therefore decided the question of expenses in the manner that the court would usually do following proof, that is by considering whether the respondent had achieved success in his action. She was correct to conclude that by receiving the principal sum sued for the respondent had achieved substantial success. It followed that it was within her discretion to award expenses to the respondent.

[25] However, the sheriff modified the expenses because she took account of various failings on the part of the respondent in the course of the litigation which are set out within paras [36] and [37] of her Note. She took account of the failure of the respondent to move to abandon the action in March when the purchase price of the motorcycle had been repaid since that was the central element of the action. In doing so, she took account of the failure of both agents "to see the wood for the trees" (Sheriff's Note, para [37]). In my view she was correct to do so. As she recounts, the respondent had failed to make his position clear with regard to his third crave, while the appellant continued to insist on proof in relation to all matters as late as the pre-proof hearing on 27 June 2023 despite the price of the machine having been repaid. The appellant's position seems somewhat disingenuous with regard to seeking expenses from the period following repayment in March since he was continuing to seek to go to proof in June. Taking all of these factors into account the sheriff decided to award expenses to the respondent on the basis of success but to modify them to 60%. It is clear that parties' submissions were of limited assistance to her for the reasons she has set out within her Note and I am satisfied that the decision which she reached was well within the bounds of her discretion. I cannot see that she has taken anything into account which she should not have, or that she has failed to take account of something that she should have considered (*Ramm* v *Lothian and Borders Fire Board*). In the convoluted set of circumstances

with which were before her it cannot be said that her decision on expenses was plainly wrong (*Ramm* v *Lothian and Borders Fire Board*). The respondent had achieved substantive success in the action which justified him receiving expenses. However, he had failed to make his position on the remaining elements of the case clear and he failed to bring the action to an end at the most appropriate time once he had received payment. These factors justified modification of expenses. The sheriff also refused the respondent's motion for expenses on a higher scale which was again a matter well within her discretion (*SSE Generation Ltd* v *Hochtief Solutions AG*).

[26] There is no merit in the appellant's submission that the matter ought to have been remitted to the simple procedure roll once the issue raised in crave 2 had been resolved. The other matters were ancillary elements of an ordinary cause action. The correct course should have been to bring the entire matter to an end once settlement of the main issue had been achieved.

[27] On the question of the sheriff's consideration of the "without prejudice" communications between the parties, I prefer the respondent's submissions. In *O'Donnell* v *AM & G Robertson* Lord Hunter made the following observation after similar correspondence had been resented to him:

> "I may remark in passing that correspondence of the same character as the foregoing was taken into consideration by the Inner House in *Critchley* v *Campbell* (1884) 11 R 475, and I notice that Lord President Inglis, at page 480, said with regard to the correspondence in that case: 'The meaning of the parties, I think, was that the offers were not in any way to prejudice their rights in regard to the question between them, and not that they might not be referred to as affecting the question of expenses.'"

It follows that the sheriff was entitled to take the correspondence into account in relation to the question of expenses. However, the sheriff did not place much weight on the extra judicial discussions including the correspondence (Note, para [33]).

[28] For these reasons I shall refuse the appeal in relation to the award of modified expenses to the respondent and adhere to the sheriff's interlocutor of 24 July 2023.

[29] The appellant shall be liable to the respondent for the expenses of this appeal.