SHERIFF APPEAL COURT

[2017] SAC (Civ) 30
EDI-A154-17

Sheriff Principal M Stephen QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M STEPHEN QC

in appeal

in the cause

GENERAL ALL PURPOSE PLASTICS LIMITED

Pursuers and Respondents;

against

JOHN YOUNG

Defender and Appellant:

29 September 2017

[1] The pursuers raised an action in Edinburgh Sheriff Court for payment of unpaid invoices in respect of the supply of plastic and other products to the defender who lives at an address in Edinburgh. They crave firstly, the sum of £6,800 being the total of the outstanding unpaid invoices together with an administration fee chargeable under their terms and conditions. They also crave the sum of £70 being the statutory charge for late payment together with expenses of the action.

[2] The initial writ was lodged by the pursuers' solicitors in March of this year. The court granted warrant for service on the defender on 8 March 2017. The defender was cited by postal means on 15 March which service was clearly effective as a notice of intention to defend was lodged by the defender personally on 30 March well within the period of notice. This leads to the court making an order in terms of Ordinary Cause Rule (OCR) 9.2 setting out the timeline which parties must adhere to. The court's order of 30 March is intimated to both the pursuers and defender in Form G5 and gives the three crucial dates as follows:-

(1) 20 April 2017 as the last date for lodging defences in terms of Rule 9.6(1);

(2) 25 May 2017 as the last date for adjustment of the pleadings in terms of Rule 9.8(1); and

(3) 8 June 2017 at 10am as the date of the Options Hearing in terms of Rule 9.2(1).

[3] The rule of court which governs both the time limits for lodging and the form of defences is OCR 9.6. The relevant part is 9.6(1) which provides: "*Where a notice of intention to defend has been lodged, the defender shall…lodge defences within 14 days after the expiry of the period of notice.*". However, should there be any uncertainty as to the last date that is provided in date form in the G5 to which I have just referred. The last day for lodging defences in this case is explicitly set out and it is 20 April 2017.

[4] In this case 20 April came and went with no defences lodged. The pursuers' solicitors lodged a motion (7/1 of process) on 26 April 2017 asking the court to grant decree in terms of their craves together with expenses. This motion was, of course, intimated to the defender who plainly received the motion as he lodged a notice of opposition with the court on 2 May. As a result the court required to assign a date for the motion to be heard. The

date so assigned was 25 May 2017. It is not entirely clear to me why the date was set so far ahead. Normally an opposed motion should be heard within a much shorter timescale.

[5] When the motion called before the sheriff on 25 May there was no appearance by or on behalf of the defender to oppose the pursuers' motion nor had defences been lodged. Perhaps unsurprisingly, when faced with the pursuers' motion for decree by default the sheriff granted the motion there being no indication from the defender as to his intention either with regard to his defence to the action or his opposition to the motion. The pursuers were entitled to move the motion standing the terms of OCR 16.2 which provides *inter alia*:

> "*(1) In a cause to which this chapter applies, where a party fails – (a) to lodge, or intimate the lodging of, any production or part of process within the period required under a provision in these rules…that party shall be in default.*
> *(2) Where a party is in default, the sheriff may, as the case may be -…(a) grant decree as craved with expenses."*

The Appeal

[6] The defender and now appellant appeals the sheriff's decision to grant decree by default. The grounds of appeal lodged with this court are to the following effect namely, that "*the defender was representing his own interests, and was unaware of the requirement to lodge defences by an appointed date. He intended to consult with solicitors and only did so after decree by default was granted on 25 May 2017. Draft defences are produced*." The appellant is unable to point to any error in the sheriff's approach. The appellant was representing his own interests until he consulted his current solicitors on 21 May 2017. It was conceded that the appellant was in default; that no defences had been lodged by the last date for lodging or indeed, by the date of the hearing of the opposed motion. It was not suggested that the appellant had not received notification of the G5 or intimation of the pursuers' motion. It was suggested that the appellant had not received the letter from the court notifying the date of the hearing on the opposed motion. The appellant's solicitor met with him on

21 May 2017 and took instructions as to his defence to the action. It was conceded that the defences were brief indeed deficient. They did not explain fully the appellant's position. He maintained that he did not order the plastic items in or around November 2016. Further information was elicited as to the likely defence in the course of submissions. It was suggested that the appellant and respondents had no contractual relationship despite the averments in the initial writ. It was accepted that there was no plea in law to that effect. This does not form any part of the written defences.

[7] As a matter of law the appellant argued that the appeal court's function in an appeal against decree by default was to exercise its discretion as to whether the appellant could be reponed.

[8] The respondents' position put simply is that the sheriff was entitled to grant decree by default. The appeal should be refused and this court should adhere to the sheriff's interlocutor. It is for the appellant to satisfy the court that the decree should be recalled. The appellant has not pointed to any error of law. The defences tendered are skeletal in nature and do not disclose a proper defence. They do not answer the averments made by the pursuers as to supply. They fail to aver that there was no contract. In the respondents' note of argument their position is that an appeal court is confined to applying the test for review of a decision on a discretionary matter as set out in *Thomson* v *Corporation of Glasgow* 1962 SC (HL) 36 and *Moran* v *Freyssinet Limited* [2015] CSIH 76. However, in his oral submissions, the solicitor for the respondents properly conceded that the question for the appeal court is whether having exercised its own discretion, the decree could be recalled and the appellant reponed.

Decision

[9] The first issue of law to be decided is the proper approach of an appellate court when reviewing a sheriff's decision to grant decree by default. The terms of OCR 16.2 clearly point to the sheriff having a discretion whether to grant decree where a party is in default. In their written submissions, parties differed as to whether the appellate court required to restrict its review of the sheriff's decision to the usual principles for review of the exercise of judicial discretion as set out in *Thomson* v *Glasgow Corporation* (supra) at page 66 and as applied in *Moran* v *Freyssinet* (*supra*) an Inner House decision on "*default*". These principles, put shortly, involve a narrow approach by examining the sheriff's decision making and assessing whether some irrelevant factor had been taken into account or an important relevant factor left out of the equation or that a decision was reached which could be described as unreasonable or unjudicial. The respondents concede that an appeal against decree by default involves the question whether the appellant should be reponed, which in other words means that the appellate court should exercise its own discretion having regard to all the circumstances.

[10] Accordingly, I approach this appeal on the basis that I may exercise my discretion whether to open up or to recall the decree by default. That means, as a matter of principle, that my decision whether to recall the decree by default should not be restricted to the question of whether, on the information available to the sheriff, she exercised her discretion reasonably by granting decree. A party who appeals a decree by default is, in effect, seeking to be reponed or to have the case put back on track with further procedure allowed. Whether or not the appellant should be reponed involves a broad consideration of the circumstances surrounding the default and whether there is a proper or meritorious defence to the action. The correct question is whether the interests of justice require that the

appellant be reponed. In Macphail Sheriff Court Practice Chapter 14 the learned author emphasises that "*The court must do justice not only to the defaulter but to the innocent victim of the default; and where the defaulter's failures in duty transcend what is acceptable to the court and fair to the other party, and matters cannot be mended by an award of expenses,..the appeal will be refused*." (at 14.15). Further, at paragraph 14.14:- "*It is always a matter in the discretion of the appeal court whether the appellant is to be reponed, and if so, upon what conditions as to expenses or otherwise. If the appeal court allows the appeal it recalls the sheriff's interlocutor, imposes any such conditions, and remits the case to the sheriff to proceed as accords*." Accordingly, reponing involves the exercise of a broad discretion. The appellate court may entertain an explanation for the default; why there was no appearance and give consideration to the question of whether there is a *prima facie* defence and the strength and substance of that defence (*McKelvie* v *Scottish Steel Scaffolding Company* 1938 SC 278.). The *dicta* of the Lord President (Rodger) in *Munro and Miller (Pakistan) Limited* v *Wyvern Structures Limited* 1997 SLT 1356 serves to emphasise the broad nature of the appeal court's discretion in such appeals.

> "*Of course, as counsel for the reclaimers argued, there is a risk that the party's absence from the diet of proof may have been due to some very exceptional circumstance of which the Lord Ordinary was unaware. But even if something of this kind comes to light after the judge has granted decree, no injustice need result since the party in default can reclaim and the court would be able to repone him. This was not disputed by counsel for the respondents.*"

[11] In this appeal the sheriff has declined to provide a note. The motion called in a busy ordinary court. It is therefore not possible to know either the submission made on behalf of the pursuers or the precise basis on which the sheriff exercised her discretion. The sheriff's decision to grant decree by default is, as I have indicated, unsurprising standing the fact that no defences had been lodged coupled with a failure to appear to oppose the granting of decree. In these circumstances it is perhaps difficult to understand how the sheriff might

have decided differently. Nevertheless, even if the exercise may be regarded as a statement of the obvious, it is invariably helpful if the sheriff records in a note, however brief, what happened in court and the reasons for the decision.

[12] Turning to the appeal and the circumstances of the default it is necessary for me to consider whether I should exercise my discretion in the appellant's favour. It is difficult to avoid the conclusion that the appellant has been less than candid in his grounds of appeal. Indeed, the grounds of appeal contradict the appellant's position as stated in his opposition to the pursuers' motion for decree by default. At that stage the appellant indicated his intention to meet with his solicitor on 3 May and that defences would be lodged together with a motion to allow the defences to be lodged late. Accordingly, in April the appellant was well aware of the need to lodge defences and he had correctly identified that the defences were by that stage late. However, no defences were lodged despite the motion being heard more than three weeks after the proposed meeting with the solicitor. The appellant therefore, appears to have taken a dilatory, if not cavalier approach, to the rules of court. It cannot be argued that the appellant was unaware of the need to lodge defences. The Form G5 makes the last date for the lodging of defences crystal clear. However, the appellant departed from the first of his grounds of appeal but only at the appeal hearing. Of course, the lack of legal representation does not absolve the appellant of the need to have proper regard to the rules of court which are available online and the crucial parts are clearly flagged up in the notices from court. Draft defences have now been tendered along with the note of appeal. These can be categorised as skeletal and give the pursuers and the court little information as to what the actual defence might be. The action is a straightforward action for payment based on unpaid invoices. The appellant has not given any indication of his position with regard to the goods in question. Curiously, the

appellant's solicitor who was consulted on 21 May 2017 (not 3 May as suggested by the appellant himself) chose not to intimate his interest to the respondents' solicitors at any stage. Instead, he simply planned to appear at the options hearing armed with the brief skeleton defences. Another concerning feature of the appellant's case is the clear inconsistency between the grounds of appeal and the oral submissions. The grounds of appeal indicate that the appellant "*intended to consult with solicitors and only did so after decree by default was granted on 25 May 2017*". Instead, I was told that the appellant consulted the solicitor who conducted the appeal on 21 May 2017. These factual assertions cannot be reconciled and add a further element of doubt as to the integrity of the appellant's position. As I have observed, these assertions are in turn contradicted by the appellant's own explanation of his intentions given to the court in writing in his notice of opposition to the pursuers' motion for decree. Had the appellant's solicitor contacted the respondents' solicitors on or immediately after 21 May to explain his client's position the significance of the impending motion roll hearing would become obvious and real. It was not at all clear to me why no steps were taken to seek to protect the interests of the appellant who by that stage was more than a month late in lodging his defences and vulnerable to a finding of default and the likelihood of decree passing against him. It is likewise beyond comprehension why the appellant himself may have failed to inform his solicitor of the pursuers' motion for decree. It is, of course, also necessary to consider the pursuers' position. The appeal is strenuously opposed. The pursuers' position is that the appellant is simply delaying and avoiding the inevitable consequences of these proceedings. At no point has the appellant challenged the quality of the goods nor had he suggested that they were not received at all until the appeal hearing. In all the circumstances it is difficult to avoid the conclusion that the appellant is simply failing to engage with the court process; has failed to

follow regular procedure; and has delayed these proceedings on account of these failures. The court has a real interest in ensuring that its rules are followed. Rules of court have the clear objective not only of regulating procedure but also to provide parties with a just resolution of the dispute between them. Non-compliance with the rules of court undermines those objectives and inflicts delay and expense on the party who follows proper procedure. The lack of a coherent explanation of the steps taken by the appellant and indeed his solicitor to deal with the failures to comply with regular court procedure and the lack of a candid and proper defence to the action lead me to the conclusion that matters cannot simply be mended by an award of expenses against the appellant. In all the circumstances, I am unable to exercise my discretion in favour of the appellant in order that he be reponed and accordingly I propose to refuse the appeal.