SHERIFF APPEAL COURT

[2019] SAC (Civ) 37
LAN-A91-17

Appeal Sheriff Peter J Braid

OPINION OF THE COURT

delivered by APPEAL SHERIFF PETER J BRAID

SHINE PROPERTIES LIMITED, a company incorporated under the Companies Act (Registered Number SC442716) and having their registered office at Radleigh House, 1 Golf Road, Clarkston, Glasgow, G76 7HU

Pursuer and Appellant

against

BIGGAR MUSEUM TRUST, a registered charity constituted as a company limited by Guarantee (Number SC044), having its registered office at 156 High Street, Biggar, Lanarkshire, ML 12 6DH

Defender and Respondent

Pursuer and Appellant: Bennie, advocate; Bannatyne Kirkwood France & Co
Defender and Respondent: Duthie QC; Smail & Ewart

11 November 2019

Introduction

[1] This is nominally an appeal against the decision of the sheriff at Lanark granting final decree on 13 August 2019. However the Note of Appeal states, by way of explanation, that on 13 August 2019 the matter of expenses was finally disposed of. The substantive decision, being the one which the appellant wishes to appeal against, is the decision of the sheriff pronounced on 21 June 2019 following proof restricted to liability.

Reference on the competency of the appeal

[2] The respondent has referred four questions about the competency of the appeal, as follows:

i. Is it incompetent, in respect that the interlocutor purportedly appealed against dated 13 August 2019 was granted on joint motion?

ii. Is it incompetent, in respect that the parties entered into an enforceable agreement as to the disposal of the first instance proceedings?

iii. Is it incompetent in respect that the appellant is personally barred from appealing the decision?

iv. Is it incompetent being out of time?

[3] It is unnecessary to examine the grounds of appeal. Suffice to say that the appeal is not directed in any way towards the disposal of expenses. Rather, the appellant avers that the sheriff made a number of errors in law in reaching the decision of 21 June 2019.

The hearing on the reference

[4] A hearing on the reference took place before me on 28 October 2019.

[5] It was common ground that a diet of proof took place on various dates between December 2018 and April 2019 before a part time sheriff. Her decision on the merits of that dispute was issued on 21 June 2019. The question of expenses was reserved. A hearing took place on 16 July 2019, when there was a difficulty with the part time sheriff's availability. Parties were encouraged to reach agreement in relation to expenses. There was an exchange of emails between the parties' solicitors, the substance of which was that the appellant conceded the expenses of the action, subject to an award being made in its favour in relation

to (a) the expenses of an amendment procedure instigated by the respondent and (b) the expenses of a motion for caution.

[6] Consequently, when the case next called before the resident sheriff at Lanark on 13 August 2019, a joint motion was made for the expenses to be disposed of on that agreed basis which duly resulted in the interlocutor of 13 August 2019 which is now appealed against. The appeal was thereafter lodged on 10 September 2019, precisely 28 days after the interlocutor. It is not disputed that that appeal is timeous, in relation to the interlocutor of 13 August.

[7] It is also common ground that the interlocutor of 21 June 2019 did not constitute a final judgment in terms of section 136 of the Courts Reform (Scotland) Act 2014 (*infra*); that no attempt was made to appeal that interlocutor (by seeking leave) within 28 days; that no mention was made by the appellant's agent of even the possibility of an appeal, while the discussions regarding expenses were ongoing; and that the interlocutor of 13 August 2019 does constitute a final interlocutor.

The law

[8] In so far as material, section 110 of the Courts Reform (Scotland) Act 2014 provides:

> "110 – (1) An appeal may be taken to the Sheriff Appeal Court, without the need for permission, against –
>
> (a) A decision of a sheriff constituting final judgment in civil proceedings…"

[9] Section 116 of the 2014 Act, in so far as material, provides:

> "116 – (1) This section applies to –
>
> (a) An appeal to the Sheriff Appeal Court under section 110…
>
> (2) In the appeal, all prior decisions in the proceedings… are open to review".

[10] Section 136(1) of the 2014 Act provides:

> "Final judgment" means a decision which, by itself, or taken along with previous decisions, disposes of the subject matter of proceedings, even though judgment may not have been pronounced on every question raised or expenses found due may not have been modified, taxed or decerned for".

Submissions for the respondent

[11] Against all of that background, the first submission for the respondent was that it was not competent for the appellant now to appeal against the interlocutor of 13 August 2019, because that interlocutor was made on joint motion; and a party could not competently appeal against a decision made on its motion. Reference was made to *Prospect Healthcare (Hairmyres) Ltd* v *Keir Build Ltd* 2018 SC 155 and *Jongejan* v *Jongejan* 1993 SLT 595. Second, it was argued that it was too late to appeal against the interlocutor of 21 June 2019 because of the peremptory terms of rule 6.3 of the Sheriff Appeal Court Rules, which provides that an appeal must be made within 28 days after the date on which the decision appealed against was given. Third, the appellant was personally barred from appealing, standing the discussions regarding expenses although this argument morphed during the hearing into an argument that the discussions regarding expenses were a factor which militated against relief being granted, rather than an absolute knockout blow to the competency of the appeal. The possibility of an appeal had never been mentioned which at least gave the whiff of something underhand in the appellant's agents' dealings with their counterparts. The respondent had made concessions in relation to expenses. Fourth, and in any event, relief should not be granted under rule 2.1, such as to prevent a late appeal now being taken in relation to the interlocutor of 21 June 2019.

Submissions for the appellant

[12] The appellant submitted in response, first, that the terms of section 110 of the 2014 Act permitted an appeal against a decision which constituted final judgment, which the interlocutor of 13 August was. It did not by itself dispose of the subject matter of the cause but had to be read with the interlocutor of 21 June 2019. An appeal against the interlocutor of 13 August opened the interlocutor of 21 June up to review. The fact that a joint motion had been made regarding expenses did not and could not preclude an appeal against the final interlocutor in so far as it was directed in substance at the interlocutor of 21 June. If the respondent was correct it would have the effect that an unsuccessful party who wished to appeal could never engage with the court regarding expenses for fear that an award of any part of the expenses in their favour would result in their losing the right to appeal. That could not be correct. While the appellant might have sought leave to appeal against the interlocutor of 21 June 2019, it was under no obligation to do so. Reference was made to *Gamble* v *Unison Scotland* 1998 SLT (Sh Ct) 5, a decision of Sheriff Principal MacLeod under the previous statutory regime, the wording of which was in very similar terms to that of the 2014 Act; *Ludlow* v *Strang* 1938 SC 551, which made clear that the interlocutor of 21 June 2019 was not a final interlocutor; and *McCue* v *Scottish Daily Record and Sunday Mail Ltd* 1998 SLT 983, in which it was observed (at 992) that the true objection to a reclaiming motion against an interlocutor pronounced on a reclaimer's motion of consent was not that it was not competent but simply that the court should not normally countenance it. If against the appellant on the competency point, relief should be granted. It was not accepted that there had been anything underhand in the dealings regarding expenses. No decision to appeal had been taken at that stage. The respondent in any event should have been aware of the possibility that there might be an appeal.

Respondent's response

[13] In a brief response, counsel for the respondent submitted that cases under the previous statutory regime were of no assistance, standing the terms of rule 6.3, previously referred to.

Discussion

[14] The starting point is to reflect that the outcome sought by the respondent is not an attractive one. It would result in an unsuccessful party losing what is otherwise an absolute right of appeal against a final decision on the merits of an action, not only in circumstances where expenses were subsequently agreed but also in circumstances where a motion for the expenses of part (or indeed all) of the process had been made and granted in favour of the unsuccessful party. Fortunately, neither the 2014 Act properly construed, nor the authorities referred to in submissions, lead to that result. It is important to observe that the interlocutor of 13 August 2019 is not, alone, the final judgment. It must be read in conjunction with the interlocutor of 21 June 2019 since it was those two interlocutors together which dispose of the whole subject matter of the action. As soon as that is understood, the rule, if it be a rule, that a party cannot appeal against that to which it has consented can immediately be seen to have no application to the interlocutor of 21 June, which was the interlocutor which disposed of the pleas-in-law, and which constituted the substantive decision in the case. In no way, shape or form did the appellant agree to that interlocutor. The respondent complains that it is too late to appeal against that interlocutor but section 116 of the 2014 Act makes clear that the effect of an appeal is to open up all prior interlocutors to review. The appeal against the interlocutor of 13 August 2019 has been made timeously, and does

competently have the effect of opening up all prior interlocutors to review, including that of 21 June 2019. In any event, following *McCue*, the matter is not truly one of competency but rather whether it is appropriate to allow a party to appeal and on any view it is appropriate to allow the appellant to challenge the interlocutor of 21 June 2019. It would be a different matter entirely if it now wished to challenge the disposal on expenses; or, for that matter, if the interlocutor of 21 June had been pronounced following a joint minute; but neither of these is the case.

[15] It seems to me that the respondent's true complaint is that they were not told that the appellant was contemplating an appeal. Two comments might be made about that. First, as the appellant's counsel submitted, the respondent ought to have been aware of the possibility that there might be an appeal following the final interlocutor. Second, whether or not the respondent was aware that an appeal was in contemplation cannot affect the competency of an appeal (as the respondent appeared to come to accept, by ultimately not insisting in the personal bar argument other than in relation to relief).

Decision

[16] The questions referred by the respondent are therefore all answered in the negative and the appeal will be allowed to proceed.

[17] For completeness I find it unnecessary to express any view on the arguments presented on either side regarding relief, save to point out that it would appear to be premature to express any view on that until the question of leave had been determined. However, even to discuss the possibility that a sheriff might be asked to grant leave to appeal an earlier interlocutor, following the granting of a final interlocutor, standing the effect of section 116, merely underlines how untenable the respondent's position is.