SHERIFF APPEAL COURT

2021 SAC (Civ) 10
GLW-CA118-19

Sheriff Principal M W Lewis
Sheriff Principal C D Turnbull
Appeal Sheriff F Tait

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the application for permission to appeal to the Court of Session

in terms of section 113 of the Courts Reform (Scotland) Act 2014

in the cause

D. McLAUGHLIN AND SONS LIMITED

Pursuer and Respondent

against

LINTHOUSE HOUSING ASSOCIATION LIMITED

Defender and Applicant

Pursuer and Respondent: Levy & McRae LLP
Defender and Applicant: Harper Macleod LLP

28 January 2021

Introduction

[1] The defender and applicant (hereinafter "the applicant") seeks permission to appeal to the Court of Session against the decision of this court of 23 December 2020 [2021 SAC

(Civ) 5[1]], refusing the applicant's appeal and adhering to the interlocutor of the sheriff. Following a debate, the sheriff had *inter alia* granted decree against the applicant for payment to the pursuer and respondent (hereinafter "the respondent") of the sum of £33,600 (in terms of crave 2); and *quoad ultra* allowed parties a proof before answer in the principal action (that in respect of craves 1 and 3).

[3] The application for permission to appeal proceeded by way of written submissions. In such circumstances, it is unnecessary for us to set out in detail the submissions made by the parties (each of which we have had regard to). Put broadly, they can be summarised as follows.

Submissions for the Applicant

[4] The applicant submits that the decision of the sheriff – as affirmed on appeal – constitutes final judgment against the applicant. The proposed appeal is therefore competent. The applicant seeks permission to appeal only in respect of this court's decision on what was termed "The First Question" in the appeal (see paragraphs [4] – [23] of the court's opinion of 23 December 2020), namely, did the sheriff err in law by granting decree under crave 2 on the basis that the applicant had no contractual entitlement to withhold the sums retained in satisfaction of liquidated damages in terms of the pay less notice?

[5] The applicant's proposed grounds of appeal contend that this court (i) erred by holding that the "clear and ordinary meaning" of clause 2.32 of the Standard Building Contract with Quantities for use in Scotland 2011 edition is that, in the absence of a new Non Completion Certificate, the applicant had no right to retain liquidated damages; and

[1] http://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2021-sac-(civ)-005.pdf?sfvrsn=0

that the absence of such a certificate was "fatal" to the applicant's right to continue to withhold liquidated damages; (ii) erred in law in its treatment of the decision of the House of Lords in *Reinwood Ltd* v *L Brown & Sons Ltd* [2008] 1 WLR 696; and (iii) erred in law by seeking to justify its disposal under reference to the decision in *A Bell & Son (Paddington) Ltd* v *CBF Residential Care & Housing Association* [1989] 46 BLR 102.

[6] The applicant submitted that the proposed appeal would raise an important point of principle (see sub-section 113(2)(a) of the Courts Reform (Scotland) Act 2014 – hereinafter "the 2014 Act") which has not yet been clearly established, arguing that (i) it concerns the proper construction and effect of an important standard form provision incorporated into a very significant proportion of construction contracts in Scotland; (ii) the particular point raised by the proposed appeal does not seem to have been considered or determined in any other reported Scottish case; and (iii) the particular point raised by the proposed appeal was noted by Lord Neuberger as "an outstanding question" in *Reinwood* but reserved for determination in another case. This case is, accordingly, one which is contemplated by the terms of sub-section 113(1)(a) of the 2014 Act *cf. Politakis* v *Spencely & another* 2018 SC 184, per the Lord President at paragraph [21].

[7] The applicant further submitted that, if this case does not raise an important point of principle or practice, there would, in any event, be compelling reasons to grant permission under sub-section 113(2)(b) of the 2014 Act. These include the interests of disposing of the case justly in circumstances where the applicant is faced with meeting a decree despite enjoying reasonable prospects of success in persuading the Inner House that the sheriff and this court had reached a decision which was plainly wrong: *cf. Politakis* at paragraph [22].

Submissions for the Respondent

[8] The respondent submitted that permission to appeal to the Court of Session cannot be given at this stage of the proceedings because it would not be competent for the court to do so. The decision sought to be appealed against is not one "constituting final judgment in civil proceedings" (see sub-section 113(1) of the 2014 Act) and the leave sought is therefore such as it would be incompetent for the court to grant.

[9] Turning to the grounds of appeal proposed by the applicant, the respondent submitted that the decision of this court was correct in law. The existence of a valid certificate of non-completion is a *sine qua non* of the levying of liquidate damages under clause 2.32. *Reinwood Ltd* was rightly distinguished from the case in hand by the Sheriff Appeal Court. The argument relied upon by the applicant in relation to pay less notices is beside the point. Such notices are concerned with the intimation of alleged rights, not the existence of the substantive rights which may lie behind their issue. This case is concerned with whether or not the substantive right to deduct liquidate and ascertained damages came into existence, not whether the right was lost through the operation of the notification system required by the Housing Grants, Construction and Regeneration Act 1996. Whether *A Bell & Son (Paddington) Ltd* was included in the list of authorities for the appeal does not affect the correctness of the observation in paragraph [23] of the decision of this court that the recognition of the need for certificates of non-completion as a suspensive condition of the right to deduct liquidate and ascertained damages was of long standing.

[10] The respondent submitted that the proposed appeal does not raise an important point of principle or practice; and that there was no compelling reason for the Court of Session to hear it.

The 2014 Act

[11] The determination of this application requires a consideration of both sections 113 and 136 of the 2014 Act. Insofar as relevant to the determination of the issue before the court, they provide as follows:

> **"113 Appeal from the Sheriff Appeal Court to the Court of Session**
> (1) An appeal may be taken to the Court of Session against a decision of the Sheriff Appeal Court constituting final judgment in civil proceedings, but only—
> (a) with the permission of the Sheriff Appeal Court, or
> (b) if that Court has refused permission, with the permission of the Court of Session.
> (2) The Sheriff Appeal Court or the Court of Session may grant permission under subsection (1) only if the Court considers that—
> (a) the appeal would raise an important point of principle or practice, or
> (b) there is some other compelling reason for the Court of Session to hear the appeal.
> …
> **136 Interpretation**
> (1) In this Act, unless the context requires otherwise—
> …
> *"decision"*, in relation to a sheriff, judge or court, includes interlocutor, order or judgment
> *"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"

Competency

[12] For the proposed appeal to be competent, it must be against a decision of this court "constituting final judgment in civil proceedings" (see sub-section 113(1) of the 2014 Act). The term "final judgment" is now defined by section 136 of the 2014 Act. When one has regard to the definition of "decision" therein, the definition of term "final judgment" is not materially different from that contained within the predecessor provision, section 3(h) of the Sheriff Courts (Scotland) Act 1907 ("the 1907 Act"), which is in the following terms:

> "*"Final judgment"* means an interlocutor which, by itself, or taken along with previous interlocutors, disposes of the subject-matter of the cause, notwithstanding that judgment may not have been pronounced on every question raised, and that expenses found due may not have been modified, taxed, or decerned for."

The value of authorities relative to the equivalent provisions of the 1907 Act was commented upon by this court in *Siteman Painting and Decorating Services Ltd* v *Simply Construct (UK) LLP* [2019] SAC (Civ) 13 at paragraph [23].

[13] The issue before the court was considered by the Inner House in *Ludlow* v *Strang* 1938 SC 551. In *Ludlow*, an action brought in the sheriff court contained four craves for payment of sums of money. The sheriff-substitute held that the pursuer's averments in support of the fourth crave were irrelevant, and dismissed the action *quoad* that crave; he allowed a proof in relation to the remaining craves. The sheriff-substitute's interlocutor also contained no finding regarding expenses. The pursuer appealed to the Inner House without leave. In the circumstances of *Ludlow*, and in terms of section 28 of the 1907 Act, such an appeal was only competent if the interlocutor appealed against was a final judgment. The Inner House held that the appeal was incompetent in that the interlocutor appealed against was not a final judgment, in respect that it did not dispose of the subject-matter of the cause and that it did not contain a finding regarding expenses.

[14] In the main opinion, the Lord President (Normand) said this at page 553:

> " … The only point in this case, therefore, is whether the judgment appealed against is a final judgment. "Final judgment" is defined in the interpretation section— section 3 of the (1907) Act, paragraph (*h*)—as an interlocutor which, by itself, or taken along with previous interlocutors, disposes of the subject-matter of the cause, notwithstanding that judgment may not have been pronounced on every question raised and that expenses found due may not have been modified, taxed, or decerned for.
> It is, I think, clear that "the subject-matter" of a cause is not disposed of by an interlocutor which allows a proof upon three of the conclusions of the action and dismisses the fourth conclusion on the ground that the

averments in support of it are irrelevant. That proposition does not need the support of any authority; but, if authority were required, it is to be found in the case of *Potter v. Mylne* [1930 SC 656]. "

[15] In the present case, the sheriff allowed a proof before answer in relation to two of the three substantial craves. Following *Ludlow*, and applying the clear meaning of the relevant provisions of the 2014 Act, the subject matter of the proceedings was not disposed of by the interlocutor of the sheriff, an interlocutor to which this court adhered. We accordingly conclude that the proposed appeal is incompetent and shall refuse permission on that basis.

The Second Appeals Test

[16] Lest we are wrong on the issue of competency, it is appropriate that we express a view on whether the proposed appeal meets the test set out in section 113(2) of the 2014 Act. For the reasons set out below, we have concluded that the test is not met. It is therefore unnecessary for us to consider whether we would have exercised the discretion vested in us by section 113(2).

[17] As set out above (see paragraph [6] above), the applicant contends that the proposed appeal would raise an important point of principle. In our view it does not. The decision of this court proceeded upon the proper interpretation of the relevant provisions of the parties' contract (see paragraph [18] of the opinion of the court). The decision reached by the sheriff, and by this court, was consistent with prior authority (see, for example, *Balfour Beatty Construction Northern Ltd* v *Modus Corovest (Blackpool) Ltd* [2008] EWHC 3029 (TCC) – referred to in argument by the respondent – see paragraph [15] of the opinion of the court). For the reasons set out in the opinion of the court the decision of the House of Lords in

Reinwood Ltd does not assist the applicant. Contrary to the assertion made by the applicant, this court did not seek to justify its disposal under reference to the decision in *A Bell & Son (Paddington) Ltd* (which was referred to by senior counsel for the respondent in the hearing of the appeal) as will be seen from a fair reading of paragraph [23] of the opinion of the court.

[18] In the alternative, the applicant contends that there are compelling reasons to grant permission under sub-section 113(2)(b) (see paragraph [7] above). Only one such reason is identified in the application, namely, that the applicant is faced with meeting a decree despite enjoying reasonable prospects of success in persuading the Inner House that both the sheriff and this court had reached a decision which was plainly wrong. In support of this argument, the applicant relies upon paragraph [22] of the decision of the Inner House in *Politakis*, which is in the following terms:

> "The existence of some other compelling reason presupposes that no important point of practice or principle has been raised (*Uphill* [v *BRB (Residuary) Ltd* [2005] 1 WLR 2070] , Dyson LJ, para 19). In *Uphill*, the Court of Appeal explained (*ibid*) that, when considering whether some other compelling reason existed, it was important to emphasise the 'truly exceptional nature of the jurisdiction' in relation to second appeals. 'Compelling' is a 'very strong word', albeit that the test is there to enable the court to deal with the case justly (*Uphill*, para 23). A good starting point is a consideration of the prospects of success (*Uphill*, para 24). The test can be met if it is clear that the court hearing the first appeal reached a decision which is 'plainly wrong' because, for example, 'it is inconsistent with authority'. Alternatively, there may be 'good grounds for believing that the hearing was tainted by some procedural irregularity so as to render the first appeal unfair' (*ibid*). The court agrees with this analysis. The tests will be satisfied only where the decision in the first appeal is clearly wrong, such as where it ignores established precedent, or where there is a procedural irregularity in that appeal which demonstrates that the applicant did not have a fair hearing (*Eba* v *Advocate General for Scotland* [2012 SC (UKSC) 1]), Lord Hope, para 48)."

[19] The present case is not one which ignores established precedent. The applicant argues that the proposed appeal would raise a point which has not yet been clearly established. The decision of this court echoes that reached by the sheriff, and is consistent with English authority on the contractual provision in question. In such circumstances, the applicant's prospects of success are, in our view, poor. No issue of procedural irregularity has been raised. There is nothing else which can be described as a compelling reason. In our opinion, the second part of the test in sub-section 113(2) of the 2014 Act has not been met.

Disposal

[20] For the reasons set out above, the application will be refused. The applicant will be found liable to the respondent in the expenses occasioned thereby.