SHERIFF APPEAL COURT

[2021] SAC (Civ) 4
DUM-A136-19

Sheriff Principal D L Murray

NOTE

by SHERIFF PRINCIPAL D L MURRAY

in application for permission to appeal to the Court of Session in terms of section 113 of the Courts Reform (Scotland) Act 2014

by

(1) GELL LEISURE LIMITED;
(2) SARAH GELL; and
(3) DUNCAN GELL

Applicants

in the cause

GORDON MATTHEW COLQUHOUN and IRENE DORIS COLQUHOUN

Pursuers & Proposed Respondents

against

(1) GELL LEISURE LIMITED;
(2) SARAH GELL; and
(3) DUNCAN GELL

Defenders & Proposed Appellants

Act: Leslie, solicitor, Leslie & Co
Alt: Murdoch, solicitor advocate, AB & A Matthews Solicitors

31 August 2020

[1] This is an application by Gell Leisure and others ("the applicants") in terms of Section 113 of the Courts Reform (Scotland) Act 2014 ("the 2014 Act") for permission to appeal to the Court of Session against the judgment of the Sheriff Appeal Court of 29 June

2020. It proceeds on the basis of written submissions. The applicants seek to appeal my decision of 29 June 2020 to refuse their motion inviting the court to exercise its dispensing power in terms of rule 2.1 of the Sheriff Appeal Court Rules 2015 to grant relief from a failure to comply with rule 6.3 and allow a late appeal.

[2] The background to the case is set out in the Opinion dated 29 June 2020. The applicants sought to appeal against the decision of the sheriff on 23 January 2020 to grant decree against them following their failure to appear or be represented at an options hearing. The appeal against that decision was not submitted to the Sheriff Appeal Court timeously and was submitted after the extract decree had been issued. I refused, for the reasons explained in the Opinion, to exercise my discretion to allow the appeal to be received late. Two questions arise: the first question whether it is competent to seek permission to appeal against the decision of 29 June 2020, and second, if it is, whether permission should be granted in terms of section 113.

Submissions for the applicants

[3] The applicants addressed the question of whether permission should be granted first. They submitted that there were conflicting decisions on the application of *Alloa Brewery Co Ltd* v *Parker* 1991 SCLR 70. Reference was made to the decision of Sheriff Principal Dunlop in *Zlatarits* v *Zlatarits* 2018 SCLR 818 where he observed at page 820:

> "The underlying principle which was approved in *Alloa Brewery Co Ltd* v *Parker* is that there can be no appeal against an extracted interlocutor. While the Extra Division appears to recognise that there may be exceptions to that principle it respectfully seems to me that the nature and scope of these exceptions is not as clearly defined in that decision as they might have been."

It was maintained there was a lack of clarity about what is meant by an extract being properly issued. Here the pursuers and respondents had lodged a record which was not in compliance with the rules of court in that it contained adjustments which had not been intimated timeously, and in respect of which no allowance for late lodging was sought. These adjustments included both a denial of the defender's averments and a preliminary plea in respect of which a rule 22.1 note had been submitted. The decision to grant decree had been made by the sheriff when he was unaware of the true facts. The extract decree had as a result been issued "improperly" and the court therefore had the discretion to allow a late appeal. Even if the court was not supportive of that argument permission should be granted to enable the Court of Session to clarify the law where a degree of uncertainty prevails.

[4] In relation to the question of the competency of the appeal the applicants argued that the consequence of the refusal of the court to exercise its discretion to allow the appeal late had the effect of concluding the case and as such the decision of 29 June 2020 constituted a final judgment. (The applicant had not identified the typographical error in the decision in *Hay* v *The Parachute Regiment Charity* unreported 20 December 2019 where reference is made to *Siteman Painting and Decorating Services* v *Simply Construct (UK) Limited* 2009 SAC (Civ 32) as opposed to *Siteman Painting and Decorating Services* v *Simply Construct (UK) Limited* 2009 SAC (Civ 13) which considered what constitutes a final judgment.) "Final judgment" was defined in section 136 of the 2014 Act. That definition closely follows the definition in section 3(h) of the Sheriff Courts (Scotland) Act 1907. Reference was made to *Macphail Sheriff Court Practice 3rd edition* 18.32 and following. Contrary to the Sheriff Principal's decision in *Hay* v *The Parachute Regiment Charity* the decision of 29 June 20 was a final

judgment. Unless permission were granted it would be the final interlocutor in the case and conclude the matter between the parties and as such it should be appealable, provided that the second appeals test was met. The application was not incompetent and the decision in *Hay* v *The Parachute Regiment Charity* should not be followed.

Submissions for the respondents

[5] The decision sought to be appealed against was the decision of the Sheriff Appeal Court on the motion to allow the appeal although late. The substantive appeal had not been considered by the Sheriff Appeal Court. I was therefore invited to follow the decision in *Hay* v *The Parachute Regiment Charity* and find that the decision to refuse the motion to appeal late is an interlocutory decision rather than a final judgment. There was no substantive appeal considered by the Sheriff Appeal Court. The decision sought to be appealed against is accordingly limited to the decision of the Sheriff Appeal Court and the merits of the decision of the Sheriff would not be the subject of the proposed appeal to the Court of Session. In terms of the competency issues raised, the instant case was on all fours with *Hay* v *The Parachute Regiment Charity*. The respondents adopted the reasoning of Sheriff Principal Stephen at paragraphs [20] – [24] and invited me to follow her reasoning. The decision of 29 June 2020 was the determination of a motion. It refused to grant the applicants relief from the applicants' procedural failures. It was, in effect, a refusal to reopen a concluded case and did not decide or interfere with the final judgment already made.

[6] In the event the court did not uphold the competency point the respondents opposed the application on its merits. Section 113(2) (a) and (b) of the 2014 Act provide that the

appeal must raise "an important point of principle or practice" or that there is "some other compelling reason" to warrant the case having the consideration of the Court of Session. The applicants did not suggest there was a basis for permission to be granted for "some other compelling reason" and relied on section 113(2)(a) that it raised an important point of principle or practice. The respondents submitted that the decision in *Alloa Brewery Co Ltd* v *Parker* established the principle that there can be no appeal against an extracted interlocutor unless there is a fundamental irregularity or incompetence in the decree or extract themselves. The various reported cases deal with the application of the rule and the principle and practice is well established. In the instant case it was suggested by the applicants that the irregularity was not on the part of the court or its staff, but rather that the pursuer's solicitor provided the court with a record which included adjustments which had not been fully consented to or approved. There was no suggestion of bad faith on the agent or the court's part and there was no question that the extract had been issued incompetently. Neither was there any suggestion that the court would have been compelled to act differently had the point about the record been brought to its attention. The applicant's position relied on the hypothesis that there would be a different outcome but there was nothing that indicated that the sheriff would or should have come to a different decision had he been advised of the status of the adjustments on record. Contrary to the applicants' position the law was settled and there was no issue which would warrant the consideration of the Court of Session. I was therefore invited to refuse to grant permission because the application was not competent or in the alternative to refuse permission as the appeal did not warrant permission being granted in terms of section 113(2).

Decision

[7] As noted the question of the competency of appeal against a decision to refuse to exercise the court's dispensing power to allow a late appeal was the subject of consideration in *Hay* v *The Parachute Regiment Charity*. There Sheriff Principal Stephen considered an application for permission to appeal her decision to refuse a motion to allow a note of appeal to proceed although lodged late to the Court of Session. The decision incorporates a detailed review of the authorities and statutory provisions, and approach to the second appeals test. The Sheriff Principal concluded that her decision in that case, as with my decision in this case, was a decision to decline to grant relief in terms of rule 2.1 for a failure to comply with the time limit for an appeal in terms of rule 6.3. She determined that was an interlocutory decision which has the effect of bringing to an end the appeal process to the Sheriff Appeal Court, but in the view of the Sheriff Principal, with which I respectfully agree, was neither a decision in an appeal nor a final judgment. There was no appellate decision to which a second appeals test as provided for in section 113 can be applied. In these circumstances I agree with the decision of the President for the reasons which she sets out in *Hay* v *The Parachute Regiment Charity* and conclude that it is incompetent to apply for permission in terms of section 113. Accordingly application for permission to appeal to the Court of Session falls to be refused as incompetent.

[8] It is appropriate however that I should express a view on the submissions on section 113 of the 2014 Act. The application maintains that the appeal raises an important point of principle and practice because it is suggested there are a number of apparently conflicting decisions on whether an appeal is competent where an extract decree has been issued. The applicants submitted that there are some aspects of the decision in *Alloa Brewery Co Ltd* v

Parker which are unclear. It would therefore be of considerable assistance to have clear and binding guidance from the Inner House on the circumstances in which discretion may be used to allow an appeal to be received notwithstanding an extract has been issued.

[9] The Opinion of 29 June 2020 makes reference to the decision of Sheriff Principal Dunlop in *Zlatarits* v *Zlatarits*, where Sheriff Principal Dunlop had raised an issue about whether an extract obtained by a party in bad faith formed sufficient ground for a recall of the extract decree. As may been seen from the opinion my conclusion was that in this case the decision of the court to grant decree in circumstances where the agent failed to appear at the options hearing and the respondents had not lodged a correct version of the record, did not bring the appellants' application for a late appeal within the scope of the exception. It was not suggested there was any bad faith on the part of the respondents. As I explain in the Opinion, the exceptions focus on the actions of the court staff in issuing an extract improperly. The sheriff at the options hearing dismissed the applicants' claims as a result of their failure to appear and there was no criticism of the process thereafter which resulted in the extract being issued after the expiry of the relevant 28-day period. In these circumstances I do not consider that this case does, as the applicant seeks to contend, raise a point of principle or practice which warrants the consideration of the Inner House. The law is well settled that there can be no appeal after extract unless the extract has been incompetently or irregularly issued. That test was applied and I was not satisfied that there was any such impropriety. Thus even if I had found the appeal to be competent I would, in any event, not have granted permission to proceed in terms of section 113, there being no point of principle or practice to bring this appeal within the terms of the section. There was

no suggestion that there was some other compelling reason for the Court of Session to hear the appeal.

[10] The application having been refused I shall award the expenses of the application in favour of the respondents and certify the opposition to the application as being suitable for the employment of counsel in terms of section 108 of the 2014 Act.