



SHERIFF APPEAL COURT

**[2022] SAC (Civ) 29
DUN-A22-20**

Sheriff Principal C D Turnbull

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL TURNBULL

in appeal in the cause

THORNTONS LAW LLP

Pursuer and Respondent

against

DR PETER DYMOKE & MRS ELIZABETH DYMOKE

Defender and Appellant

**Pursuer and Respondent: Thorntons Law LLP
Defender and Appellant: Parties**

29 September 2022

Introduction

[1] For the purposes of this opinion, the factual background as to the dispute between the appellants and their former solicitors, the respondent, is not of significance. The dispute resolved at mediation. A settlement agreement was entered into. All parties signed the settlement agreement. On 12 May 2022 the sheriff at Dundee granted decree for the principal sum then outstanding (a lesser amount than that stated in the settlement agreement); allowed payment by way of instalments of £200 (a lesser instalment than that stated in the settlement agreement); and found no expenses due to or by any party. The

sheriff's interlocutor records that the dispute had resolved through mediation. The interlocutor purports to have been pronounced of consent, implementing the terms of the (settlement) agreement which are stated as having been confirmed in open court.

[2] The appellants have lodged separate appeals against the interlocutor of 12 May 2022. It is unnecessary to consider their grounds of appeal in detail. Put shortly, the appellants assert that the court refused to grant reasonable adjustments to Mrs Dymoke under the Equality Act 2010 prior to the hearing, and prior to previous proceedings. The appellants also complain as to the manner in which the hearing on 12 May 2022 was conducted. Dr Dymoke appeared on 12 May 2022; Mrs Dymoke did not.

[3] The respondent referred a question about the competency of the appeals. The question referred (which is the same in both appeals) is "*Whether the appeal is competent, having regard to the mandatory requirements of Rule 6.2(2)(b) of the Act of Sederunt (Sheriff Appeal Court Rules) 2021?*" The fact that decree was granted of consent is referred to in each of the respondent's references.

Procedure

[4] The court directed that the question of competency be dealt with by way of written submissions. In addition to addressing the question of competency raised by the respondent, in their written submissions parties were directed to address the fact that the interlocutor complained of was, in effect, of consent and to set out why the court should countenance an appeal in such circumstances. The court has the benefit of written submissions on behalf of both appellants and the respondent and has had full regard to the terms of those written submissions in reaching its decision.

Competency

[5] Appeals from the sheriff to this court are governed by section 110 of the Courts Reform (Scotland) Act 2014 (“the 2014 Act”). An appeal may be taken, without the need for permission, against a decision of the sheriff constituting final judgment in civil proceedings (see section 110(1)(a) of the 2014 Act). The term “final judgment” is defined by section 136(1) of the 2014 Act. The sheriff’s interlocutor of 12 May 2022 is a final judgment. The appeals are, therefore, competent in terms of the 2014 Act.

[6] The references turn upon the requirements of rule 6.2(2)(b) of the Sheriff Appeal Court Rules (“the Rules”). The rule in question sets out one of the requirements of a note of appeal, namely, the note of appeal must state the grounds of appeal in brief specific numbered paragraphs setting out concisely the grounds on which it is proposed that the appeal should be allowed.

[7] Rather than a question of competency, what is asserted by the respondent is a failure to comply with a provision of the Rules, namely, rule 6.2(2)(b). The competency references are misconceived. Alleged failures to comply with the requirements of rule 6.2 are not uncommon. Should a respondent wish the court to determine such an allegation, the appropriate way to proceed is by motion inviting the court to find the appellant in default, by virtue of a failure to comply with the requirements of the relevant rule (see rule 3.1(d)). In response to such a motion, it is open to an appellant to seek relief in terms of rule 2. If, as is asserted in the present appeal, the appellant has failed to comply with the requirements of rule 6.2, the court may grant relief by permitting the appellant to amend their note of appeal. If the court was to view a deficient note of appeal as a matter of competency (which it is not) relief would not be possible and the appeal would fall to be refused.

[8] In accordance with rule 6.10(1)(b) I find the appeals to be competent.

Appeal against an Interlocutor Pronounced of Consent

[9] The issue of appeals against interlocutors which were pronounced of consent was considered by this court in *M v M*, unreported, 8 April 2022. It was formerly thought to be incompetent to appeal against an interlocutor which had been pronounced of consent (as the interlocutor of 12 May 2022 was). Apparent authority in support of that proposition could be found in the Third Edition of *Macphail, "Sheriff Court Practice"* at paragraph 18.15 (published in 2006). The decision of the Inner House in *McCue v Scottish Daily Record and Sunday Mail Limited* 1998 SC 811 was said in that edition of *Macphail* (at paragraph 18.70) to have overturned, or at least put in doubt, a number of propositions relative to appeals, including the proposition that it is incompetent to appeal against an interlocutor which has been pronounced of consent. Regrettably, that important development was not noted at paragraph 18.15 of the Third Edition.

[10] The position in relation to such appeals has now been clarified in the Fourth Edition of *Macphail* (published this year) at paragraphs 18.16 and 18.124. As in the present case, where an appeal may be taken in terms of section 110 of the 2014 Act, the appeal is a competent one. The issue for the court in an appeal against an interlocutor which has been pronounced of consent is whether it is prepared to countenance such an appeal (see *McCue* at page 824 E-F; and *Clark v Greater Glasgow Health Board* 2017 SC 297 at paragraph 40).

[11] As noted by the sheriff, the appellants have been party litigants from the outset. He reports that they lodged a single notice of intention to defend and then unitary

defences (challenging the quality of the services rendered by the respondent); and that at no time, throughout the conduct of the litigation, was any separate position in fact or law advanced on the part of Mrs Dymoke.

[12] The interlocutor of 12 May 2022 records appearances on behalf of the respondent and by Dr Dymoke. Mrs Dymoke was neither present nor represented. The interlocutor records Mrs Dymoke as absent. Despite what is said by the sheriff in his note, in such circumstances, Mrs Dymoke cannot have consented to the interlocutor now complained of.

[13] The position is different in relation to Dr Dymoke. He was present on 12 May 2022. Moreover, the grounds of appeal advanced by Dr Dymoke are predominantly directed against what Dr Dymoke describes as “Mrs Dymoke’s issues”. Taken together, nothing is advanced by Dr Dymoke which forms a basis upon which the court could consider his appeal, notwithstanding the fact that in his case, the interlocutor complained of was pronounced of consent.

Disposal

[14] The court will not countenance and will therefore refuse Dr Dymoke’s appeal against the sheriff’s interlocutor of 12 May 2022, which, in his case, was pronounced of consent. The pursuer’s challenge to the competency of the appeal was ill conceived and involved Dr Dymoke in not insignificant work to respond to it. In these circumstances, I will find no expenses due to or by either party in respect of the appeal by Dr Dymoke.

[15] In relation to the appeal by Mrs Dymoke, the competency challenge has been unsuccessful and the appeal will proceed as accords. The respondent will be found

liable to Mrs Dymoke in the expenses occasioned by the procedure relative to the question of competency raised by them. In terms of rule 6.11(2), the issue of competency having been resolved, I will appoint the appeal to chapter 8 procedure.