SHERIFF APPEAL COURT

[2023] SAC (Civ) 5
EDI-SQ28-22

Sheriff Principal N A Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in the appeal in the cause

ANDREW SPEIGHT

Pursuer and Appellant

against

ACCOUNTANT IN BANKRUPTCY

Defender and Respondent

9 January 2023

[1] By interlocutor dated 29 September 2022 the sheriff dismissed an appeal by the debtor and appellant ("Mr Speight"). Mr Speight's appeal to the sheriff was against the adjudication by the respondent (the "AiB"), his trustee in bankruptcy.

[2] Mr Speight was sequestrated on 17 October 2018. The AiB duly commenced administration of the sequestrated estate. The adjudication of creditor claims was issued on 18 June 2020. Mr Speight requested a review of the creditor claims. After review these claims remained unchanged. They became confirmed in terms of section 127(4)(b) of the Bankruptcy (Scotland) Act 2016 (the "Act"). The decision was intimated by the AiB to Mr Speight in August 2020.

[3] The time limit for challenge of such a decision is 14 days. The expiry of the time limit for challenge was therefore 24 August 2020. No timeous challenge was made.

[4] Mr Speight submitted the present appeal to the sheriff. It is dated 19 August 2022, almost 2 years after the statutory deadline. The averments recognised that the appeal is late, but relied on the distraction of a family bereavement in July 2020, together with allegations of credible grounds on which to challenge the original adjudication.

[5] Upon presentation of the appeal, by interlocutor dated 1 September 2022, the sheriff appointed intimation, ordained answers, and fixed a hearing on 29 September 2022. The AiB opposed the appeal. At a hearing on 29 September 2020 the AiB sought dismissal of the appeal as out of time. The sheriff dismissed the appeal as incompetent, being out of time.

Parties' submissions

[6] Mr Speight places some reliance on the fact that the sheriff, in pronouncing the interlocutor dated 1 September 2022, thereby accepted the appeal as competent. That point is not supportable, because a sheriff may refuse to allow a case to proceed only in very limited circumstances. The sheriff should not take a view on the merits of the case at the point of fixing further procedure in appeal procedure, or when considering a warrant for service in an ordinary action (Macphail *Sheriff Court Practice* (4th ed) 6.09). The proper course is to allow the action to proceed, which will allow the parties to be heard on the merits. That is what the sheriff did.

[7] Thereafter, Mr Speight relies on section 211 of the Act. He did not refer to that section before the sheriff. Section 211 provides:

> "(1) On the application of a person having an interest, the sheriff may—
>
> (a) if there has been a failure to comply with a requirement of this Act (or of regulations made under this Act), make an order—
>
> (i) waiving the failure …"

[8] He submits that the sheriff was in error in failing to have regard to that section, and that the sheriff should have waived Mr Speight's failure to lodge this appeal timeously. In any event, he submits that this court should do so.

[9] The AiB submits that section 211 does not apply in these circumstances. The AiB submits that section 211 applies only to failures to comply with a requirement of the Act. Because there is no requirement to lodge an appeal against the AiB's decision, an appeal is a voluntary act. It is therefore not a "requirement" of the Act, and section 211 is not triggered.

The effect of section 211

[10] At the outset, the sheriff cannot be criticised for failing to have regard to statutory provisions to which he was not referred. The matter has been raised now, so it is necessary for me to consider this point of new.

[11] In my view, contrary to the AiB's submission, section 211 is available in the present circumstances. In my view, the critical component is the time limit of 14 days. In my view, that is properly described as a "requirement" of an appeal. Section 211 is therefore, in theory, available to waive that time limit.

[12] The question is whether that waiver should be exercised. In assessing that question, it is significant that there is no explanation for such inordinate delay. A delay of almost

2 years is grossly disproportionate to a statutory time limit of 14 days. The only explanation, namely recent bereavement, is not supported by any evidence. It is not explained by any medical factor. It does not by itself explain why a timeous application could not have been presented in 2020 and then sisted. The passage of time has meant that any extenuating circumstances have diminishing weight.

[13] There is also the matter of balancing the equities between the parties. The statutory time limit is not arbitrary. It is a short period. Once passed, the trustee in sequestration is free to pay dividends. It allows the trustee to act with certainty in distributing the estate. The late opening up of claims would undermine the trustee's statutory function. If the statutory deadline were vulnerable to being overruled it would mean endless uncertainty as to whether the trustee could safely make payments to the creditors.

[14] Accordingly, in my view there were no rational grounds on which the sheriff could have exercised his discretion to allow this late appeal, even if such an application been made.

[15] It is open to this court, as a matter of discretion, to consider the terms of section 211. I will refuse to do so, because there is no reason that point could not have been made to the sheriff. The requirement to exercise a discretion to waive the time limit was the central point in this cause.

[16] In any event, had I considered section 211 of new, I would have declined to exercise any discretion to allow this late appeal, for the same reasons. The appeal is inexplicably late, and the AiB would be significantly prejudiced thereby, having distributed the estate.

[17] I will accordingly refuse this appeal. Parties should please attempt to agree the question of expenses of process, including this appeal. If they are unable to reach agreement, either party can apply to the clerk for a hearing to be fixed.