SHERIFF APPEAL COURT

[2023] SAC (Civ) 8
AYR-B207-19

Sheriff Principal M W Lewis
Sheriff Principal C D Turnbull
Appeal Sheriff I M Fleming

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal in the cause

STEVEN MILLER

Pursuer and Appellant

against

JACQUELINE MILLER

First Defender and Respondent

FRASER STEWART

Second Defender and Respondent

and

DONALD ROSS ESTATE AGENTS LIMITED

Third Defender

Pursuer and Appellant: McShane, advocate; Oracle Law
First and Second Defenders and Respondents: R.D.Anderson, advocate; Levy & McRae

9 March 2023

Introduction

[1] In May 2019 the pursuer and appellant ("the appellant") commenced proceedings, by way of summary application, for orders under section 994 of the Companies Act 2006 in relation to the third defender ("the company"). As at the date of commencement of the said

proceedings, the first defender and respondent and the second defender and respondent (together "the respondents") were the directors of the company.

[2] After sundry procedure, in June 2020, the sheriff allowed parties a proof on the question of unfair and prejudicial conduct on dates to be afterwards fixed. Following a further five procedural hearings, a proof proceeded on 28 September 2021 at the conclusion of which (evidence having been led and closed) the sheriff assigned a hearing on the evidence. At the conclusion of that hearing, on 25 October 2021, the sheriff, having heard parties' submissions, made avizandum.

[3] Almost 9 months later, on 21 July 2022, the sheriff *ex proprio motu* assigned a hearing for 28 July 2022 "to issue an ex tempore judgement" (*sic*). At that hearing, the sheriff refused the craves of the summary application and assoilzied the respondents. Having done so, the sheriff then assigned a hearing on expenses for 31 August 2022, at which he found the appellant liable to the respondents in expenses. The appellant appeals against the interlocutors of 28 July 2022 and 31 August 2022.

Decision

[4] Issues in relation to extempore opinions in the sheriff court have arisen on more than one occasion recently, see *McLeish* v *McLeish* 2022 SLT (Sh Ct) 67 and *M* v *M* 2022 SLT (Sh Ct) 185. Those opinions relate to ordinary actions in the sheriff court. In the present case, the court is concerned with proceedings by way of summary application in relation to which the starting point is section 50 of the Sheriff Courts (Scotland) Act 1907 which provides *inter alia* that, where a hearing is necessary, the sheriff shall give judgment in writing. In the present case, the sheriff did not do so.

[5] Leaving aside for the moment the application of OCR 12 to summary applications, that rule sets out clearly the distinction between an extempore and a reserved judgment (see OCRs 12.2(4), 12.3 and 12.4). At the conclusion of any hearing in which evidence has been led the sheriff is required to do one of two things. They must either pronounce an extempore judgment or reserve judgment. Making avizandum is reserving judgment. Having regard to the provisions of section 50, that is the only available course in a summary application where a hearing is necessary.

[6] Irrespective of that position, what a sheriff cannot do (in either an ordinary action or in a summary application) is reserve judgment and subsequently purport to pronounce an extempore judgment. Providing to parties on request a transcript of the extempore judgment (as happened in the present case) is not giving judgment in writing.

[7] No judgment having being given in writing, it is unnecessary for us to consider the requirements of a written judgment in summary applications other than to note that in *Lothian Regional Council* v *A* 1992 SLT 858 at 865 K-L the Lord President (Hope) observed that the sheriff quite properly followed the then applicable rule in relation to written judgments (rule 89(1)) in the context of a summary application. Para [28] of the subsequent opinion of the Inner House in *Wilson* v *Jaymarke Estates Ltd* 2006 SCLR 510 may be difficult to reconcile with the effect of section 39 of the 1907 Act insofar as the requirement to make findings in fact and law in reserved judgments is concerned. In our view, in a summary application, where evidence has been led, it is incumbent upon the sheriff to issue a written judgment incorporating findings in fact and law; and including the reasons for their decision on any questions of fact or law or of admissibility of evidence.

[8] Regrettably, the effect of the decision we have reached in this matter is that the evidence will require to be re-heard before a different sheriff.

Disposal

[9] We shall allow the appeal; recall the interlocutors of the sheriff dated 28 July 2022 and 31 August 2022; and remit to the sheriff to proceed as accords. We shall direct that further procedure shall take place before a different sheriff. In the circumstances of this appeal, we shall find no expenses due to or by either party.