FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 63
XA99/17

Lord President
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Appeal

in the cause

BRIDGING LOANS LIMITED

Pursuers and Respondents

against

SANDRA WALLACE HUTTON

Defender and Appellant

Respondents: Swanney; Ledingham Chalmers LLP
Appellant: Party

26 September 2018

[1] This is an appeal by the defender against an interlocutor of the Sheriff Appeal Court dated 16 May 2017, which in turn refused an appeal against an interlocutor of the sheriff at Forfar dated 20 January 2017 granting decree by default in a summary application by the pursuers for recovery of possession of Cotterton Lodge, Forfar.

[2] In order to purchase the Lodge, the defender had obtained funds, first, from the Halifax Bank and, secondly, in the form of a bridging loan of £50,000 from the pursuers. Both loans were secured over the Lodge, with Halifax having a prior ranking. A standard

security was executed by the defender in favour of the pursuers. It was registered on 8 November 2013. The bridging period was originally 12 months to 5 November 2014. The defender did not repay the loan. On 17 September 2015 the pursuers served a calling up notice in terms of section 19 of the Conveyancing and Feudal Reform (Scotland) Act 1970 requiring payment of approximately £86,000. On 20 November 2015 the pursuers advised the defender that the calling up period had expired. They gave the defender an additional 28 days by which to repay the loan. The defender did not do so.

[3] The pursuers' application for possession was made on 23 December 2015. On 8 February 2016, the sheriff assigned a pre-proof hearing for 29 February and a diet of proof for 11 March. On the defender's motion, that diet and subsequently three more proofs were discharged. Three of the proofs had been discharged because agents had withdrawn from acting and one because of the defender's ill-health. On 10 October 2016 a further diet of proof was assigned for 20 January 2017. By that time the defender had been represented by four different law agents and had appeared several times as a party litigant. By the eventual proof diet on 20 January 2017, the case had been the subject of multiple hearings and had been in court for over a year.

[4] The defender accepts that she is in default. She contends, in terms of section 24(5)(b) of the 1970 Act, that it would not be reasonable for decree to be granted. This is on the basis that there are extraneous reasons for her failure or inability to pay; notably the fact that she has not been able to sell the property. She maintained in the sheriff court that the property was being actively marketed and missives were expected to be completed by December 2016. She had been discussing refinancing with other lenders, but the pursuers had hampered her efforts. The defender also founded upon a number of health complaints in

support of a contention that she needed to have a permanent residence and ought not to be the subject of a decree of ejection.

[5] Shortly before the proof diet of 20 January 2017, the defender's latest agents withdrew from acting. The defender represented herself. She moved for a discharge of the proof and a continuation of the case on the basis that the property was to be sold at auction on 7 March. The auctioneers were confident that the sale price would exceed £350,000. The motion to discharge the proof was opposed. The sheriff asked the defender if she had any documentary evidence which could vouch her assertions. The sheriff adjourned the case for 15 minutes to allow the defender time in which to produce the emails which she said would do so. When the case was recalled, the defender was not present. According to the report from the sheriff, the Bar Officer had advised him that she had been seen leaving the building, as was indeed the case. The Bar Officer had unsuccessfully searched for her. The sheriff had her case recalled without success. The pursuers' agents then moved for decree by default. This was granted. The defender did eventually return to court, but this was some 30 minutes after decree had been granted. By that time the pursuers' agent had left the court building to return to Glasgow.

[6] The sheriff considered that the defender had been trying to engineer a further adjournment or otherwise to delay the grant of decree against her. The basis for his reasoning was partly the history of the case and the fact that the defender had left the court building during the adjournment and had failed to return in time for its calling. The sheriff took into account the fact that the case had already been before the court longer than he considered necessary. In addition, he regarded the defender's prospects of success as being limited. It would not be possible for the defender to establish the defence which she was advancing. It relied on what would be a further breach of the loan conditions, which

prohibited her from occupying the Lodge. Her averment that the property could be sold within a reasonable period had not been realised. Her averments of ill-health were unsupported by any form of medical vouching.

[7] The Sheriff Appeal Court refused the defender's appeal. The SAC observed that it was important for a sheriff to take into account the whole circumstances and to have regard to where the interests of justice lay. In particular the sheriff required to do justice both to the defaulter and to the "innocent victim of the default" (*Chas Stewart Plumbing and Heating* v *Lowe* 2005 SCLR 235 at para [29]). Whether to grant decree by default in the circumstances was a matter for the sheriff's discretion. By the time of the appeal hearing, the property had failed to sell at auction, yet the defender wanted more time to refinance her purchase. She had been granted, as the SAC put it, "remarkable latitude" and continued to employ delaying tactics. The sheriff had been correct in his conclusion in that regard. This justified the grant of decree (*Canmore Housing Association Limited* v *Scott* 2003 SLT (Sh Ct) 68 at para [7]). The defence of reasonableness was restricted to certain health issues. No vouching had been produced in that regard. The defender's motion to be able to sell the property at auction conflicted with the reasonableness defence.

[8] In her written argument, it was contended on behalf of the defender that the sheriff had failed to exercise his discretion correctly. He had not considered whether there were exceptional circumstances, inordinate or unexplained delay or the substantial risk of unfairness or serious prejudice (Macphail: *Sheriff Court Practice* (3rd ed) para 14.04). The sheriff had assumed that the defender had failed to appear after the adjournment as a result of bad faith. He did not have a proper basis to make that finding. He had erred in holding that the onus of establishing that it was unreasonable to grant decree rested upon the defender. The sheriff had erred further by holding the pursuer had very limited prospects

of resisting decree. At the hearing on the appeal, the appellant said that she had left the court building to find a Wi-Fi signal and that the court staff had known this. The appellant's circumstances had changed and she wished more time in which to resolve matters.

[9] It was maintained on behalf of the pursuers that the sheriff had a wide discretion, which this court should be slow to disturb. The sheriff had not misdirected himself in law, or, in the exercise of his discretion, misused or misapprehended the facts (*Woods* v *Minister of Pensions* 1952 SC 529 at 534). He had not taken into account an irrelevant consideration, failed to take into account a relevant consideration (*Thomson* v *Glasgow Corporation* 1962 SC (HL) 36 at 66) or erred in balancing the various considerations. He had not reached an unreasonable result or exercised his discretion wrongly. The delay, or failure to appear, after the adjournment had remained unexplained. The delay in the overall progress of the action had been inordinate. Further delay would cause the pursuers unfairness and serious prejudice. The loan outstanding was, by the time of the sheriff's decision, approaching £130,000. No re-payments had been made.

[10] This appeal involves a discretionary decision of a sheriff to grant decree by default in circumstances in which the pursuer had failed to appear, as she was required to do, after the sheriff had already indulged her by granting an adjournment to produce certain emails to vouch her position. This was in the context of a summary application which had proceeded, for such an application, at a glacial pace by reason of repeated discharges of diets of proof at the defender's instance. There is no defence to the action. The defender owes the pursuers ever increasing sums, now in the region of £150,000. The defender has had ample opportunity, in what will shortly become three years since the application was lodged, to take whatever steps could be taken in relation to the sale of the Lodge. In these circumstances the court has no hesitation in refusing this appeal. No error on the part of the

sheriff has been discovered which would justify interfering with his decision. Where a default has occurred, and decree granted against the defaulter, the appellate court will look at the whole circumstances (including any new explanation for the default) in order to determine whether, nevertheless, the interests of justice require its recall (*Coatbridge Health Studio* v *Alexander George & Co*, 1992 SLT 717, Lord McCluskey, delivering the opinion of the court at 720 and following *Hyslop* v *Flaherty* 1933 SC 588). This is what the SAC did. The Sheriff Principal (Lewis) also deduced that the appellant was continuing to employ delaying tactics and had poor prospects of success in her defence to the action. The court agrees with that analysis.

[11] The only concern which the court does have is in relation to the grant of permission to appeal to this court. Such permissions may only be granted if there is an important point of principle or practice raised or there is some other compelling reason for the court to hear the appeal (Courts Reform (Scotland) Act 2014 s 113(2)). Notwithstanding the terms of the appellant's application for permission, the court has been unable to find any basis for the view this appeal, which sought to review a discretionary decision of a sheriff, on a matter concerning sheriff court procedure which had already been reviewed by the Sheriff Appeal Court, raises any point of principle or practice, far less an important one, or that there was a compelling reason for the court to hear the appeal.