SHERIFF APPEAL COURT

[2019] SAC (Civ) 3
KIL-A20-14

Sheriff Principal D L Murray
Appeal Sheriff A MacFadyen
Appeal Sheriff P J Braid

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D L MURRAY

in appeal by

OSAMAH SHAHEEN & DALIA ALSAWAY

Defenders and Appellants

in the cause

COLIN GARROW

Pursuer and Respondent

against

OSAMAH SHAHEEN & DALIA ALSAWAY

Defenders and Appellants

Defenders/Appellants: Party;
Pursuer/Respondent: Massaro; Boyd Jackson, Solicitors

30 January 2019

Background

[1] The houses 5 and 7 Townhead, Beith form part of a row of dwellings attached to each other in the manner of a terrace. The appellants are the proprietors of 5 Townhead, Beith which comprises three floors: ground, first and second. The respondent is the proprietor of 7 Townhead which comprises two floors: ground and first. The houses were not built at the

same time, the respondent's property having been built as a later addition in the nineteenth century and built in a manner which attached it to the appellants' property.

[2] The respondent seeks remedy against the appellants for damage caused and continuing to be caused to his property as a result, he avers, of water penetration and dampness occurring as a direct result of the dilapidation of the appellants' adjoining property. Following proof, the sheriff found in favour of the respondent and ordained the appellants to render the property at 5 Townhead, wind and water tight by covering the property with a wind resistant membrane and carrying out such repairs to the roof and rear elevation of the property as may be required for that purpose, or by rendering the property wind and water tight in any other way so that the property can be certified as wind and water tight by a chartered building surveyor jointly nominated by the respondent and the appellants which failing, by the court; all within 28 days of the interlocutor. The sheriff further ordained the appellants to dry out the gable wall between number 5 and number 7 Townhead by the use of such specialist equipment as may be required, under the control of a specialist contractor and for such period as is required, so that the walls can be certified as having been dried out by a chartered building surveyor jointly nominated by the respondent and the appellants, which failing by the court; such process to commence within 28 days of the property being certified as wind and water tight in terms of the previously-specified order. The sheriff interdicted the appellants from permitting their side of the boundary wall between 5 and 7 Townhead, to be exposed to the elements and permitting it to become wet or damp with rainwater for as long as the appellants remain proprietors of the said property.

Grounds of appeal

[3] The appellants' grounds of appeal may be summarised as follows:

(i) they were denied permission to amend the Record by deletions and the addition of relevant points that corrected their position and responded to claims by the respondent; in particular they were denied permission to remove erroneous responses included in the Record at earlier stages by their then solicitor;

(ii) they were not allowed to question the respondents' expert witness Mr Gilroy's qualifications;

(iii) Mr Gilroy did not meet the criteria for an expert and the sheriff was in error in the reliance he placed on Mr Gilroy's testimony, in particular the sheriff was in error in accepting the evidence of Mr Gilroy that the boundary wall between the two properties was saturated due principally to holes in the roof of the appellants' property

(iv) the sheriff erroneously ignored the first appellant's wide knowledge of building practice;

(v) the appellants were prevented from advancing alternative explanations as to the sources of the water ingress into the respondent's property;

(vi) the sheriff had made errors in his findings-in-fact which indicated he did not understand the evidence as presented to him.

[4] At a procedural hearing on 26 November 2018 Sheriff Principal Murray discharged the appeal hearing previously assigned for 29 November and fixed a new appeal hearing for 11 December. In order that the hearing could proceed on that date he made specific orders requiring the appellants to lodge four copies of the following documents: a) a

supplementary appendix of the appeal print containing a transcript of the notes in evidence of Mr Gerry Gilroy and Mr Colin Garrow; and b) an inventory of the pictures lodged by the appellants and respondent in the appendix to the appeal print. On the basis that these orders were complied with the parties were also required to lodge four copies of their respective reading lists by 7 December 2018. The appellants failed to comply fully with this interlocutor, and only produced the transcript of the evidence of Mr Gerry Gilroy on the morning of the appeal hearing. They also produced a purported reading list but the numbering of the reading list was not consistent with the documentation lodged before the court. The inventory of pictures lodged by the appellants and respondent in the appendix to the appeal print was not produced.

[5] When the case called on 11 December the first appellant appeared in person and was authorised to act as lay representative on behalf of his wife, the second appellant. He sought that the appeal hearing be discharged to allow the appellants further time to prepare and comply with the orders of the court, but failed to give any satisfactory explanation for the appellants' noncompliance with the orders. Counsel for the respondent invited the court to dismiss the appeal given the appellants' default. The court was not persuaded that the interests of justice would be best served by giving the appellants' further time to comply with the order or that it should accede to the respondent's motion to dismiss the appeal on the grounds of the appellant's default. Rather the court determined, given what had been lodged by the appellant, that the interests of justice would be best served by hearing the appeal.

Submissions for the appellants

[6] The first appellant has a very clear view of the explanation for the damage and deterioration to the property at 7 Townhead. He explained that he had expertise in such matters from his work in project management. It is his belief that the damage and deterioration to the property at 7 Townhead arises from a defective concrete skew. In short, the appellants' position is that what has happened to 7 Townhead has not resulted from the condition of 5 Townhead and the sheriff was in error in accepting the evidence particularly of Mr Gilroy that it was.

[7] Since the appellants had acquired 5 Townhead it has always been open to the elements as it had been prior to their acquisition of the property in 2009. It was accepted that the rear dormer and an extension had been removed from 5 Townhead, but this had been done in accordance with building control requirements on or about June 2016 and it was disputed that this impacted on the saturation of the wall between 5 and 7 Townhead. It was submitted that the damage to the respondent's property should have increased significantly if it could be related, truly, to water ingress into the property from 5 Townhead. There was no evidence to support further deterioration in the respondent's property, which demonstrated that the damage could not be attributed to 5 Townhead. The appellants maintain there is nothing in the condition of 5 Townhead which is in any way adversely affecting 7 Townhead.

[8] The first appellant maintained that from an early stage he had identified the problem as arising from the concrete skew. That could be seen from the terms of his email of 26 July 2011 (Appendix page 106). This problem with the concrete skew was also identified by Mr Gilroy, in his report of 23 January 2012 (Appendix page 35 at page 37). Mr Gilroy noted that an initial repair was carried out in 2012 with mortar being placed on the skew but the lead

flashing was not introduced until 2014. It was further submitted that the photographs (page 121 of the Appendix) demonstrated that the repair with insulation and lead flashing was inadequate as it could be seen not to have been fitted sufficiently far up beneath the slates. Under reference to the schematic (page 55 of the Appendix) the appellants advised that of the four sections of the respondent's roof, the only section which did not have lead flashings was directly above the area in the respondent's property where the most significant dampness is present.

[9] The first appellant submitted that Mr Gilroy had made various errors. He had wrongly reported that the wall between 5 and 7 Townhead was a 450 mm wall whereas in fact the appellants knew it to be a 585 mm wall. The hole which was discovered on the roof of 5 Townhead was at the front dormer of the property and there was nothing to suggest that the water ingress through this hole had any impact on 7 Townhead. In his initial report Mr Gilroy had reported that: "the inner face of this wall (ie the inner face of number 5) is saturated" but he had not been inside 5 Townhead to enable him to reach such a view. His conclusion that the water was running down the wall from the top floor of 5 Townhead was disputed. He had contradicted himself in his evidence as to the height at which the water penetration occurred: at page 69 of the transcript he stated the "dampness and running water was at a higher level than the level of the skew flashing you are talking about". But he then stated at page 73 of the transcript: "Running water was evident on the mutual wall between numbers 5 and 7 Townhead at ground floor level roughly at the wall's mid-point." This contradicted the view that the rear dormer had amplified the damage to number 7. Mr Gilroy had failed to offer any proof or explanation of his claim that the common wall was saturated and was the cause of the damp within the respondent's property.

[10] Under reference to page 43 of the transcript the sheriff had refused to permit the appellants to expand their questioning in relation to Mr Gilroy's Masters in Construction Law. It was said to be normal for a surveyor going to a property to take photographs and it was extraordinary that there was no photographic evidence produced with Mr Gilroy's initial report. Mr Gilroy could not be said to have the relevant skills and expertise to provide expert evidence. Neither had he acted in a way or provided any information that demonstrated that he should be regarded as an expert with a responsibility to the court.

[11] It was submitted that the first appellant's own expertise was sufficient to have carried more weight with Sheriff Watson and his evidence should have been preferred to that of Mr Gilroy. The sheriff accordingly should not have relied on the evidence of Mr Gilroy.

[12] When invited to clarify their position the appellants advised the court that they had no position on the status of the wall between 5 and 7 Townhead. It was explained that they no longer sought to rely on the averments which their former solicitor had included in relation to the ownership of the wall, these were included in the averments they had sought to amend out immediately prior to the proof.

[13] It was also established that the highlighted document headed minute of amendment produced by the appellants although in the form of an adjusted record reflected the purported minute of amendment which Sheriff Foran had required to consider. The appellants submitted that Sheriff Foran had erred in her refusal to allow the amendment to the Record two days before the date of the proof. She had also shown bias by asking the appellants "Why don't you fix a hole in the roof?" It was accepted that if the amendment, in which the appellants sought to aver an alternative hypothesis, had been allowed it would have required to be answered which would have resulted in the proof being adjourned. The

first appellant confirmed that their former solicitor had resigned agency on 12 October 2016 and he had commenced acting on his own behalf in December 2016, some eight months prior to the minute of amendment being refused.

Submissions for the Respondent

[14] There was no note from Sheriff Foran explaining her decision on 18 August. Rule 6.2 specifies that where a decision is complained about an appellant should have requested a note. It was not apparent whether the appellant maintained that her decision amounted to an error of law or that she had exercised her discretion inappropriately. Neither was a clear explanation given by the appellants to substantiate their allegation that Sheriff Foran was biased and that she had formed her own view of the case. The failure of the appellants to request a note from the sheriff meant this aspect of the appeal could not be maintained as this court did not have the benefit of Sheriff Foran's explanation.

[15] Counsel for the respondent submitted that the substance of the appeal was a criticism of how the sheriff dealt with Mr Gilroy's evidence. He made reference to *McGraddie* v *McGraddie* 2015 SC (UKSC) 45 in support of his submission that this was a case where it was particularly for the first-instance decision-maker to form a view on credibility. He submitted the sheriff had done his job properly in assessing the expert evidence. It was simply unrealistic to expect a judgement of the first instance court to address every question. Rather it is the duty of the judge at first instance to address the key issues and express his conclusions on those key issues, which the sheriff had done. In relation to the evidence-in-chief at pages 16 – 27 of the transcript, Mr Gilroy provided evidence upon which the sheriff was entitled to rely.

[16] In terms of the restriction in questioning Mr Gilroy about his Construction Law Masters, as could be seen from page 44 of the transcript the sheriff correctly recognised the Construction Law Masters qualification was not relevant to the expert evidence which Mr Gilroy provided in this case. Nothing here turned on what subjects Mr Gilroy had studied in his Construction Law Masters degree.

[17] In paragraph 84 of the judgment the sheriff noted Mr Gilroy to have been an impressive witness with the qualifications, experience and skills necessary to form a meaningful opinion based on the facts as he observed them. At paragraphs 19 to 21 the sheriff set out the evidence which Mr Gilroy gave about the cause of the dampness. At paragraph 22 he narrated Mr Gilroy's evidence about inspection of 5 Townhead and the defects which he observed. At paragraph 23 he noted the developing problems following the demolition work having been undertaken. At paragraph 28 he noted Mr Gilroy's rejection of the first appellant's hypothesis and his reasons for concluding the wall was saturated. He also explained the use of saturation and that could be attributed to the derelict state of 5 Townhead. At paragraph 32 the sheriff recounted the unequivocal position of Mr Gilroy that the roof of number 7 is not a contributor to the damp penetration and his reasons for that conclusion.

[18] The appellants challenged Mr Gilroy's credibility: it was said that he was untruthful. Often when the evidence of an expert is challenged it is in respect of their reasoning but the appellants had not identified any inconsistency in his reasoning. Unless the appellants establish otherwise this court was entitled to assume the sheriff was correct in his acceptance of Mr Gilroy's evidence. As the sheriff noted at paragraph 84 the evidence of Mrs Lang of similar problems she was experiencing in the gable between her house at 3 Townhead and the appellants' property supported Mr Gilroy's analysis, as did that of the roofer Mr Elliot.

Their evidence was not consistent with the appellants' position that the concrete skew between 5 and 7 Townhead was the root of the problem. To succeed the appellants required to satisfy the court that no reasonable sheriff could have reached the conclusion which he did that the condition of number 5 Townhead and the significant water penetration causing saturation was the cause of the entire problems found in 7 Townhead. That was a high hurdle and one which the appellants were nowhere near surmounting. The appeal should be refused.

Decision

[19] Lady Paton adopted the guidance given by the Supreme Court in *Barton v Wright Hassall LLP* [2018] UKSC 12, in *AW* 2018 Fam. L.R. 60 at paragraph 13:

> "Clarification as to how the rules of court ought to be treated as applying to an unrepresented individual has in fact been given recently, in the UK Supreme Court, in the case of *Barton v Wright Hassall LLP* particularly at paragraphs 18 and 42. That guidance is in the following terms:
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> > "18 …In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules … The rules do not in any relevant respect distinguish between represented and unrepresented parties … it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him … The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights … Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in

> person to familiarise himself with the rules which apply to any step which he is about to take."

And at para.42:

> "… there cannot fairly be one attitude to compliance with rules for represented parties and another for litigants in person, still less a general dispensation for the latter from the need to observe them.""

[20] The appellants here have manifestly failed to bring the necessary information before this court to enable it to determine the argument as regards the refusal of the sheriff to allow their minute of amendment to be received. It is however not unreasonable to suggest that when almost 8 months had elapsed since the withdrawal of their previous agent, against whom it was suggested that he had failed to properly plead their case, that they had ample time to reformulate their pleadings. Given the history of this case it would have been surprising if the sheriff would have been prepared to allow such a late amendment and a refusal to do so might be thought likely to fall within her discretion. Certainly no relevant matters were raised before this court which indicated that allowance of the minute of amendment was a realistic possibility. As it is this court has been denied the opportunity to examine the sheriff's reasons for refusing the motion. Given that arises from the appellants' omission to comply with the requirement to request a note we shall refuse the appeal in so far as it relates to the challenge against the decision of Sheriff Foran to refuse the minute of amendment on 18 August 2017.

[21] We find no prejudice to the appellants in the sheriff intervening to restrict the appellant's questioning the nature of Mr Gilroy's Masters in Construction Law. That qualification was not material to his ability to give expert evidence in relation to the matters in dispute in this case, and while it is surprising that the sheriff made reference to that

qualification in his own contextualisation of Mr Gilroy's expertise, that does not vitiate his decision.

[22] The substance of the appellant's challenge was that Mr Gilroy was not a suitably qualified expert witness and the sheriff was in error in accepting his conclusions. The sheriff narrates that he found Mr Gilroy to be an impressive witness at paragraph 84:

> "I found Mr Gilroy to be an impressive witness. He is a man of significant seniority in his profession with qualifications and experience such that he clearly has the skills necessary to analyse the facts presented to him and to form a meaningful opinion based on those facts. It was clear from Mr Gilroy's evidence that he has visited the properties on a number of occasions over a number of years and has obtained first-hand sight of the development of issues over that period. Just as the problems have developed and evolved over the period, so Mr Gilroy's reports reflect that evolution of matters. I am unable to see any proper reason why I should reject his evidence as untruthful, as the first defender suggests. It appears to me that this suggestion by the first defender is based only on the fact that his conclusions are not those which the first defender wishes to hear."

[23] There is no basis for this court to conclude that the sheriff was incorrect in that assessment. He was entitled to form the view that Mr Gilroy was a skilled witness and he was entitled to accept his evidence.

[24] In *Kennedy* v *Cordia Services LLP* 2016 SC (UKSC) 59 the Supreme Court set out in some detail the duties and responsibilities of a skilled witness. Lords Reed and Hodge who gave the judgement of the court stated at paragraph [44]:

> "There are in our view four considerations which govern the admissibility of skilled evidence: (i) whether the proposed skilled evidence will assist the court in its task; (ii) whether the witness has the necessary knowledge and experience; (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and (iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence."

[25] Mr Gilroy's knowledge in this case would appear to fall clearly within the rule which the Supreme Court Justices approved at paragraph [46] as stated by Justice Blackmun

in *Daubert* v *Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993) in the US Supreme Court when he stated at page 588:

> "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

We are also satisfied that Mr Gilroy demonstrated having adequate expertise to assist the court and there was effectively no challenge to his impartiality or his other responsibilities to the court.

[26] Given that the appellants did not accept Mr Gilroy's analysis much of their difficulty stems from their not calling an expert witness who expressed a contrary view to that of Mr Gilroy. The first appellant explained that they were unable to fund their own expert. That placed them at significant disadvantage; however the sheriff must proceed on the basis of the evidence which was before him. This court is limited to reviewing the sheriff's assessment of the evidence in the transcripts produced to this court.

[27] We found there to be no substance to the appellants' submission that they were denied the opportunity to offer an alternative explanation as to the source of the water ingress into the respondent's property. The first appellant himself sought to give such an explanation in his evidence to the sheriff.

[28] It was apparent to the court that the first appellant had a very clear view on the cause of the dampness and that he vehemently disagreed with the conclusions of Mr Gilroy which had been accepted by the sheriff. He faced a number of significant challenges in persuading the court to overturn the sheriff's decision. Firstly, his own experience and qualifications to express an authoritative view were less than clear. He cannot be treated as a skilled witness because of his interest in the proceedings and therefore his evidence cannot be said to carry

with it the necessary impartiality even if he had the necessary qualification and professional expertise to provide skilled evidence. In any event the appellants also failed to produce the transcript of the first appellant's evidence before the sheriff as they required to do: (Act of Sederunt (Sheriff Appeal Court Rules) 2015 Rule 7.10 (2)(b)). This meant all this court had to consider beyond the transcript of Mr Gilroy's evidence were the assertions of the first appellant in submission. These do not form a basis on which this court could find the sheriff was wrong to reach the conclusions which he did on the cause of the water penetration and the resultant damage to the respondent's property.

[29] The transcript of Mr Gilroy's evidence showed that the first appellant had challenged his evidence and put to him the alternative explanation for the damage and potential other remedies to the problems being experienced in 7 Townhead. We do not accept that the appellants were improperly restricted from advancing alternative explanations for the damage to 7 Townhead.

[30] The court was less than impressed by the totally unsubstantiated allegation that Mr Gilroy had simply lied in court. Even accepting there to have been certain inaccuracies in Mr Gilroy's various reports we did not consider that this gave any substantive basis for the allegation made by the appellants. While the sheriff had not identified an error on Mr Gilroy's part in stating that the whole roof of 5 Townhead had been removed that error was not sufficient to prejudice his fundamental conclusion. In short the first appellant appeared fixated by his own interpretation of the source of the water ingress and refused to accept the view of Mr Gilroy which was supported by the evidence of Mrs Lang and Mr Elliot.

[31] We have no hesitation in also refusing this aspect of the appeal. The appellant has provided no basis on which it may be said by this court that no reasonable sheriff would

have accepted the evidence of Mr Gilroy. We accept the sheriff in his note has set out a clear reasoned basis for reaching the view which he did.

[32] We shall therefore adhere to the sheriff's interlocutor of 11 June 2018. In relation to expenses parties were agreed that expenses should follow success and the respondents sought sanction for junior counsel. We will grant sanction for the employment of junior counsel for the appeal and award the expenses of the appeal as taxed in favour of the respondent.