SHERIFF APPEAL COURT

[2019] SAC (Civ) 17
ABE-CA35-16

Sheriff Principal Abercrombie QC
Appeal Sheriff Braid
Appeal Sheriff Cubie

OPINION OF THE COURT (No 2)

DELIVERED BY APPEAL SHERIFF PETER J BRAID

in the appeal

SHEILA RITCHIE

Pursuer and Appellant

against

EUAN DUNBAR AND NICOLA DUNBAR

Defenders and Respondents

Pursuer and Appellant: Garioch, Gilson Gray LLP
First Defender and Respondent: McDiarmid; Stronachs LLP

Edinburgh, 23 April 2019

Introduction

[1] To paraphrase Mr Punch on the subject of marriage: advice to any solicitor contemplating lending money to a client: don't. This case serves as a stark warning as to the consequences which may ensue if that advice is ignored.

[2] The background to the appeal, and to the latest, and, we hope, final hearing before us on 22 March 2019, is set out in our opinion of 29 January 2019. It is unnecessary to repeat that here. However, to put the following discussion into context it is necessary to restate some of the key features of the dispute and of the litigation.

[3] In order to assist her clients to settle a commercial transaction, the pursuer secured a loan of £130,000 from another client. Unfortunately, the basis upon which she did so was not committed to writing. However, following the proof before the sheriff, and the refusal of the cross-appeal before this court, it is now conclusively established, as a matter of fact, that in doing so she was acting as agent for the first defender. He did not repay the loan to the lender. Accordingly, the loan was repaid by the pursuer. It has always been her position that the rate of return which had been agreed with the lender was the sum of £12,000, and the sum repaid by her was £142,000. Some time later, she took an assignation from the lender of his supposed extant entitlement to sue the defenders for repayment of the loan. The defenders not having reimbursed the pursuer, she raised the present action, founding solely upon the assignation. The action was defended on various grounds and eventually went to proof. The sheriff held that the assignation did not confer any title to sue upon the pursuer, and dismissed the action. However, he also set out detailed findings in fact, in relation to the disputed factual issues. One of those was whether the pursuer had acted as the defenders' agent in securing the loan. The sheriff found that she had acted as agent for the first defender only. Another factual issue was what rate of return, if any, had been agreed and in particular whether a £12,000 uplift had been agreed on the £130,000 principal sum. The sheriff did not make an express finding in fact on that issue, but stated in his note:

> "I am satisfied that the first defender was aware from the outset that [the lender] sought a return of £12,000".

He then gave reasons for that conclusion. He went on to say at paragraph 75:

> "On the basis of the evidence, it seemed to me to be clear that the first defender incurred personal liability for the sum of £142,000. Had I been granting decree against the first defender I would have found him liable to pay that sum".

[4] Thus, the sheriff could not have made it any clearer that, had he not dismissed the action having sustained the plea of no title to sue, he would have granted decree against the first defender for £142,000.

[5] The sheriff's decision that the assignation conferred no title to sue on the pursuer is no longer challenged. However, as we observed in our earlier opinion, it seemed to us that the correct analysis of the factual situation, as found by the sheriff, might be that the pursuer was acting as agent not for an *undisclosed* principal but for an *unnamed* one. If that were correct, she would have incurred personal liability to repay the loan and accordingly, upon repayment of the loan by her, the debt would have been extinguished. Accordingly, the assignation, taken after the event, would have been of no effect.

[6] The pursuer's solicitor accepted that the appeal was unarguable. However, after due consideration he sought, and this court granted, leave to amend, for reasons explained in our earlier opinion. The effect of the amendment is that the action is now founded upon the right of an agent, who pays a debt due by his principal, to be relieved by that principal.

[7] The cross-appeal (which had challenged the sheriff's entitlement to make certain findings in fact) having been disposed of, four issues remained live immediately before the outset of the continued appeal hearing on 22 March, as follows:

1. Whether the pursuer was entitled to be relieved, to any extent, by the first defender in respect of the sum repaid to the lender;

2. If so, whether the first defender's liability extended only to the principal sum of £130,000 or whether he was liable for the entire £142,000 paid by the pursuer to the lender;

3. Whether the pursuer was entitled to interest from the date of citation or from the date of intimation of the minute of amendment;

4. Expenses.

[8] At the outset of the hearing on 22 March, we were informed that the first of these apparent issues was no longer in dispute. The first defender, contrary to the position taken in the pleadings to date, now conceded that the pursuer was entitled to be relieved in principle. However, the rate of return remained in issue, as did interest and expenses.

[9] We shall deal with each of those issues in turn.

Rate of return

[10] Mr McDiarmid for the first defender submitted that the pursuer was entitled to be relieved only to the extent of the principal sum of £130,000. That was because the sheriff had not made an express finding in fact to the effect that there was an agreed uplift of £12,000. He drew our attention to the salient findings in fact, set out at paragraph 7 of our previous opinion. The sheriff had made deliberate and well-reasoned findings. He must be taken to have consciously declined to draw an inference that the first defender was aware of the rate of return. In the absence of any finding in fact expressly to the effect that the first defender was aware of the rate of return, it was not open to this court to draw an inference for itself. Mr McDiarmid accepted that the sheriff had not drawn the contrary inference either – namely, that the first defender was unaware of the rate of return – but submitted that the issue had simply been left hanging. He drew our attention to paragraphs 74 and 75,

mentioned above. In support of his submission that we should not draw any inference for ourselves, he referred to *Henderson* v *Foxworth Investments Ltd and Another* [2014] UKSC 41; 2014 SC (UKSC) 203. He submitted that, if invited so to do by the appellant, we should not make any additional finding in fact about the rate of return.

[11] In reply, Mr Garioch also referred to paragraphs 74 and 75 of the sheriff's note. He submitted that it was clear that the sheriff's decision was that the first defender was aware of the rate of return. Clearly the sheriff's conclusion at paragraphs 74 and 75 was justified by the findings in fact which he had made. Mr Garioch did not invite us to make any additional finding in fact, because, he submitted, it was unnecessary for us to do so. The position could be inferred from the findings in fact which had been made.

Discussion

[12] We consider that there was considerable force in Mr Garioch's assertion, in the course of his submission, that the first defender's argument is detached from reality. In the first place, the argument based upon *Henderson* v *Foxworth Investments Ltd* is misconceived. The approach an appellate court should take to findings in fact is clearly set out in *W* v *Greater Glasgow Health Board* [2017] CSIH 58. There, the Inner House made clear that a distinction falls to be drawn between, on the one hand, decisions as to credibility, reliability and the primary facts: what the persons involved actually did or said or what happened to them; and, on the other, inferences of fact drawn from the primary facts (para 39). While it is rare that an appellate court should interfere with findings of primary fact, it may more readily interfere in a case where the findings are inferences drawn from the primary facts rather than findings of primary facts based on the credibility and reliability of the witnesses (para 49).

[13] We mention that case for completeness. However, this is not a case where it is contended that the sheriff drew the wrong inference; rather, that he drew no inference. In fact, it is plain from reading the sheriff's judgment as a whole concluding his note at paragraphs 74 and 75 that he *did* draw the inference, from the primary findings in fact, that the first defender was aware of the rate of return. Plainly he was entitled to do so. We agree with Mr Garioch that it is unnecessary for us to add any additional finding in fact (although, had it been necessary, we would have had no hesitation in drawing the requisite inference from the sheriff's primary findings in fact). It might have been neater if there had been an express finding in fact about the rate of return but, reading the judgment as a whole, the absence of one is of no consequence. It is as plain as a pikestaff, from findings in fact read along with the sheriff's note, that he did infer that the first defender was aware of the rate of return and was accordingly bound to repay same, along with the principal sum.

[14] Accordingly, there is no defence to the case which is now pled against the first defender. We shall recall the sheriff's interlocutor, and grant decree for the sum of £142,000 (under deduction of the £130,000 paid to account). In reaching that decision, we stress that no criticism falls to be attached to the sheriff, who correctly decided the case as it was pled before, and presented to, him.

Interest

[15] In relation to interest, the point is a straightforward one: as a matter of competency, can judicial interest run from the date of citation, or must it run only from the date of intimation of the minute of amendment. Mr McDiarmid submitted that it was the latter, Mr Garioch the former.

[16] Under reference to *Elliot* v *Combustion Engineering Ltd* 1997 SC 126, Mr McDiarmid submitted that interest could run only from the date of judicial demand. The debt which had been demanded in the initial writ was fundamentally different from that which had now been found to be due following the amendment. The former was a debt said to be due to the lender, the pursuer having sued as assignee. The latter was a debt due to her as an individual.

[17] In reply, Mr Garioch submitted that interest should run from date of citation of the writ. Although the basis of claim had changed, it was fundamentally the same sum of money which had been demanded as had now been found due to the pursuer, namely the loan arranged by the pursuer, which the defender had refused to repay.

Discussion

[18] We were referred to no authorities other than the Inner House case of *Elliot* v *Combustion Engineering*, *supra*, but the issue in that case was whether an arbiter had the power to award interest on a sum due under a contract, from a date earlier than that of the first judicial demand. The court held that in relation to a debt due under a contract, the courts (and hence the arbiter) had no discretionary power to award interest from a date prior to date of citation. However, on any view, the Inner House did not lay down an absolute rule that interest may never run from an earlier date than date of citation, stating in terms that there may be exceptions to the general rule. The rationale for awarding interest at all is that money has been wrongfully withheld. So, in relation to contractual debts, *Elliot* is authority that the date from which interest runs is the date of citation, but in other situations, an earlier date may be both appropriate and competent. The pursuer's claim, being one of relief, is not strictly a sum due under a contract, albeit it arises from the

contractual relationship of agency. Not having had the benefit of full citation on this point, we cannot advance it any further than stating that there may have been an argument that interest might have run in the present case from a date earlier than judicial demand even if that were held to be the date of intimation of the minute of amendment. If that were correct, then it would not matter whether the date of judicial demand was the date of citation of the initial writ, or the date of intimation of the minute of amendment.

[19] However, we consider it unnecessary to answer that question, because we have come to the view that interest can competently be awarded from the date of citation, as the date of judicial demand, in any event. Lord Cameron explained the rationale behind awarding interest in *Dean Warwick Ltd* v *Borthwick* 1983 SLT 533 at 535 as follows:

> "The pursuer, *ex hypothesi* of the court's decree, has been deprived of the use and fruit of the sum for which decree has been granted during the period of non-payment, i.e. since the formal judicial demand was made, while conversely the defender wrongfully has enjoyed that use and fruit."

[20] We consider that the first defender's argument unnecessarily complicates the issue. If interest can competently be awarded from date of citation, then it is unnecessary to look behind that date in deciding the date from which interest can competently run. The fact is that the pursuer craved payment of £142,000 and has been awarded that sum in implement of that crave, in the same action. We were referred to no authority in which the court has embarked upon an examination of the pleadings to ascertain whether the basis of the claim might have been changed, nor is it obvious as a matter of principle why it should ever do so. The pursuer has on any view been deprived of the use of her £142,000 since the date of payment, and the defender has been aware of that since, at the latest, the date of service of the initial writ. The defender has had the wrongful use of it from that date. The sum to which the pursuer was eventually found entitled was in substance the same £142,000 as

featured in the crave. The crave itself was unaltered by the minute of amendment. The defender's position on the merits was not that he was due to pay the debt to the lender, rather than to the pursuer, but that he was not due to pay it to anyone. It would be contrary not only to principle, but to common sense and equity, if we were to hold that interest should run only from the date of the minute of amendment. Accordingly we will award interest on the sum craved (under deduction of the sum paid to account), from date of citation.

Expenses

[21] Having told the parties what our decision would be in relation to the rate of return, we invited submissions on expenses. Mr Garioch moved for:

1. The expenses of the sheriff court action to be awarded to the pursuer against the first defender, subject to a modification of 25% to reflect the areas of the action in which the pursuer had been unsuccessful.
2. The expenses of the appeal to be awarded against the first defender except:
   (a) the expenses of the amendment procedure;
   (b) the first day of the appeal.

(c) In each case those expenses should be awarded to the first defender;

3. No expenses due to or by the second defender.
4. An additional fee under grounds 5, 6 and 7 of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993 (1993/3080), Regulation 5.

[22] In support of his motion for the expenses of the action he submitted that the pursuer had been substantially successful against the first defender. The primary defence had been

that the debt was due by the company controlled by the defenders. That had been unsuccessful. A proof would have been necessary even if the action had been raised on the correct basis from the outset. The respects in which the pursuer had been unsuccessful were adequately reflected by a modification of 25%. The pursuer had also been successful in the appeal, other than in relation to the first day of the appeal and the subsequent amendment, which were conceded. There should be no expenses due to or by the second defender, as she was represented by the same solicitor as the first defender. As regards justification for the additional fee, Mr Garioch founded upon a letter sent to the defenders dated 31 August 2016 in which the pursuer had offered to accept payment from the company. No such payment was made. As regards importance, the matter had been important to the pursuer since her standing as a solicitor was potentially compromised by the action.

[23] In response, Mr McDiarmid submitted that the expenses of the appeal should be dealt with as follows:

(a) the second defender should be awarded the expenses of the appeal;

(b) the expenses of the amendment should be awarded to the first defender;

(c) expenses of the cross-appeal should be awarded against the first defender and there should be no expenses due to or by the pursuer and the second defender;

(d) expenses of the appeal up to and including the hearing of 7 August 2018 should be awarded to the first defender;

(e) as regards the hearing on 22 March 2019, there should be no expenses due to or by either party, because the hearing had been fixed by the court;

(f) as regards the cause at first instance, the expenses should be awarded to the second defender, since she had achieved decree of absolvitor which she had retained. The expenses of the action should also be awarded to the first defender, because he had

been successful. He had sought a debate on the plea of no title to sue, which had ultimately succeeded before the sheriff, correctly so as the pleadings then stood. In addition, there were aspects of the procedure which had been caused by the failure of the pursuer to specify her claim with sufficient precision. The pursuer's evidence at proof was not on all fours with what she had pled. The circumstances did not merit an additional fee.

Discussion

[24] Dealing first with the expenses of the appeal and cross-appeal, we largely prefer the pursuer's submissions. The appeal has ultimately succeeded against the first defender, albeit on a different basis from that on which it was originally presented. The appropriate means of reflecting that is to award the expenses of the appeal to the pursuer against the first defender, except for the expenses of the amendment procedure and of the first day of the appeal, which, in each case, should be awarded to the first defender. Insofar as the cross-appeal is concerned we shall award the expenses to the pursuer against the first defender. As regards the second defender, she joined in the cross-appeal, in which she was unsuccessful, but retained the benefit of the decree of absolvitor in her favour. We consider that it is appropriate in the circumstances that there be no expenses due to or by her in relation to both the appeal and the cross-appeal.

[25] As regards the principal action, the position is more complex. However, it is clear that a proof would have been necessary, even had the action been raised on the correct basis from the outset. Whatever the basis of the action, there were questions of fact between the parties, which the court had to, and did, resolve. The pursuer was substantially successful on all factual disputes. We consider that the aspects in which she has not been successful, or

where time was taken up due to the abortive assignation, are more than adequately reflected by the 25% abatement which the pursuer has conceded. Accordingly, we will find the first defender liable to the pursuer in the expenses of the action modified by 25%.

[26] As regards the second defender, however, the fact is that the pursuer did fail against her. We will find the pursuer liable to the second defender in the expenses of the action.

[27] Finally, as regards the pursuer's motion for an additional fee, we have some sympathy with the argument that some extra responsibility was undertaken by the solicitor for the pursuer, on account of the pursuer's status as a solicitor. On the other hand, it cannot be ignored that the action was, for a long time, pursued upon entirely the wrong basis. The correct basis was identified only on the first day of the appeal, and then only after it was pointed out that the appeal was likely to fail on the previous pleadings. We do not consider that the steps taken to try to settle the action were out of the ordinary. In all the circumstances we have decided that an additional fee is not appropriate.