SHERIFF APPEAL COURT

[2019] SAC (CIV) 6
GLW-A8111-07

Sheriff Principal C D Turnbull

OPINION OF THE COURT

in the appeal in the cause

NORNA CRABBE

Pursuer & Appellant

against

ALEXANDER REID & OTHERS

Defenders & Respondents

Pursuer & Appellant: Party
Defenders & Respondents: Manson, advocate; Reid Quarton

20 December 2018

Introduction

[1] The issue in this appeal is whether the appellant's failure to oppose a motion, as a consequence of which a final interlocutor was pronounced in this case, precludes her from challenging both that interlocutor and two earlier interlocutors which she had previously been unable to challenge, this court having held that an earlier appeal against those interlocutors was incompetent.

[2] As noted by the now Lord President, giving the opinion of an Extra Division in *Reid* v *Crabbe* 2010 SC 268, the parties are solicitors and were formerly partners in West Anderson & Co, Glasgow. The respondents retired from the partnership on 31 January 1998; at which

time the appellant continued the business under its existing name as a sole practitioner. More than twenty years later, the parties have still not resolved their disputes.

[3] The present action was raised in 2007. In it the appellant sought payment of certain sums of money under three separate craves. After sundry procedure, which included a successful appeal to the Inner House by the respondents (see *Crabbe* v *Reid & Others* [2013] CSIH 53), the sheriff heard a preliminary proof in relation to the respondents' plea of prescription. In his decision dated 7 November 2017, the sheriff sustained the respondents' plea to the extent that it related to crave one and assoilzied the respondents in respect of that crave. In that same decision the sheriff appointed parties to be heard on further procedure in relation to craves two and three. The sheriff subsequently, on 24 November 2017, dealt with the question of expenses to that date and allowed a proof before answer in respect of craves two and three, the appellant's remaining craves.

[4] The appellant sought to appeal the decisions of 7 and 24 November 2017 to this court. On 8 March 2018 the appellant's appeal was refused as incompetent. The reasons for so doing were set out by the Appeal Sheriff in his note of that date. I need not repeat his reasoning, however, one passage is worthy of repetition. In relation to the decision of the sheriff of 7 November 2017, the Appeal Sheriff said this:

> "It is not a final interlocutor, as the court's remit has not been exhausted, because craves two and three remain to be decided upon. Once that process is at an end … then that court will be *functus officio*, and the appellant may then appeal the whole merits (if justified) without leave. The case has not yet reached that stage."

[5] On 12 April 2018 the sheriff assigned 11 May 2018 as a diet for the proof before answer he had previously allowed. The subsequent events in the period between 26 April 2018 and 4 May 2018 are of considerable significance to the issue this court requires to determine. Accordingly, I set them out in some detail.

The Events of 26 April 2018 to 4 May 2018

[6] On 26 April 2018 the first named respondent wrote to the appellant indicating that as the respondents had been assoilzied from crave one, and having regard to the economics of their continuing with the defended action in relation to what he described as "the lesser craves", without admission of liability and without prejudice to the respondents' position, the respondents would make payment in full of the sums due in respect of craves two and three. A cheque in favour of the appellant was enclosed. The respondents also indicated they were content to concede the expenses of the cause, as taxed, in so far as they had not already been dealt with. The first respondent's letter indicated that the respondents' motion, seeking the discharge of the forthcoming proof and dismissal of the action; and conceding expenses in the manner outlined, would follow in early course. The letter and cheque were delivered to the appellant personally on 27 April 2018 at 11.35 am (by messenger-at-arms).

[7] The respondents' motion (7/15 of process) was lodged with the court on 30 April 2018. The respondents moved the court to (i) shorten the period of opposition to 48 hours in accordance with OCR 15.2(4); (ii) discharge the diet of proof fixed for 11 May 2018; (iii) grant decree of dismissal; and (iv) find the respondents liable to the appellant in the expenses of the cause, save in so far as already decerned for, as taxed by the auditor of court or as otherwise agreed. On 30 April 2018 the sheriff, having considered the respondents' motion, reduced the period for the lodging of opposition to 48 hours. A note to the sheriff's interlocutor provided that, if opposed, the motion would call on 4 May 2018 at 9.45 am. It is pertinent to add that the sheriff who dealt with the motion was the sheriff who had heard the preliminary proof abovementioned.

[8] The motion and relative interlocutor were intimated to the appellant, by facsimile transmission, on Monday 30 April 2018, at 3.07 pm. In terms of the court's interlocutor, notice of opposition required to be lodged by the same time on Wednesday 2 May 2018.

[9] On Thursday 3 May 2018, at or around 11.32 am, most unusually, the court sent an e-mail to the appellant asking if it was her intention to oppose the motion, albeit then late, no notice of opposition having been lodged. The e-mail culminated by asking the appellant that if it was not her intention to oppose the motion, she confirmed that as soon as possible as the motion was due to be passed to the sheriff for consideration "to grant same".

[10] The appellant replied to that e-mail a little over an hour later, at or about 12.54 pm. Insofar as relevant, the appellant's e-mail is in the following terms (the underlining has been added by the court):

> "I'm in receipt of the motion and interlocutor dated 30th April 2018 and the motion for the defenders in the above action.
> …
> The defenders have made no offer of settlement. I'm still awaiting a response to my letters with regard to the same. The cheque p. 13,125 has been accepted as an attempt to settle now after over 10 years Craves 2 and 3. In view of Sheriff Deutsch's views and comments I believe there is no prospect for the Motion not to be granted. I will be in any event appealing against the final Decree. Please let me have the Interlocutor as quickly as possible so that I can take steps to formulate the appeal and to take what other action I feel is necessary."

[11] Upon receipt of the appellant's e-mail the court again wrote to the appellant, by e-mail, asking if it was the appellant's intention to oppose the motion or not. The appellant did not reply to that e-mail until Friday 4 May 2018 at or about 10.43 am, by which time the motion had been granted. This e-mail is considered below at paragraph [15].

[12] On 3 May 2018, the appellant also wrote to the first named respondent by e-mail (at 12.55 pm), acknowledging receipt of his letter of 26 April 2018 and of the cheque. The appellant accepted the cheque in settlement of craves two and three and indicated that she

would found on the same if required in any appeal. Her letter also indicated that as "no concrete offer of settlement has been made to me I have now no option but to appeal against the final Decree …". This being a reference to the sum the appellant had sought in terms of crave one.

[13] Later on 3 May 2018 (at 2.44 pm), by way of an e-mail, the court asked the first named respondent to provide documentation showing that the principal and interest due in respect of craves two and three of the initial writ had been paid. That e-mail was copied to the appellant.

[14] No notice of opposition was lodged by the appellant. Nonetheless, in accordance with OCR 15.5.(1), the sheriff declined to determine the motion in chambers without the appearance of parties and directed that the hearing provisionally assigned for 4 May 2018 at 9.45 am proceed. The appellant neither appeared nor was represented at that hearing. The sheriff's interlocutor of that date is in the following terms:

> "The Sheriff, having heard Mr Reid, Solicitor for the Defenders and having considered the documents placed before the Court today and having seen the email dated 3 May 2018 from the pursuer; Grants the defenders unopposed motion No.7/15 of process and in terms thereof:- Discharges the diet of Proof assigned for 11 May 2018; Dismisses craves two and three of the Initial Writ and Finds the defenders liable to the pursuer in the expenses of the cause in so far as not already decerned for as taxed; Allows an account thereof to be given in and Remits same when lodged to the Auditor of Court to tax and to report thereon."

[15] On 4 May 2018, at or about 10.43 am, the appellant replied to the court's e-mail which is referred to at paragraph [11] above. In her e-mail, the appellant stated that, "I would confirm that I do oppose the Motion and am not acquiescing in the grant of decree of dismissal and absolvitor (*sic*)." The appellant sent with her e-mail a form of opposition to the motion which, by this time, had been granted.

[16] The appellant marked an appeal against the decision of the sheriff of 4 May 2018. From a consideration of the grounds of appeal it became apparent that she also wished to challenge the interlocutor of 19 November 2014 (Sheriff Reid); the interlocutors of 7 November 2017 and 24 November 2017 (Sheriff Deutsch) referred to above; an interlocutor of the then sheriff principal of 13 October 2015; and the interlocutor of the Appeal Sheriff of 8 March 2018 referred to above.

[17] At an earlier hearing of the present appeal I refused the appeal as incompetent insofar as it was directed against the interlocutor of the sheriff of 19 November 2014; the interlocutor of the then sheriff principal of 13 October 2015; and the interlocutor of the Appeal Sheriff of 8 March 2018. The hearing that proceeded before the court on 29 November 2018 was restricted to the issue of whether the remainder of the appeal was competent, or more properly, having regard to *McCue* v *Scottish Daily Record and Sunday Mail Ltd* 1988 SC 811 at 824 D - F, whether the court should countenance an appeal against the interlocutors of 7 November 2017 and 24 November 2017 and 4 May 2018.

[18] Essentially, the appellant seeks to use the vehicle of the unopposed interlocutor of 4 May 2018 to allow her to challenge the interlocutors of 7 and 24 November 2017, which deal with crave one and the expenses of the cause for the period 7 June 2013 to 24 November 2017 respectively.

Parties' Submissions

[19] The respondents argue that as the appellant did not oppose the granting of the interlocutor of 4 May 2018, the court should not countenance an appeal against it and, as such, the appellant would not be entitled to subject to review the earlier interlocutors of November 2017.

[20] The appellant argues that she did not consent to, or acquiesce in the granting of, the motion. She had made it clear that it was her intention to appeal. In the circumstances, there was no basis upon which she could, in fact, have opposed the motion in question. She did not act in reliance upon the interlocutor of 4 May 2018.

Discussion

[21] In his submissions, counsel for the respondents submitted that five propositions could be derived from the facts of the case and by reference to certain authorities. These propositions are a convenient framework against which the court can address the issue in this appeal, as set out in paragraph [1] above.

[22] The first proposition is that there is no practical difference between the rules of practice and procedure of the Court of Session and Sheriff Court in connection with the question of appeals against interlocutors pronounced of consent. The respondents submit that this court should follow the consistent line taken in these cases. The appellant argues that as section 116 of the Courts Reform (Scotland) Act 2014 post-dates the decision in *McCue* v *Scottish Daily Record and Sunday Mail Ltd,* that decision is no longer binding.

[23] There is no practical difference, for the purposes of this appeal, between section 116(2) of the 2014 Act, which governs the position in the sheriff court, and the current Rule of the Court of Session, r.38(6). In each case, the effect of a competent appeal (or reclaiming motion) is to submit for review by the appellate court in question all previous interlocutors in the case. The starting point in the present case is that an appeal can competently be brought against the interlocutors of 7 and 24 November 2017, as between them they constitute a final judgment in the case (see section 110(1)(a)).

[24] The position in relation to the authorities is not controversial. As argued before the First Division in *Jongejan* v *Jongejan* 1993 SLT 595, the principles are both well established and not seriously in dispute, namely, that a party cannot seek the recall of an interlocutor which had been granted on his own motion or with his consent. In the present case, however, the interlocutor was neither granted on the motion of the appellant nor was it of consent. To bring themselves within the principles above enunciated, the respondents rely upon their second proposition.

[25] The second proposition is that there is no difference between an interlocutor pronounced of consent and one which is pronounced on an unopposed motion. In support of this the respondents rely upon three cases.

[26] Firstly, in *McLaren* v *Ferrier* (1865) 3 M 833, the Lord Ordinary made a remit to persons of skill to examine and report, the interlocutor bearing that the remit was made "of consent". The Inner House refused to entertain an argument by the defender (after the remit had been executed and the interlocutor had become final) that he had not actually given his consent to the remit. The argument of the defender turned also on there being no minute of consent in process. The Inner House held that when an interlocutor bears to be of consent, if parties do not timeously object to it, it must stand as finally determining the course of enquiry directed by it to have had the concurrence of parties, as much as if a minute of the consent had been lodged in process.

[27] The second case referred to is *Whyte* v *Whyte* (1895) 23 R 320. The factual background which underlies this decision is important. The petitioner presented a petition seeking to be decerned executor-dative *qua* his deceased sister. Answers were lodged by the sister of the petitioner who claimed to be an executor-nominate under a mutual settlement. The sheriff-substitute found that that settlement had been revoked and an appeal against this judgment

was dismissed. The petitioner then lodged a minute seeking to be appointed executor-dative. The sheriff-substitute subsequently pronounced an interlocutor which recorded that the agent of the respondent having stated at the bar that he now withdrew his opposition to the minute for the petitioner, the sheriff-substitute decerned the petitioner executive-dative. The respondent appealed to the Inner House. The appeal was based upon the sheriff-substitute having been in error in supposing that the respondent had withdrawn her opposition to the petitioner's application. That contention was disputed, as a matter of fact, by the respondent who also argued that, the interlocutor being of consent, it was not open to review. In their opinions, both Lord Adam and Lord McLaren make it clear that in a dispute of this nature the court could make enquiries as to what, in fact, had occurred before the sheriff-substitute. The curiosity in the case is recorded by Lord Adam at page 321. Whilst the court was ready to remit the matter to the sheriff-substitute to report, they "…were very distinctly informed at the bar that the appellant did not desire any such course." The consequence of that was that the court required to proceed on the basis that what had taken place before the sheriff was properly recorded in the interlocutor and, that being so, it was impossible for the court to review the judgment on the merits as it had proceeded of consent.

[28] Thirdly, *Paterson* v *Kidd's Trustees* (1896) 23 R 737 is another example of an appeal which was unsuccessful on the basis that the interlocutor challenged had been pronounced of consent. To that end it adds little to the principle enunciated in the earlier cases above referred to. Counsel for the respondent drew attention, however, to the observations of Lord McLaren. I confess to being unable to glean from his Lordship's opinion exactly what he meant when saying that his first impression was that no apparent distinction could be taken between an interlocutor proceeding upon a consent and an interlocutor proceeding

merely upon the motion of one of the parties. The suggestion advanced by the respondents in their note of argument that his Lordship was suggesting that there was no practical difference between an interlocutor proceeding upon a consent and one pronounced upon the motion of one of the parties, is not supported by any authority to which the court was referred and, simply, could not be correct in the case of an interlocutor pronounced in the face of opposition.

[29] In support of their contention that that there is no difference between an interlocutor pronounced of consent and one which is pronounced on an unopposed motion, the respondents draw attention to *McLaren*, where the absence of a minute of consent was not conclusive; *Whyte*, where the withdrawn opposition was treated as an act of consent; and Lord McLaren's discussion in *Paterson*.

[30] It is a matter of agreement that the appellant did not oppose the respondents' motion (7/15 of process) which led to the interlocutor of 4 May 2018. That, however, must be distinguished from the question of consent. In the context of motions in the sheriff court, consent is dealt with by OCR 15.4. In this case the appellant did not endorse the motion, or give notice to the sheriff clerk in writing, of her consent. Another possibility, namely, the giving of consent at the hearing of a motion, does not arise in this case. The terms of the appellant's e-mail of 3 May 2018 (quoted at paragraph [10] above) are, in my view, consistent with a lack of opposition, not with consent.

[31] The respondents' argument that there is no difference between an interlocutor pronounced of consent and one which is pronounced on an unopposed motion is fallacious. The fallacy is, perhaps, best demonstrated by an example. A motion is properly intimated in terms of OCR 15.2, with the requisite certificate of intimation lodged with the sheriff clerk in terms of OCR 15.1.(2)(a). The motion is misplaced within the office of the recipient solicitor.

No notice of opposition is lodged. There being no circumstances to direct otherwise, the motion is determined by the sheriff in chambers without the appearance of parties, in accordance with OCR 15.5, and is duly granted. Subsequently, the motion is found within the office of the recipient solicitor. In such circumstances, one simply cannot equate a lack of opposition with consent. Consent will ordinarily be clear and unequivocal in the eyes of the court. The reason for an absence of opposition is not necessarily so.

[32] The third proposition is that whether expressed under reference to competency or not, the court should not normally countenance an appeal against an interlocutor pronounced of consent. The proposition is sound, however, for the reasons set out above, it is of no application to the present case.

[33] The fourth proposition is that consent can be gleaned most obviously from a formal representation by way of minute or using other mechanisms under the rules of court; but it can also be ascertained from the conduct of the relevant party. The conduct of the appellant in relation to this matter is set out above in some detail. I am unable to glean consent from that conduct.

[34] The final proposition is that it would be contrary to the principles of judicial procedure to entertain an appeal against an interlocutor which is to a party's benefit and in respect of which the appellant has acquiesced and would act upon. In this regard the respondents rely upon *Ferguson's Trustee* v *Reid* 1931 SC 714.

[35] In *Ferguson's Trustee*, the pursuer in a sheriff court action pleaded that the defences were irrelevant. The sheriff-substitute sustained this plea. The sheriff, on appeal, after amendment of the defences, allowed the appeal, repelled the plea, allowed a proof and found the defender liable in expenses. The pursuer did not seek leave to appeal against this interlocutor. Thereafter, the sheriff-substitute fixed a proof and, by subsequent interlocutor,

he approved, of consent, a specification of documents for the pursuer; approved a specification for the defender, and granted the pursuer leave to appeal. The Inner House held that the pursuer was not entitled to submit to review the interlocutor of the sheriff allowing a proof, in respect that he had acquiesced in and acted upon it. For present purposes, it is notable that in *Ferguson's Trustee*, the pursuer was a party to the taxation of the expenses found due to him, taking advantage of the sheriff's interlocutor to that extent.

[36] The respondents argue that the interlocutor of 4 May 2018 is to the appellant's benefit, is one in respect of which the appellant has acquiesced and is one she will act upon. The appellant rejects those assertions.

[37] The interlocutor is only to the appellant's benefit to the extent that it makes an award of expenses in her favour. It must not be overlooked that the interlocutor was pronounced at the behest of the respondents, not the appellant. Having paid the remaining principal sum, their concession in respect of expenses was unsurprising. The respondents argue that it is this interlocutor which the appellant will act upon. It is notable, however, that, at the point in time she seeks to challenge that interlocutor, she has not acted upon it. Indeed, whether or not she acts upon it depends on the outcome of the appeal, albeit it is difficult to see that particular aspect being disturbed, irrespective of the outcome. I am unable to identify any acquiescence on the part of the appellant, outwith her decision not to oppose the motion, which I have already dealt with. The position in the present case is materially different to that in *Ferguson's Trustee*.

[38] Importance requires to be attached to the relationship between the prior interlocutor and the final judgment, see *Prospect Healthcare (Hairmyres) Ltd* v *Kier Build Ltd* 2018 SC 155 at 159. Properly, the respondents accept that they are linked. Taken together, the prior interlocutor (namely, that of 7 November 2017) and the final judgment on the merits

(namely, that of 4 May 2018) deal with the whole craves of the initial writ. As noted by the Lord President in *Prospect Healthcare (Hairmyres) Ltd* at page 161, the intention of the equivalent Court of Session rule (r. 38.6(1)) is to allow the appellate court "to do complete justice." Having reached the conclusion that the effect of section 116(2) of the 2014 Act is essentially the same as that of r. 38.6(1), I am satisfied that in this case the only way in which complete justice can be done in relation to this long running matter is to countenance an appeal against the remaining interlocutors now complained of.

[39] I will allow the appeal to proceed insofar as it is directed against the interlocutors of 7 November 2017; 24 November 2017; and 4 May 2018. A further hearing will be assigned for that purpose. The expenses occasioned by the hearing on 29 November 2018 are reserved meantime.