



[2016] SAC (Civ) 3
SAC/2016/X046/16/AP
SAC/2016/X054/16/AP

Sheriff Principal M M Stephen QC, President of the Court
Sheriff Principal D C W Pyle
Sheriff Principal M W Lewis

NOTE

(1)
in appeal by

ANDREW HAMILTON

Pursuer and Appellant

against

GLASGOW COMMUNITY AND SAFETY SERVICES

Defenders and Respondents

and

(2)
in appeal by

JOSEPH SWEENEY

in the cause

COMMERCIAL FIRST BUSINESS LIMITED

Pursuer and Respondent

against

JOSEPH SWEENEY

Defender and Appellant

-
- (1) Act: Party Appellant
Alt: McDonald, solicitor
(2) Act: Party Appellant
Alt: No appearance
Walker, Advocate *amicus curiae*

INTRODUCTION

1. We have held a conjoined hearing in two cases in which the appellants seek to lodge a note of appeal to this court, though late. Both appellants, Mr Hamilton and Mr Sweeney, have provided an explanation and reasons for the appeal being lodged late. However, the important preliminary question which we have to determine is whether it is competent to appeal late, whatever the reason, standing the terms of Rules 6.3 and 6.4 of the Sheriff Court Appeal Rules made by Act of Sederunt (Sheriff Appeal Court Rules) 2015. It is also necessary to consider whether this court may exercise its discretion to relieve a party of the consequences of failing to comply with the 28 day time limit for lodging an appeal in terms of Rule 2.1.
2. Both appellants are unrepresented. The question which the court has to answer is a question of law. In these circumstances Mr Walker has been appointed *amicus curiae*. The role and function of the *amicus* is to assist the court by presenting a neutral appraisal of the issues which require to be decided and by raising considerations that might not otherwise come to the court's attention particularly in circumstances where the appellants are not legally represented. It is important that we point out that the *amicus* has no interest in the cause and does not represent the view of one or any party. The *amicus* is in a position to provide advice on points of law purely for the information of the court. It is important that it is understood that the *amicus*' function is not to assist or represent either of the appellants who will, of course, have an opportunity of addressing the court.
3. Any appeal to this court must be brought within 28 days after the date of the decision appealed against (Rule 6.3 of the Sheriff Appeal Court Rules 2015). It is not

in dispute that in these cases the notes of appeal were lodged in this court outwith the period of 28 days allowed by Rule 6.3 and are therefore late.

The Sheriff Appeal Court Rules 2015

4. The terms of Rules 6.3 and 6.4 are as follows:-

"Rule 6.3

6.3.- (1) An appeal must be made within 28 days after the date on which the decision appealed against was given.

(2) This rule does not apply where the enactment under which the appeal is made specifies a period within which the appeal must be made."

and

"Rule 6.4

6.4.- (1) This rule applies where the enactment under which the appeal is made-

- (a) specifies a period within which the appeal must be made; and
- (b) provides that a party may apply to the Court to allow an appeal to be made outwith that period.

(2) An application to allow an appeal to be received out of time is to be made by motion.

(3) That motion is to be made when the note of appeal is lodged.

(4) Where a motion to allow an appeal to be received out of time is refused-

- (a) the Clerk is to –
 - (i) notify the sheriff clerk that leave to appeal out of time has been refused;
 - (ii) transmit the note of appeal to the sheriff clerk;
- (b) the sheriff clerk is to place the note of appeal in the process."

Rule 2.1 which deals with the court's power to relieve a party of a failure to comply

with the rules is in the following terms:-

"Rule 2.1

2.1. – (1) The Court may relieve a party from the consequences of a failure to comply with a provision in these Rules.

(2) The court may do so only where the party shows that the failure is due to-

- (a) mistake;
 - (b) oversight or;
 - (c) any other excusable cause.
 - (3) Where relief is granted, the Court may-
 - (a) impose conditions that must be satisfied before relief is granted;
 - (b) make an order to enable the appeal to proceed as if the failure had not occurred."
- 5. We have had the advantage of considering the submissions presented by the *amicus* who has carefully analysed the case law. In particular, *Graham v John Tullis & Sons (Plastics) Limited (No 1)* 1992 SLT 507; *Graham Builders Limited v Mann* 2003 SC 479 and *Hume v Nursing and Midwifery Council* 2007 SC 644 (followed by the Extra Division in *Holmes v Nursing and Midwifery Council* 2010 SC 246) can be said to favour the court having a discretion which it may exercise to relieve an appellant of the consequences of missing a time limit or failing to present his appeal timeously. In *Hume* the court raised the question as to the competency of the use of the dispensing power in such a case where the appeal is by a nurse against a decision of his professional body. The Nursing and Midwifery Order 2001 creates a right of appeal to the Court of Session against any order made by the Council. The appellant, who was unaware of the order pronounced, failed to appeal within the time limit (28 days). The Council did not contest the point and confirmed that it had no objection to its decision being set aside. The First Division held that it could exercise its discretion to allow the appeal albeit late despite the terms of the order which could be construed as requiring strict compliance with the timetable for appeal.
- 6. Nevertheless, these cases can be contrasted with *Mucelli v Government of Albania* [2009] 1 WLR 276 a House of Lords decision dealing with the provisions of the

Extradition Act 2003 and *Simpson v Downie* 2013 SLT 178 which considered the terms of the Family Law (Scotland) Act 2006. In these cases the court required to consider the provisions in the statute or enactment which laid down time limits. In particular, it was noted in *Simpson v Downie*, a Scottish case on cohabitants' rights, that there was no saving provision in the statute which allowed the court discretion to excuse a breach of a time limit. The English authorities consider the Extradition Act 2003 which is a UK statute. *Mucelli* was concerned with the time limits for bringing an appeal under the Extradition Act 2003. Although the House of Lords gave a split decision on what was required of appellants in order to comply with the statutory provisions for appeal, their Lordships were unanimous that the time limits set out in the statute could not be extended by operation of the applicable rules of court in England which may excuse a failure to comply with any provision in the Rules of Court. These rules could not be used to excuse a failure to comply with a time limit imposed by statute unless the statute itself so provides. In other words, the court rules could not be used where they conflicted with the mandatory statutory provision. We also considered *Pomiechowski v Poland* [2012] 1 WLR 1604 and *Adesina v Nursing and Midwifery Council* [2013] 1 WLR 3156. The significance of *Pomiechowski* is that apparently absolute time limits may in certain exceptional circumstances have to yield to the requirements of Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). That reflects a significant departure from the decision of the House of Lords in *Mucelli* which the Supreme Court in *Pomiechowski* considered may have been decided on a mistaken factual assumption. In *Adesina*, another Nursing and Midwifery Council appeal, the court dealt again

with the issue of a late appeal. The court held that the time limit laid down in the order was not an absolute one but, in the light of Article 6 of the ECHR, was subject to the court's discretion. However, invoking that discretion would only arise in exceptional circumstances and where the appellant had personally done all she could to bring the appeal within the prescribed time limit. Therefore the scope for departure from the time limit was extremely narrow. The court in *Adesina* applied the decision of the UK Supreme Court in *Pomiechowski*.

The Sheriff Appeal Court rules and the right to appeal

7. The submissions advanced by the *amicus* are clear, persuasive and in our opinion correct. Mr McDonald who appeared for the defender and respondent in the first appeal agreed with Mr Walker's submission that the court had a discretion to consider late appeals in the exercise of its dispensing power. Neither Mr Sweeney nor Mr Hamilton had any submission to make.
8. The Sheriff Appeal Court is established by virtue of the provisions of the Courts Reform (Scotland) Act 2014 ("the 2014 Act"). Sections 71, 82 and 110 make provision for cases that must be appealed to this court. The 2014 Act, however, makes no provision for the time limit within which an appeal must be made. The time limit for bringing appeals to the Sheriff Appeal Court is set by the Sheriff Appeal Court Rules ("the Rules") made by Act of Sederunt (Sheriff Appeal Court Rules) 2015 (SSI 2015 No 356). The authority for making these rules may be found in section 104 of the 2014 Act. The time limit for appealing is "*within 28 days after the date on which the decision appealed against was given*" and may be found in Rule 6.3. Accordingly, the

appeals before this court today are not subject to any time limit imposed by statute or enactment beyond that contained in Rule 6.3.

9. It remains for us to consider the terms of Rule 6.4 which applies where the "*enactment*" under which the appeal is made specifies a period for lodging an appeal. We are in agreement with the submissions made by the *amicus curiae* that Rule 6.4 only applies where an appeal is being brought under a statutory provision (primary or secondary legislation) and then only when the legislation itself specifies the time limit applicable to the appeal and where it provides that an application to appeal out of time can be competently made to the court.
10. Rule 6.4 does not apply in the present cases as neither Rule 6.4(1)(a) or Rule 6.4(1)(b) is engaged. It follows that the appeals are subject to the 28 day time limit contained in Rule 6.3 – a time limit imposed by the rules themselves and not by any statutory provision.
11. Rule 2.1 is concerned with relief for failure to comply with rules. We agree that that rule is drafted in wide terms. Rule 2.1(1) refers to a failure to comply with a provision in these rules. It appears that Rule 2.1 can be invoked by a party to excuse any failure to comply with any of the rules. It therefore applies to the 28 day time limit for lodging appeals which is, in itself, a requirement of the court rules. Accordingly, we conclude that this court may consider whether to exercise its discretion under Rule 2.1 to relieve the appellants of their failure to lodge their appeals timeously within the 28 day time limit stipulated in Rule 6.3(1). That is because that time limit is one which is a requirement of the rules themselves and not a time limit imposed by the statute under which the appeals have been taken. This

reasoning and conclusion accords with the previous practice in appeals to the Sheriff Principal. (See *Graham (supra)* and *Graham Builders (supra)*). The Inner House in these cases decided that the Sheriff Principal was entitled to consider whether to exercise his discretion to allow the appeal late. This court should possess the same discretionary powers in late appeals. It follows, therefore, where there is a failure by a party to mark an appeal timeously in terms of the Sheriff Appeal Court Rules it will be open to this court to consider whether to exercise its discretion to excuse any failure to comply with the time limits. However, for the avoidance of doubt we accept that the dispensing power provided by Rule 2.1 cannot normally be used to excuse a failure to comply with a time limit imposed by a statute or another enactment whose time limit for bringing an appeal or taking any other steps must be complied with (as in *Mucelli*). This strict rule may be subject to exceptional circumstances as set out in *Pomiechowski (supra)* and *Adesina (supra)*.

APPLICATION OF RULE 2.1 TO THE PRESENT APPEALS

12. Mr Sweeney addressed us on the circumstances which led to his note of appeal being lodged late in this court. The decision which he seeks to appeal is the decision of the sheriff in Inverness on 10 February 2016 to grant decree against him. Mr Sweeney maintained that he received notification of the pursuer's motion to recall the sist and seek decree on the same day the motion was heard in court and possibly after the motion had been heard. He knew that the time limits for appeal had been increased to 28 days and on 9 March 2016 he presented his note of appeal to the sheriff clerk's office in Inverness. When he discovered that the appeal required to be lodged at the

offices of the Sheriff Appeal Court in Edinburgh he sent a fax of the note of appeal but could not lodge the note of appeal timeously. In these circumstances we are satisfied that it is appropriate to grant the motion to allow the appeal to be lodged late and on the explanation presented to us today the delay in lodging the appeal is excusable.

13. We heard a lengthy submission from Mr Hamilton and a response from Mr McDonald as to the procedural history of Mr Hamilton's reparation action against the defenders in respect of industrial dermatitis. Mr Hamilton failed to attend timeously for a proof on 15 February 2016. It was clear that Mr Hamilton was aware that his action had been dismissed when he turned up later that day. The decree of dismissal was extracted once the appeal days had passed. There was no suggestion that the extract decree had been improperly or incompetently issued and in these circumstances the general rule applies that there can be no appeal against an extracted interlocutor (*Alloa Brewery Company Limited v Parker* 1991 SCLR 70). Accordingly we are unable to exercise our discretion in favour of allowing this appeal late. In any event, we reiterate that any party to an action who wishes to appeal must either seek legal advice or if a party represents himself he requires to comply with the Rules of Court. The Rules of Court apply equally to parties who are legally represented and litigants who choose to represent themselves. In these circumstances we refuse Mr Hamilton's motion to allow the note of appeal to be lodged late.