SHERIFF APPEAL COURT

[2016] SAC (Civ) 10
SAC/2016/XO18/16

Sheriff Principal D L Murray
Sheriff Principal M Lewis
Sheriff P Arthurson Q.C.

OPINION OF THE COURT

Delivered by Sheriff Principal D L Murray

In Appeal by

MARK ROBERTSON

Pursuer/Appellant

Against

JENNIFER ANNE ROXBURGH or MUIR

Defender/Respondent

Appellant: K, Solicitor
Respondent: Muir, Lay Representative

30 August 2016

[1] This matter called for the hearing of an appeal on 30 August 2016, this date having been fixed at a procedural hearing on 24 May 2016. The appeal was against the decision of the sheriff to make no award of expenses. As a preliminary matter the court had to consider

a motion made at the bar, which had been informally intimated by email the preceding day. For convenience the parties are referred to as the pursuer and defender. This motion, on behalf of the pursuer, was to discharge the appeal hearing, and to fix another date for the hearing.

Background

[2] The action was concluded in October 2010, when it was agreed by way of joint minute that the pursuer would have conferred upon him parental responsibilities and rights and would be awarded contact with the child CR. In June 2015 the defender lodged a minute seeking to vary the terms of the decree by suspending the pursuer's contact and granting a specific issue order, ordering that the child CR be permitted to re-locate with the defender to Australia.

[3] The minute called before the sheriff on 15 July 2015 when the pursuer appeared in person. The pursuer advised he did not qualify for legal aid, and intended to represent himself as he was unable to obtain legal representation. The pursuer was appointed to lodge written answers and a proof was assigned for 6 August 2015. The pursuer in fact obtained legal representation although these solicitors withdrew from acting for him, and a peremptory diet was fixed for 5 August 2015. On 5 August 2015 the pursuer was represented by counsel. The sheriff records he was told that the pursuer very recently instructed new solicitors and they had instructed counsel. The sheriff also records that further time was required to prepare for the proof, and the pursuer was now seeking a residence order in relation to the child. The interlocutor records that the pursuer's opposed motion to discharge the diet of proof was granted, and a new diet of proof fixed for 16

October 2015. Thereafter the pursuer's new solicitors also withdrew from acting and a peremptory diet was fixed for 30 September 2015. On that date the pursuer appeared in person, without representation. He advised the sheriff he was no longer in employment, and was seeking legal aid in order to instruct a third firm of solicitors. His opposed motion to discharge the proof fixed for 16 October 2015 was granted, and a new proof was fixed for 22 January 2016 with a further day also assigned. When the case called on 22 January 2016 for proof the pursuer appeared and was represented by counsel, but the defender appeared without representation. The defender's former solicitors had intimated by letter the previous day that they were withdrawing from acting. The defender advised the sheriff she wished to drop the action. The sheriff in his note records:

> "The [defender] told me that she and her new husband had sold their new house in Scotland in anticipation of moving to Australia, but the capital which this produced meant she was no longer eligible for legal aid. She told me that she felt she could not take the risk of an award of expenses against her, and that with great reluctance she had decided not to proceed with the action. She advised me that this would bring to an end the plans of herself and her new husband to emigrate to Australia, but she told me she had thought very carefully about this."

The sheriff also records that counsel for the pursuer told him that his instructing solicitors had only been informed the day before, in the afternoon, that the defender's solicitors were withdrawing from acting. His instructing solicitors had tried to speak to the solicitors for the defender to clarify the situation but they could not get hold of them. He moved for the expenses of the action on the basis that the pursuer had been put to the expense of defending the minute and that it had been dropped at the very last minute. Counsel for the pursuer also advised the sheriff that the pursuer had been in receipt of a legal aid certificate from 12 November 2015. In relation to the question of expenses the defender told him she had been in receipt of legal aid but this had been withdrawn at 2 pm the day before. She

said the pursuer's position constantly changed and this had caused the action to be extended. She said she was not in a position to pay any legal expenses herself. The sheriff determined to make no award of expenses.

The Motion

[4] Ms K, who appeared, advised that she was not the principal agent acting for the pursuer. She explained her colleague Mr M was the principal agent in the case. He was unable to attend as he was presenting submissions following a proof in Glasgow Sheriff Court in respect of a relocation hearing in which evidence had recently concluded, this being the only date when the submissions could be made. Her motion was for the appeal hearing to be discharged in order that Mr M, who was fully acquainted with the case, could present the appeal at a later date to be fixed. She explained that she would be unable to argue the appeal were the motion to be refused. She submitted there would be no prejudice to the defender in the appeal being postponed.

[5] We invited her to explain why Mr M, when he agreed to the case before us being fixed for 30 August, had not intimated at the procedural hearing that there were issues with legal aid; how Mr M had found himself in Glasgow Sheriff Court as opposed to appearing in the Sheriff Appeal Court given that the hearing date had been fixed on 24 May, which Ms K understood to have been prior to the relocation proof; further, what the background was to legal aid not being available; and, finally, why authorities had not been provided. We adjourned to enable Ms K to seek further information from Mr M. She was unable to contact him and believed it probable he was in court. She was able to advise the outcome of the legal aid review, which was to refuse legal aid, had only been intimated on 23 August. The

review had been submitted following legal aid being refused on 6 June. The pursuer had then intimated he wished to fund the appeal on a private basis, but given the absence of funds Mr M had been unable to prepare. Intimation of the motion for discharge of the hearing had been made to the defender following the refusal of legal aid, but, through oversight, not to the court.

[6] Mr Muir, who appeared as an authorised lay representative for the defender, invited us to refuse the motion. He submitted that no good reason to justify the discharge had been provided. He submitted that the appeal was of no merit and advised us that the defender wished the matter to be finally concluded.

[7] Before intimating the decision on the motion the court asked Ms K to confirm whether she would be able to argue the appeal before us in the event that her motion was refused. She confirmed that she was not in a position to argue the appeal.

[8] The court refused the motion for discharge of the appeal hearing. We identified a number of failings on the part of Mr M, the agent for the appellant. At the procedural hearing on 24 May he failed to disclose that legal aid remained unresolved. This resulted in the appeal hearing being fixed for 30 August. The interlocutor of 24 May also appointed parties to lodge four copies of a joint bundle of authorities within 28 days of the order. He had failed to comply with this order. Ms K accepted that he had prioritised a submissions hearing in Glasgow Sheriff Court rather than this hearing. We consider he was wrong to do so and that the superior court business should have been given precedence. He also failed to comply with para. 46 of the Sheriff Appeal Court - Practice Note No 1 (Civil) of 2016 at any stage before the 29th of August, which provides:

> "Communication where appeal is not to proceed

> 46. Parties are reminded that those involved in litigation have an obligation to take reasonable care to avoid situations where court time would be wasted. Where a party or that party's legal representative considers that it is likely that the appeal may not proceed, the Clerk must be informed immediately."

Intimation of a motion to the court seeking discharge of the appeal hearing only having been made the day before the appeal hearing, we consider the failures on the part of Mr M amount to a significant dereliction of his professional responsibilities to this court.

[9] We did not accept the reasons given warranted the hearing being adjourned. We considered a discharge would indeed be prejudicial to the defender in postponing a final resolution of the case and requiring her to attend again at an adjourned hearing. We were therefore not satisfied it was in the interests of justice to adjourn the hearing. In doing so we took account of the assertion by Ms K that she would be unable to argue the appeal. We therefore anticipated that having refused the motion we would be invited on behalf of the defender to refuse the appeal for want of insistence.

[10] The motion having been refused, Ms K intimated she now wished to argue the appeal. She was invited by the court to reflect on that proposal, given her previously repeated assertion to the court that she could not. She confirmed she wished to argue the appeal.

The Sheriff's Decision on Expenses

[11] The key findings in the sheriff's decision which was subject to appeal were as follows:

> "[10] In deciding the question of expenses I had firmly in mind, of course, that the normal presumption that expenses follows success. However I also had regard to the fact that this is not a rigid rule, as set out in *Howitt v Alexander & Sons* 1948 SC 154 as follows:
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> > *"An award of expenses according to our law is a matter for the exercise in each case of judicial discretion, designed to achieve substantial justice and very rarely disturbed*

> *on appeal. I gravely doubt whether all the conditions upon which that discretion should be exercised have ever been, or ever will be, successfully imprisoned within a framework of rigid and unalterable rules, and I do not think that it would be desirable that they should be."*

It also seemed to me that certain observations made by Lord Gill (as he then was) in the Outer House in the divorce case of *Adams v Adams* (No.2) 1997 SLT 150 were of some relevance, namely:

> *"… the court's approach to expenses must be more flexible than that would be in a simple petitory action … In exercising its discretion as to expenses the court may take into account such matters as the reasonableness of the parties' claims, the extent to which they have cooperated in disclosing, and agreeing on the value of, their respective assets, the offers they have made to settle, the extent to which proof could have been avoided and, of course, the final outcome."*

Although Lord Gill's observations were made in the context of a divorce action, it seemed to me that they indicated that the traditional rule that expenses follow success might not always be applied in its full rigour in some family cases.

[11] In weighing up the whole circumstances of the case there were three factors in particular that I regarded as important.

[12] First, I took into account that as the pursuer would not agree to the child relocating to Australia, and as the defender could not remove the child without the authority of the court (see section 2(3) and (6) of the Children (Scotland) Act 1995), she had no alternative but to lodge a Minute seeking to vary the 2010 decree. There was therefore no question of the action, to call it that, being without merit, or being raised for less than proper reasons, and the defender would have proceeded to proof had the rug not been pulled from under her feet by the legal aid board at the very last minute.

[13] Secondly, I also thought it important that the procedural history of the case had become considerably lengthened by the pursuer's solicitors withdrawing from acting for him on two occasions. I was not given the reason for that, but the changes of solicitors meant that the case had called in court a number of times, and proofs discharged, with the result that the expenses of the action will have been considerably increased.

[14] Thirdly, I also thought it important that the pursuer had his own crave for a residence order in respect of the child, and that crave was pursued until the day of the proof. It is my understanding that the pursuer could have continued with his crave, which would have become a free standing crave, notwithstanding that the [defender's] crave had been dismissed. I was advised on the morning of the proof that the pursuer no longer wished to seek to pursue his crave for residence, and accordingly I dismissed it. I took the view that in these circumstances the pursuer's

> crave must have added to the complexity and expense of the action, and that is something for which the defender should not be liable. As the pursuer was no longer proceeding with his crave it also seemed to me there was a very real element of divided success.
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> [15] Finally, I also had in mind, indeed I would respectfully suggest that it is quite important, that had I found the defender liable in expenses I think it very likely that I would have found her liable as an assisted person, which may well have led to a modification of her liability under the legal aid legislation.
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> [16] It therefore seemed to me that the whole equities, including a large element of divided success, led to the conclusion that the just finding in expenses was that there should be no expenses due to or by either party, and that is the finding which I made.
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> [17] I would add that I do not recall being told anything about the defender failing to declare a change in her financial position, and that consideration did not form any part of my decision."

Submissions in the appeal

[12] Ms K recognised that the sheriff identified three factors as being important to his decision. The sheriff had, however, she submitted, taken inadequate account of the normal rule that expenses should follow success. She accepted that the defender was bound to lodge a minute to seek to vary the order. She submitted that following 2010 the pursuer was exercising contact on a regular basis and therefore the pursuer had no option but to defend the minute. She submitted the sheriff was misstating the position in paragraph 14 and in reality the pursuer was only seeking a residence order for the child as a consequence of the specific issue order. She noted that it was only on the morning of the proof on 22 January, when the defender indicated that she was not continuing with her action, that there ceased to be any purpose in the pursuer seeking a residence order. She submitted that, the specific issue order having been refused, there was no question but that the pursuer had

been successful. Accordingly, the sheriff was in error when he classified the outcome as involving divided success.

[13] Ms K submitted the sheriff had fallen into error in commenting on modification of expenses. She submitted that if legal aid were refused in terms of Regulation 32 the pursuer would have been treated as never having been in receipt of legal aid and modification would not have been applicable. She was unable to say whether the withdrawal of legal aid was as a result of a Regulation 32.1(b) situation or not. She simply speculated that as a result of the pursuer having sold property, and being in receipt of a capital sum, the pursuer was no longer eligible for legal aid.

[14] Mr Muir, for the defender, responded by referring to the history of the action. He pointed out that at the first discharge of a proof the pursuer was in full-time employment and decided to represent himself. It was the sheriff who suggested that he should explore legal aid and discharged the proof to enable him to seek representation. On the second occasion the pursuer had asked for the proof to be discharged as legal aid had not been approved, and legal aid was only granted after that proof was discharged. On the next occasion when the matter called for proof, he attended with a different counsel and the proof was discharged as counsel was not fully briefed and sought further time to prepare in order to argue the case. Mr Muir recounted that he and the defender were now separated and reported that they had sold the house very quickly after putting it on the market in August 2015. In December 2015 the defender received an enquiry from the Scottish Legal Aid Board (SLAB) seeking further financial information, to which they responded. The defender was advised by her solicitors the day before that they had received a telephone call from SLAB advising legal aid had been withdrawn and they would require £5,000.00 to

represent the defender at the proof the following day. The defender's financial circumstances were such she could not risk an award of expenses being made against her and she had accordingly decided to discontinue the action. In response Ms K indicated that when legal aid was granted, her firm's practice was to send a guidance note to the legally-aided client which made clear that they must advise SLAB of a change in financial circumstances. She pointed out that the contract is between the applicant and SLAB, and as a matter of best practice, she contended that contact on financial matters be directly between the client and SLAB.

Discussion and Decision

[15] The appeal seeks to challenge a decision of the sheriff on expenses. As is noted in McPhail 3rd edition par 18.117: while an appeal may be taken on a question of expenses only, appeals on expenses are severely discouraged (*Fraser and Sons* v *Bute Gift Co Ltd* (1958) Sh Ct Rep 154; *D Macdonald & Bros Ltd* v *Cosmos Decorators Ltd* 1969 SLT Sh Ct 9 and *Kennedy* v *Kennedy* 1991 SLT (Sh Ct) 39).

[16] This court would endorse those observations. An appeal is highly unlikely to be entertained unless there has been an obvious miscarriage of justice or the expenses have become markedly more valuable than the merits or indeed a question of principle is involved. We find that none of these factors are applicable in the instant case.

[17] It is important to stress also that in making an award of expenses a sheriff is making a discretionary decision. An appellate court will be slow to interfere with a discretionary decision unless it may be shown that the judge did not exercise his discretion at all, or that in exercising it he misdirected himself on the law or misunderstood or misused material facts

before him, or took into account an irrelevant consideration or failed to take account of some relevant consideration, or if his conclusion is such that although no erroneous assumption of law or fact can be identified he must have exercised his discretion wrongly and reached a conclusion which is plainly wrong.

[18] We have set out in full above the background to this case and the reasoning of the sheriff. The sheriff recognised the normal rule is that expenses follow success, but identified, in the light of observations by Lord Gill, as he was then, in *Adams* v *Adams (no 2)* 1997 SLT 150, that this might not always be applied with its full rigour in family actions.

[19] He set out the factors which he regarded as important (paras. 12 – 16) and made an observation (para. 17) on the grounds of appeal that he did not recall being advised of the defender failing to declare a change in her financial circumstances.

[20] We consider the sheriff was right to look at the procedural history of the case. It was surely relevant for him to have consideration of the number of times the proof had been discharged and indeed at whose instance those requests were made.

[21] Further, we do not consider that it may be said that the sheriff attached undue weight to the appellant's crave for a residence order. We view this simply as one of the three key factors which the sheriff noted in weighing up his decision. There is nothing to suggest it was given undue weight. The reference by the sheriff to its being an important matter is not in our view a proper basis to suggest the sheriff has fallen into error. It was a factor he was entitled to give consideration to. Likewise, we accept that he was entitled to find that, the action having been dismissed with neither parties' craves having been upheld, this was a case resulting in divided success.

[22] We have considered the terms of para. 15 of the sheriff's note which refers to modification of the expenses of a legally aided person. The sheriff's note makes no reference to it having been suggested to him that regulation 32 was applicable. Neither have we been provided with confirmation of whether legal aid was withdrawn by the application of regulation 32. We do not accept that the sheriff's tentative view that there might have been a modification of expenses, which in any event he did not identify as a key component in his reasoning, results in his having exercised his discretion in a wrong manner.

[23] We accept the sheriff, in identifying three important reasons which he took into account in making no award of expenses, reached a view which took account of the key factors which he was required to take into account. The conclusion he reached in weighing up these factors clearly fell within his discretion and the appeal falls to be refused as one wholly lacking in merit.

Further Observations

[24] We consider Ms K's action in proceeding to present the appeal, having argued the motion for discharge on the basis that she was unable to so, to be a stark and concerning breach of her duties and professional responsibilities. We shall bring this to the attention of the Scottish Legal Complaints Commission. There being no motion by the defender for expenses we made no award. We might well, however, have been sympathetic to an award being made personally against the pursuer's agents as a result of the cavalier way in which the appeal was progressed.