SHERIFF APPEAL COURT

[2025] SAC (Civ) 45
HAM-A512-24

Sheriff Principal A Y Anwar KC
Appeal Sheriff D O'Carroll
Appeal Sheriff J F Kerr

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL AISHA Y ANWAR KC

in the appeal in the cause

EILEEN MARIE McARTHUR

Pursuer and Appellant

against

EUAN ROBERT McARTHUR

First Defender and First Respondent

and

CATENA TRUSTEES LIMITED

Second Defender and Second Respondent

11 December 2025

Introduction

[1] On 26 February 2025, following the appellant's (Mrs McArthur's) failure to lodge a record, the sheriff granted decree by default. That decision was appealed. On 26 August 2025, this court refused the appeal.

[2] Both respondents sought the expenses of the appeal on a solicitor and client, client paying basis to be met personally by the solicitor for the appellant, Mr Johnstone. The motion proceeded by way of written submissions.

Background

[3] The background to these proceedings and the reasons for our decision are set out in our opinion (*McArthur* v *McArthur & Catena Trustees Ltd* [2025] SAC (Civ) 31). Put briefly, between 10 February 2015 and 9 August 2019, the second respondent loaned to Mr and Mrs McArthur the sum of £80,500 by way of a number of promissory notes. In March 2021, the parties agreed that the sums would be secured by a standard security over the McArthurs' home, over which Mr and Mrs McArthur had granted a number of prior ranking standard securities. In 2021, the second respondent settled the McArthurs' debts to the prior ranking security holders by lending to the McArthurs the further sum of £175,874.44. That sum was secured by a number of promissory notes. Mr and Mrs McArthur's relationship broke down and divorce proceedings were commenced in Glasgow Sheriff Court in July 2022. The second respondent sought payment of the outstanding balance in full from both Mr and Mrs McArthur on 23 November 2023. Payment not having been made, the second respondent commenced proceedings in the Court of Session for recovery of the sum of £175,874.44. Mrs McArthur entered process to defend that action; Mr McArthur elected not to do so. Meanwhile, in the divorce proceedings, Mrs McArthur's solicitor sought to sist the proceedings to allow a separate action to be raised for reduction of the standard securities and promissory notes, as regards her obligations. That motion was refused on 28 November 2023.

[4] The appellant's solicitor, Mr Johnstone, drafted an initial writ seeking to reduce the standard securities and the promissory notes. On 21 March 2024, the sheriff refused to grant a warrant of citation, not being satisfied that the court had jurisdiction; the appellant had not provided an address for Mr McArthur.

[5] A further motion to sist the divorce proceedings was lodged on 18 January 2024, consideration of which was continued to 2 April 2024. On 2 April 2024, the appellant advised the court that sanction had been obtained from the Scottish Legal Aid Board to raise proceedings to reduce the standard securities and promissory notes including sanction for the employment of a handwriting expert and the instruction of junior counsel. The sheriff granted the motion to sist.

[6] It took a further 6 months for the present proceedings to be raised. These proceedings purport to seek reduction of a standard security and promissory notes. Warrant to cite was granted on 4 October 2024. The appellant failed to lodge a certified copy of the record in terms of OCR 9.11(2) 2 days prior to the options hearing. At the options hearing on 26 February 2025, the respondents sought decree by default. The appellant's solicitor was unaware that no record had been lodged and could provide no reason for the failure. He had not adjusted the appellant's pleadings nor responded to the note of basis of preliminary pleas lodged by both respondents. The sheriff was aware that the divorce proceedings and the proceedings in the Court of Session had been sisted to await the outcome of these proceedings. He was not persuaded that it was in the interest of justice to grant relief from the failure to comply with the court rules and granted decree by default. The appellant appealed.

The Sherif Appeal Court decision

[7] On 26 August 2025, the Sheriff Appeal Court ("SAC") refused the appeal. The SAC noted the lack of explanation for the appellant's default, the appellant's dilatory approach in raising the present proceedings and the consequential effect on two pending actions which had been sisted meantime. It noted that the appellant's pleadings were confused, skeletal and barely intelligible. The craves, which failed to set out the details of the standard security and the promissory notes which the appellant sought to have reduced, were incapable of being granted. It noted that the appellant both asserted that she was coerced into signing documents and that she signed them without legal advice and, concurrently, that she did not sign the documents and that her signature was forged. No specification was provided in relation to the "documents". The SAC described the appellant's case as frivolous and noted that it was inevitable, there having been no adjustments to the appellant's pleadings and no suggestion that they would be amended, that the action would have been dismissed at a diet of debate. It noted the prejudice to the respondents in the delay and expense occasioned and the ability of the appellant to re-raise proceedings if she so wished in the event the appeal was refused. The SAC was not persuaded that the sheriff had erred in the exercise of his discretion nor that it was in the interests of justice for the SAC to exercise its own discretion to recall the decree of dismissal.

[8] Parties were ordered to lodge written submissions on the issue of the expenses of this appeal.

Submissions for the first respondent

[9] The first respondent noted that an award of expenses had already been made against Mr Johnstone personally on a solicitor and client, client paying basis in respect of a failure to lodge an appendix to the appeal print timeously.

[10] The appeal process was littered with failures on the part of the appellant's agent to lodge the correct paperwork, in the correct format, which resulted in numerous appeal prints and appendices being lodged on: 13 May; 15 May; 8 June; 10 June; 1 July; and 2 July 2025. The authorities were lodged on four occasions; the first bundle of authorities had been lodged in an incomprehensible format. Each time documents were lodged, they required to be considered and responded to, causing additional work. Originally three grounds of appeal were advanced. The second ground was no longer insisted upon when the appellant's note of argument was lodged. The first ground was not insisted upon on the morning of the appeal. The respondents had required to prepare for all grounds of appeal. The appellant's agent had also wrongly advised counsel that a record had indeed been lodged but in another process.

[11] It was clear that the action would never have survived debate. The appellant could simply have re-raised the action after decree by default had been granted. The appellant's agent had caused unnecessary delay by pursuing an appeal. Expenses ought to be awarded against the appellant's agent following the decisions in *Blyth* v *Watson* 1987 SLT 616; *McKie* v *Scottish Ministers* 2006 SC 528 and *J T Forsyth Greenpark Garage Ltd* v *Angus Council*, 2023 GWD 40-329.

Submissions for second respondent

[12] It was submitted that the appellant was legally aided and was believed to be impecunious. Any award of expenses against the appellant would likely be modified to nil. The initial conduct resulting in the dismissal of the action arose from a clear failure on the part of the appellant's agent. The appellant could simply have re-raised proceedings but chose to proceed by way of an appeal. The appellant had offered no submission to the court which could have met the test relative to the overturning of a discretionary decision to grant decree by default. The appeal was almost certainly doomed to fail. The SAC had described the action as "frivolous" having regard to the appellant's pleadings. It was bound to have been dismissed at debate. It can be assumed that the appellant's agent had advised the appellant to pursue an appeal. He should not be permitted to escape the consequence of doing so where expenses had been generated by his own fault (*Bremner* v *Bremner* 1998 SLT 844 at p 846).

[13] It was accepted that it was not possible to make an award of expenses against counsel personally (*Reid* v *Edinburgh Acoustics Ltd (No 2)* 1995 SLT 982). While solicitors can rely upon counsel in complex or specialist matters, they retain ultimate responsibility for compliance with procedural rules in straightforward cases (*Reid* per Lord McLean at p 984). This appeal involved routine procedural obligations with clear deadlines. There were no complexities. The appellant's agent required to exercise independent judgment. His failure to do so caused unnecessary expense. The SAC was advised by counsel that advice had been tendered in relation to the re-raising of the action. Counsel appeared to distance himself from the course of action adopted, namely the pursuit of the appeal. The responsibility for that rests with the appellant's agent.

[14] The conduct of the appeal had been undertaken incompetently and unreasonably. Awarding expenses on a solicitor client, client paying basis was appropriate. The submissions lodged by the appellant in opposition to the present motion sought to challenge the merits of the court's decision to refuse the appeal rather than focus on the question of expenses. They again demonstrate an inherent lack of understanding in relation to the rules of court.

Submissions for the appellant

[15] In his written submissions for the appellant, Mr Johnstone stated that all of the facts were not properly put before the SAC when it refused the appeal and had those facts been available, it would not have refused the appeal. He then set out a critique of the SAC's decision to refuse the appeal. He described the SAC's decision as being "unsound" and invited the court to reconsider its previous decision.

[16] He submitted that counsel acted without instruction at the hearing when he intimated that the first and second grounds of appeal were not insisted upon. Counsel also incorrectly advised the court, when providing an explanation of the failure to timeously lodge a record, that "the wrong record had been lodged at the wrong court." In a brief submission directed at the second respondent's motion, Mr Johnstone submitted that his failure to lodge a record timeously was an isolated incident and that a finding of expenses against him personally would set a "dangerous precedent". He submitted that:

> "The motion for expenses against myself [sic] personally is as stated personal for my efforts to obtain justice for Mrs McArthur. It would be inherently wrong as in the Law of Scotland that a party who has committed a nefarious act would benefit from his own deeds"

and further that:

> "Any claim for expenses in my view should be decided at the Proof Hearing of a particular case… The motion for expenses against me is a personal one and should not be granted as I act for the Pursuer and Appellant under her Legal Aid Certificate and number".

Decision

[17] The usual principle is that the cost of litigation should fall upon the party who has caused it; the successful party is entitled to the full expenses of process as taxed. An award of expenses is a matter of judicial discretion. The default scale of taxation is as between party and party. These general rules are subject to a number of exceptions.

[18] It has long been established that, in exceptional circumstances, a solicitor may be found personally liable for the expenses which have been occasioned by the solicitor's own fault (*McKechnie* v *Halliday* (1856) 18 D 659).

[19] The foundation for the rule that can expose a solicitor to an award of expenses was explained by the Extra Division in *Bremner* (above) in the following terms (Lord Caplan delivering the opinion of the court, at p 846):

> "… a person employed to conduct a litigation because of supposed specialist expertise should in appropriate circumstances be open to a finding by the court to bear any expenses clearly generated by his own fault and for which the client cannot be said to shoulder to any of the blame. In other words a solicitor should not be able to load material expense on to a client by culpable actings and then escape all immediate consequence."

[20] As explained by Lord Atkin in *Myers* v *Elman* [1940] AC 282 at p 302, a professional qualified solicitor is under a duty to conduct litigation with due propriety. A solicitor who unreasonably initiates or continues with an action where it has no or substantially no chance of success may be guilty of an abuse of process and found personally liable for the expenses

of the opposing party (*Stewart* v *Stewart* 1984 SLT (Sh Ct) 58 per Sheriff Ireland QC, with whom Lord MacLean agreed in *Reid* (above) at p 984).

[21] That the proceedings are funded by legal aid does not shield a solicitor from liability. In *Blyth* (above), an action was raised for damages arising from an accident on behalf of an individual who had already accepted payment, through his solicitor, in settlement of his claim. The action had been raised with the benefit of legal aid. While acknowledging that an award of expenses against a solicitor personally may be made only in exceptional circumstances, Lord Morison considered that if solicitors failed to act with due regard to their responsibilities to the court and to the legal aid fund, such exceptional circumstances may be made out. He explained (at p 617):

> "I do not consider that the grant of legal aid absolves solicitors from their duty to the court to refrain from instructing the raising of an action which they know to be unfounded, nor from their duty to see that the legal aid fund is not unnecessarily diminished. Apart from other considerations, disregard of these duties may very well lead, as it has done in the present case, to expense being incurred by the opposing party which he is unable to recover … fairness demands that [the solicitors] should take personal responsibility for the expense incurred by the defender as a result of the misguided way in which they have proceeded."

[22] As regards the scale of taxation on the solicitor and client scale, the law is well-settled as Lord Hodge explained in *McKie* (above) at para [3]:

> "… where one of the parties has conducted the litigation incompetently or unreasonably, and thereby caused the other party unnecessary expense, the court can impose, as a sanction against such conduct, an award of expenses on the solicitor and client scale … [In] its consideration of the reasonableness of a party's conduct of an action, the court can take into account all relevant circumstances … [including] the party's behaviour before the action commenced, the adequacy of a party's preparation for the action, the strengths or otherwise of a party's position on the substantive merits of the action …".

These comments are equally applicable to the consideration of expenses in an appeal process.

[23] Having regard to these principles, we were invited to exercise our discretion and award the expenses of the appeal process against Mr Johnstone personally, on a solicitor client, client paying basis. There is no question that the expenses of the appeal ought to be granted in favour of the respondents who have successfully opposed the appeal. As the appellant is in receipt of legal aid, ordinarily those expenses would be modified to nil. The respondents invite this court to consider whether exceptional circumstances exist to find Mr Johnstone personally liable for the expenses and if so, on what scale those expenses ought to be awarded.

[24] As we explained when we refused the appeal, the pleadings, which had been drafted by Mr Johnstone were confused, skeletal and barely intelligible. The craves, which failed to specify the details of the standard security and promissory notes, were incapable of being granted. The averments advanced two contradictory positions, namely that the appellant had been coerced into signing the documents and did so without legal advice on the one hand, and that she did not sign the documents and her signature had been forged, on the other. In refusing the appeal, we concluded that the sheriff had correctly had regard to the lack of an explanation for the failure to lodge a record timeously, the dilatory approach to raising proceedings which had an impact upon proceedings currently sisted in the Court of Session and the Sheriff Court, and the absence of averments which might constitute a proper claim.

[25] Against that background, one might have expected consideration to be given to re-raising proceedings with properly formed craves and relevant supporting averments. Counsel explained advice had been tendered in that regard but that those instructing him had instead insisted on pursuing the appeal.

[26] The appeal had very poor prospects of success. That was recognised by counsel who intimated that the first two grounds of appeal were no longer insisted upon; his submissions in relation to the third ground, namely that it had not been in the interests of justice to grant decree by default, were notably brief. Mr Johnstone submitted that counsel had acted without instructions in not insisting on the first two grounds of appeal. That is a serious allegation and one to which we are unable to attach any weight. The concession that the second ground of appeal was not arguable was made in a note of argument drafted by counsel but lodged by Mr Johnstone 1 month prior to the appeal hearing. The concession that the first ground was not insisted upon was made on the morning of the hearing, while Mr Johnstone was in attendance. Accordingly, Mr Johnstone was aware, or ought to have been aware, of the position adopted by counsel. Were that position contrary to his instructions, he could and ought to have made that clear at the time. He did not do so.

[27] Nor can the court attach any weight to Mr Johnstone's submission that counsel had incorrectly advised the court during the appeal, when providing an explanation of the failure to timeously lodge a record, that "the wrong record had been lodged at the wrong court" by those instructing him. Again, this is a serious allegation. We regard it as highly improbable that counsel would make such a statement without a basis for doing so. We note that on behalf of the first respondent, it was submitted that Mr Johnstone made the same submission, namely that the wrong record had been lodged at the wrong court, when he appeared at Glasgow Sheriff Court in July 2025 to explain the default; the present counsel was not involved in that hearing. We infer that counsel's submission reflected his instructions and was consistent with Mr Johnstone's previous submissions.

[28] Turning to the conduct of the appeal, the court is entitled to expect solicitors appearing before it to have an understanding of the procedural rules, the rules of pleading

and the duties they owe to the court. That is an essential aspect of the "specialist expertise" clients are entitled to expect from those employed to conduct litigation on their behalf; those representing an opposing party similarly are entitled to assume that a professional qualified solicitor will conduct proceedings with due regard to the procedural rules, the duties they owe to the court and with due propriety.

[29] Regrettably, Mr Johnstone did not do so. He did not equip himself with the necessary knowledge to conduct the appeal. It was evident that he was unfamiliar with the terms of Chapter 7 of the Act of Sederunt (Sheriff Appeal Court Rules) 2021 and the Sheriff Appeal Court (Civil) Practice Note No 1 of 2021. Numerous inventories of production were lodged which have no place in appellate procedure. Mr Johnstone appeared ignorant of the duties upon him as solicitor for the appellant, to lodge an appendix to the appeal print and to discuss its contents with the other parties (SAC Rules 7.5(1) and (4)). Appeal prints and appendices containing errors were lodged on: 13 and 14 May; 8 June; 10 June; 26 June; and 1 July 2025. This caused additional unnecessary work for those acting on behalf of the first and second respondents and involved the clerks directing Mr Johnstone to the court rules repeatedly. He lodged, as separate items of process, copies of prior decisions upon which he relied. When advised that a joint list of authorities was necessary, Mr Johnstone lodged selected extracts from decisions upon which he sought to rely with his commentary or analysis of each. Again, he required to be referred to the court rules and reminded of the requirement to consult with the other parties before lodging the joint list of authorities (SAC Rule 7.10). The purported joint list of authorities required to be returned to him repeatedly. Documents were lodged late without accompanying motions to have them received late. Finally, in his submissions in opposition to the first and second respondents' motions for expenses, he described this court's decision on the substantive appeal as "unsound" and

invited us to reconsider it. It is a well-established principle that a court cannot review or recall its own interlocutor (*Campbell* v *James Walker Insulation Ltd* 1988 SLT 263 at pp 264 - 265). Mr Johnstone sought the expenses of the appeal, notwithstanding the outcome favoured the respondents. His submissions on each of these matters were misguided and without foundation.

[30] We acknowledge that the appeal cannot be said to have been unstatable, however poor its prospects of success and notwithstanding the obvious alternative course of action available to the appellant; the re-raising of the action. This is not a case where the actions of the solicitor amounted to an abuse of process in the sense that the appeal should never have been mounted, albeit we have very considerable doubts as to the wisdom and professional judgement of pursuing this appeal rather than re-raising the action. We also acknowledge that where counsel has been instructed, a solicitor is generally entitled to rely upon the advice of counsel, albeit the instruction of counsel "does not operate so as to give a solicitor an immunity in every such case" (*Davy-Chiesman* v *Davy-Chiesman* [1984] Fam 48 per May LJ at p 64). We are, however, satisfied that the appeal proceedings have been conducted unreasonably and in respect of the examples referred to above, incompetently. Accordingly, as a sanction against such conduct, we find that the scale of expenses of the appeal process, insofar as not already dealt with, shall be on the solicitor and client, client paying basis.

[31] Turning to the separate question of on whom liability to pay the taxed expenses falls, we are very conscious that it is only in exceptional circumstances a solicitor may be found personally liable for expenses. Furthermore, even if such circumstances exist, the award should be limited to those expenses clearly generated by the solicitor's own fault and for which the client cannot be said to shoulder any blame. In this appeal, there is no suggestion that the client herself bears any responsibility for the manner in which the appeal has been

conducted or for the poor nature of the pleadings before the sheriff. This is an exceptional case in which this exceptional sanction should be applied. Fairness demands that Mr Johnstone should bear personal responsibility for the misguided manner in which he has sought to conduct this appeal and the additional expenses and delay caused thereby. The expenses clearly resulting from fault on Mr Johnstone's part are: (a) those described in para [29] of this decision; (b) his failure to address and acknowledge the obvious shortcomings in the pleadings drafted by him; (c) his opposition to both respondents' motions for expenses, in terms of which he invited the court to review its own interlocutor, continued to insist that the appeal was well-founded and sought to implicate counsel; and (d) his unfounded and inexplicable motion inviting the court to grant the expenses of the appeal in favour of the appellant.

[32] Accordingly, we find Mr Johnstone personally liable to each of the respondents as regards the taxed expenses; however, we consider modification appropriate. To make Mr Johnstone liable in full for both respondents' accounts of expenses on the solicitor client, client paying scale, would, in the circumstances of this appeal, be excessive. We will therefore modify the level of expenses recoverable and allow each respondent to recover a figure of 25% of the taxed expenses, insofar as not already dealt with.

[33] Finally, in light of the nature of our decision, we have instructed the clerk of court to send a copy of this opinion to the Chief Executive of the Scottish Legal Aid Board.