**EXTRA DIVISION, INNER HOUSE, COURT OF SESSION**

**[2014] CSIH 107**
XA34/14

Lady Smith
Lord Malcolm
Sheriff Principal Stephen

OPINION OF THE COURT

delivered by LADY SMITH

in the CAUSE

MACLAY MURRAY AND SPENS LLP

Pursuers and Respondents:

against

ANDREW ORR

Defender and Appellant;

**Act: McConnell; Maclay Murray and Spens LLP**
**Alt: Party**

12 December 2014

**Introduction**

[1] The pursuers (MMS) are a firm of solicitors who provided legal services to the appellant. They have sued him for fees and outlays which they claim are outstanding and due. It is not disputed that they carried out legal work for him in responding to a petition raised in this court for orders in terms of sec 996 of the Companies Act 2006 in relation to two family companies.
[2] The appellant counterclaimed for £17,000 and sought to set off that amount against any sums he might be due to pay MMS. They sought summary decree, including for dismissal of the counterclaim. It was conceded that, if the counterclaim were to be dismissed, MMS would be entitled to be paid £5255 by the defender.
[3] Paragraph 17.2 of the Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 ("OCR"), as substituted by an amendment which came into effect on 1 August 2012, applied. Its terms, insofar as relevant, provide:

"**Applications for summary decree**

**17.2**(1) Subject to paragraphs (2) to (4), a party to an action may, at any time after defences have been lodged, apply by motion for summary decree …..

(2) An application may only be made on the grounds that -

(a) an opposing party's case (or any part of it) has no real prospect of success; and

(b) there exists no other compelling reason why summary decree should not be granted at that stage…….

…….

(4) The sheriff may –

(a) grant the motion in whole or in part, if satisfied that the conditions in sub-paragraph (2) are met."

[4] The appellant's solicitor accepted, before the sheriff, that the rule applied to counterclaims. Further, it was not suggested that there was a compelling reason why summary decree should not be granted. The questions for the sheriff, therefore, were (a) whether he was satisfied that the defence to the principal action or the counterclaim had no real prospect of success and (b) whether, in that event, he should exercise his discretion and grant the motion for summary decree in whole or in part?

[5] In the event, the sheriff dismissed the counterclaim – on a motion by MMS, for summary decree. The sheriff was satisfied that it had no real prospect of success and that he should grant the motion. He also granted summary decree for £5255. He did not, however, grant summary decree for the remainder of the sums sued for; he decided that the appellant was entitled to put the pursuers to proof in relation to it since there was a dispute about receipt and construction of a letter of engagement and about what, in the circumstances, would have been a reasonable fee.

**The Counterclaim**

[6] The basis of the counterclaim was that MMS were said to have been in material breach of contract; the breach alleged was that their chief executive had breached their duty to maintain client confidentiality. It was said that the appellant therefore considered it necessary to instruct new solicitors , which he did , thereby incurring fees of £12,000 and considerable inconvenience , bringing the total losses caused by the breach to £17,000.

[7] Central to that contention was an issue of fact, namely whether or not the chief executive of MMS had, at a meeting of the Scottish Financial Services Board on 22 November 2011, said to the First Minister, Alex Salmond MSP, that a family dispute in which the appellant was involved had been sorted out. That dispute had resulted in litigation. We understand that litigation to be the company petition referred to in paragraph 1 above. It was said to have been holding up a significant new town development on land at Blindwells which was owned by the family company, in circumstances where, it was said, the First Minister was keen that the project go ahead. It is averred that MMS' chief executive:

"….attended a meeting of the Financial Services Advisory Board chaired by John Swinney, the then Cabinet Secretary for Finance and Sustainable Growth, on or about 22 November

2011 at St Andrews House, Edinburgh. The meeting was joined, towards its conclusion, by the first Minister, Mr Alex Salmond. When the meeting had ended a number of the participants remained and continued to discuss the matters which had arisen during the meeting. In that informal conversation (the chief executive) advised Mr Salmond and others that the Scottish Government could assume that the development of a new town would now proceed as the defender and his siblings had resolved their dispute with the petitioners. In fact no such agreement had been reached ……".

[8] It is also averred that neither the appellant nor his siblings had advised MMS that any such agreement had been reached and that his and his siblings' intentions in relation to the land in question were confidential.

[9] The appellant's point is that the dispute was not resolved at all. Assuming that to be correct, it is difficult to see that telling a third party that the family dispute had been resolved would be a breach of confidentiality; it might properly be regarded as the communication of erroneous information but it would not amount to disclosing information held in confidence. What, on the appellant's averments, was held in confidence was the fact that no agreement to settle the family litigation had in fact been reached; it is not alleged that that confidence was breached. That was what the sheriff principal concluded; we consider that he was entitled to do so.

**Affidavits relied on**

[10] Two affidavits were relied on by the appellant. One was an affidavit from his wife. She states that she is employed by the Scottish National Party as a political adviser, that she was in attendance at a meeting of the Financial Services Advisory Board on 22 November 2011 at which important housing projects were on the agenda including one at Blindwells, and that:

" 4. The First Minister attended the FiSAB meeting at the end as he had been elsewhere. He was present at the post meeting discussion when the question of the delay at Blindwells was raised. (The pursuer's chief executive) was also present. (He) said with confidence and assurance to the First Minister that the problem was sorted and the project would go ahead.

5. The First Minister said that he had heard that before, and asked what was holding the project up. (The pursuer's chief executive) said that two members of Lindsays solicitors were sitting on the board of directors of the company which owned the land and the matter was in hand."

The other affidavit, from the appellant, shows that he was not present at the meeting; he is not, accordingly, in a position to give an account of what was said.

**Other documents**

[11] No other documents were produced to support the appellant's case, notwithstanding the use of a relevant specification of documents procedure.

[12] There were some other documents which were relied on by the sheriff and the sheriff principal as supporting the conclusion that the counterclaim had no real prospect of success. There was an affidavit from the pursuers' chief executive and a letter from the First Minister's private

secretary. The sheriff read the letter from the First Minister's private secretary as being an unequivocal statement on his behalf that he did not attend any part of the meeting referred to and did not speak to MMS' chief executive at any time about the development proposals to which the defender refers ; the statement was supported by the fact that the First Minister was not recorded in the minutes as being present and that he was at his home in the north east of Scotland that day as vouched by his official diary and by a record of him having telephoned in from there, to a meeting of the Scottish Cabinet. We accept that that is a fair summary of what can be taken from the letter.

[13] The affidavit from MMS' chief executive stated that not only did he not make the disclosure alleged but he did not speak with the First Minister, the First Minister was not at the meeting and he did not speak with him at all about the development.

**The decisions in the courts below**

[14] Both the sheriff and the sheriff principal had regard to all of the above material and concluded that it showed that there was no real prospect of the defender succeeding in the counterclaim. The sheriff decided to exercise his discretion and dismiss it. The sheriff principal concluded that, in all the circumstances, he was entitled to do so.

**Discussion and Decision**

[15] We cannot fault either the sheriff's decision to dismiss the counterclaim or the sheriff principal's decision to refuse the appeal.

[16] On a motion for summary decree, parties will, inevitably, have conflicting views about the prospects of the defender's case. The defender will, typically, believe them to be sound. The pursuer will, typically, say that when all the available material is considered, it is clear that the defender's belief is, however genuine, misplaced and that the only conclusion to be drawn is that there are no real prospects of his case succeeding.

[17] What the court has to do is apply the terms of the rule, asking whether, in all the circumstances, the pursuer is correct. That is a task which involves the exercise of judgment. Neither the appellant's averments nor any documents relied on require to be taken at face value – as was accepted by the appellant's solicitor at the hearings before the sheriff and sheriff principal and as is also accepted in the note of argument in support of his appeal (see: paragraph 5 of his note of argument). The court has to analyse all the material and assess what, fairly, can be taken from it.

[18] For instance, in the present case, the appellant relied on his wife's affidavit as demonstrating that he would be able to provide evidential support for his averments about breach of confidentiality by MMS' chief executive. However, whilst she states that she was present at the meeting referred to and that the First Minister arrived towards the end, her report of the conversation between him and the chief executive does not support the critical averment that the breach of confidentiality consisted of the chief executive saying that the appellant and his siblings had settled their litigation. According to her affidavit, what she would say in evidence is something rather different, namely that the First Minister was told, in relation to the delay of the Blindwells development, that "the problem" was sorted out and, regarding what had been holding it up, there were two members of Lindsays solicitors sitting on the board of the company which

owned the land and "the matter was in hand". On that account, disclosure of anything relating to the defender's family litigation did not feature.

[19] This fundamental difficulty is not resolved in any document that was placed before the sheriff or the sheriff principal. The appellant's solicitor sought to address it before the sheriff, by saying that there would be evidence that everyone knew that the problem being referred to was the family litigation, but he did not explain or identify or vouch what or who would be the source of that evidence. Before the sheriff principal, he sought to address it by asserting that the problem being referred to was the family dispute. The sheriff regarded the difficulty as being of particular significance and the sheriff principal found that he was entitled to do so. On this matter, the appellant's argument in this appeal is to say that what his wife reports the chief executive as having said created an inference that the dispute had been resolved. He also says that the critical averments about breach of confidentiality are in fact supported by his wife's affidavit and he invites this court to accept that it is likely that her evidence would be corroborated by other colleagues. That, however, misses the point in two respects. First, if such support exists, affidavits from those colleagues ought to have been placed before the sheriff; there were, however, none. Secondly, even if it were to be assumed that such support existed, it could not alter the fact that what was said by the appellant's wife did not support the breach of confidentiality averments. We do not accept that the affidavit provides any basis for drawing the inference referred to above.

[20] At the hearing before us, the appellant indicated that he would wish to try and obtain statements from MMS' chief executive and a person who worked for them with a view, it seemed to be, to obtaining support for his wife's account of events. He did not, however, point to anything which showed that these persons would either agree to give statements or that the chief executive would depart from his position as set out in his affidavit. More importantly, the task for this court, on appeal, is to decide whether the lower court erred in law in granting summary decree on the basis of the material before it, not to have a rehearing after the introduction of new material. To do so would undermine its appellate function.

[21] It is also important, when considering a motion for summary decree, that the sheriff recognises that the mere existence of a dispute of fact will not preclude the application of a rule such as OCR17.2. Similar terminology appears in paragraph 24 of the Civil Procedure Rules ("CPR") applicable in England and Wales. The sheriff principal adopted what was said about the nature of CPR 24 in the case of *ED & F Man Liquid Products Ltd* v *Patel & Anr* [2003] EWCA Civ 472, at paragraph 22. We consider that he was correct to do so. As Lord Justice Potter explained, the court does not have to accept, without analysis, everything said in the documents by, or on behalf of, the party whose case is being challenged as being without real prospects of success. Indeed, we consider that it would be failing in its duty to judge whether or not there are "real" prospects of success if it did so.

[22] A significant disputed fact was whether or not the First Minister was present at the meeting on 22 November 2011. A clear and detailed response to the specification of documents and follow up questions was provided by his principal private secretary in letters of 9 April and 18 June 2013, both of which were before the sheriff; the First Minister was not, it was said, present and that statement was supported by a clear explanation of how that had been confirmed. The only evidential material offered by the appellant in support of his case to the contrary is his wife's affidavit. That affidavit refers to other people being present at the time of the conversation in

which the disclosure is alleged to have been made; she refers to there being board members still in the meeting room at that time. The absence of any document indicating that any of those persons would give evidence and would say that the First Minister was present at some part of the meeting that day was regarded by the sheriff and sheriff principal as significant. We agree that they were entitled to do so. We also agree that when all these matters are taken together, the private secretary's letter could properly be given weight when judging the prospects of the counterclaim succeeding.

[23] The defender seeks, in his note of argument, to criticise the sheriff's analysis of the averments and of the defender's wife's affidavit as having failed to test or adequately test the authenticity of the counterclaim, under reference to *Frimokar (UK) Ltd* v *Mobile Technical Plant (International) Ltd* 1990 SLT 180, at the foot of p 181. In *Frimokar*, the rule of court under consideration was not the current OCR 17.2, but was a rule of this court which was in the same terms as was OCR 17.2 before it was amended. The issue was not whether or not the defence had any real prospect of success but was whether there was no defence disclosed in the defences, a somewhat higher test. However, the comments made by Lord Caplan in *Frimokar* that are relied on by the appellant – that "the court is concerned not only to test the relevancy of the defence but the authenticity of the defence" in the light of not only the pleadings but also any extraneous material relied on – could apply equally to the present case and, far from showing that the sheriff or sheriff principal fell into error, they support the approach adopted by them. Likewise, Lord Caplan's observations at p182 that a defender is not, at the stage of a motion for summary decree, to be granted indulgence to leave it to a later date to provide a different or better explanation of his position could be applied to the present case; the issue of whether or not there was a real prospect of the counterclaim succeeding had to be decided at the time of the motion on the basis of the material that had been placed before the sheriff.

[24] The appellant is also critical of comments made by the sheriff principal to the effect that he doubted whether, even if the alleged disclosure was made, it amounted to a material breach of contract. It is sufficient, for present purposes, to observe that those comments were *obiter.* Even if the sheriff principal was wrong to entertain that doubt, it would not show that he erred in concluding that the sheriff was entitled to dismiss the counterclaim as being without any real prospect of success.

[25] In all these circumstances , we are satisfied that the sheriff and the sheriff principal did not err in law; the sheriff was entitled , on the averments and the other material relied on, to conclude that this counterclaim had no real prospect of success and the sheriff principal did not err in his approach to the appeal before him. This appeal is, accordingly, refused.