



SHERIFF APPEAL COURT

**[2026] SAC (Civ) 63
AIR-A51-25**

Sheriff Principal Catherine Dowdalls KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL CATHERINE DOWDALLS KC

in the appeal in the cause

by

ASHTENNE CALEDONIA LIMITED

Pursuer and Respondent

against

THE BAKEHOUSE (SCOTLAND) LIMITED

Defender and Appellant

Pursuer and Respondent: Young, advocate

Defender and Appellant: White, advocate

02 October 2026

Introduction

[1] This is an appeal case against the decision of the sheriff on 5 March 2024 granting summary decree against the appellant for payment to the respondent of £27,112.83.

[2] The appellant submits that the sheriff failed to correctly apply the test for summary decree under and in terms of Ordinary Cause Rule 17.2(2) (“OCR 17.2(2)”) or that the sheriff conflated the appellant’s very poor conduct of the litigation with the lack of a substantial defence. The respondent argues that OCR 17.2(2) was applied correctly.

[3] The appeal proceeds under chapter 8 of the Sheriff Appeal Court Rules 2021. I heard oral submissions on 13 August 2026. In advance of that hearing, both parties had lodged detailed notes of argument. I am grateful to counsel for their helpful written and oral submissions.

Factual background

[4] The action was raised in 2025. Payment was sought by the respondent from the appellant in the sum of £27,112.83 in respect of estate management charges said to be due by the appellant as proprietor of certain properties. The action was defended and the record closed in June 2025. Extensive procedure then followed.

[5] On 8 January 2026 the appellant's solicitor confirmed that the action was defended on quantum only. The sheriff refused the respondent's motion for summary decree *in hoc statu* and found the appellant liable to the respondent for the expenses of hearings on 24 July and 21 August 2025 on the agent/client, client paying basis. He continued the case to allow parties the opportunity to discuss possible settlement, the appellant having recently obtained legal representation; continued the respondent's motion as to further procedure; and ordered parties to lodge written submissions on part of the motion for expenses which was yet to be determined. On 6 February, the appellant's solicitor queried numerous invoices issued to the appellant by the respondent and indicated that the issue between the parties was, essentially, about accounting. By interlocutor of that date, the sheriff refused to assign a diet of proof and continued the cause for 4 weeks to allow parties the opportunity to "enter into proactive meaningful discussions". The sheriff indicated that this was their final opportunity to progress matters and that "further delay would not be acceptable".

[6] The action called again on 5 March. At that hearing, the appellant's solicitor explained that disputed invoices had been identified and sought a continuation for further discussion. That motion was refused, but the sheriff allowed the parties time for discussion. When the case called later in the day, parties had not reached agreement. The respondent moved for summary decree in terms of OCR 17.2(2), together with the expenses of the proceedings. The motion for expenses was not opposed, but the appellant sought a further continuation. The sheriff then made more detailed enquiry as to the procedural history of the action since he had last presided over the calling of the case on 8 January. The respondent sought, and the sheriff granted, summary decree.

The applicable law

[7] Parties were agreed that the applicable law is as set out below.

[8] OCR 17.2 provides as follows:

- “(1) Subject to paragraphs (2) and (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.
- (3) The party enrolling the motion may request the sheriff –
 - (a) to grant decree in terms of all or any of the craves of the initial writ or counterclaim;...
- (4) The sheriff may –
 - (a) grant the motion in whole or in part, if satisfied that the conditions in subparagraph (2) are met,
 - (b) ordain any party, or a partner, director, officer or office-bearer of any party –
 - (i) to produce any relevant document or article; or
 - (ii) to lodge an affidavit in support of any assertion of fact made in the pleadings or at the hearing of the motion.”

[9] In *McAlinden v Bearsden and Milngavie District Council* 1986 SLT 191 the following observation was made:

“It (the summary decree motion) is not in my view intended to provide an opportunity on the motion roll for legal debate appropriate to the procedure roll.” (Lord MacDonald, unreported 26 March 1985, quoted in the Parliament House Book at D.1 145. 1).

[10] Reference was made to *Henderson v 3052775 Nova Scotia Limited* 2006 SC (HL) 85:

“The very description ‘summary’ decree indicates that the procedure is intended to be used where the matter can be determined in a summary fashion, without there being any need for a prolonged examination of matters of fact or law.” (Lord Roger of Earlsferry at para [14]).

[11] Parties agreed that the proper approach to motions for summary decree was set out in *Grier v Chief Constable Police Scotland* [2020] CSOH 33 as follows:

- “(a) the degree of satisfaction that is the tipping point for the court is less than certainty, but more than probability;
- (b) the court can take into account documents other than the pleadings;
- (c) while the court at the stage of the summary decree motion should not trespass on what is actually a matter for proof, it is in a quest to see if there is a genuine defence and not merely a relevant defence pled. Accordingly, a defender might state a defence, but if the facts appear to the contrary then the court can grant summary decree. Accordingly, the reverse of *Jamieson v Jamieson*, as it were, does not apply; and
- (d) summary decree is not limited to those cases where there is no defence stated at all or the stated defence is plainly irrelevant; the court is not barred from pronouncing decree simply because the defender makes unspecific assertions which, if established, would provide a defence where the defender does not offer to prove it.” (Lord Bannatyne at para [18]).

Sheriff’s note

[12] The sheriff explained the reasons for his decision in a brief note appended to the interlocutor of 5 March 2026. Having first set out the recent procedural history of the action, he explained that the action had not materially moved on since it had last called on 6 February 2026, and that nothing had happened since 8 January 2026, save receipt by the

appellant's solicitor of a handwritten note from the appellant identifying, without further explanation, which invoices were challenged.

[13] The sheriff noted the respondent's submissions relating to the court's entitlement, by reference to *Grier*, when faced with a motion for summary decree, to examine whether a genuine defence had been stated. He also noted the appellant's failure to seek to amend its pleadings to reflect any objections to the invoices, which were referred to by its solicitor, but not further explained. The sheriff was satisfied that the test in *Grier* was made out and that the appellant's objections to the invoices was a delaying tactic. On that basis, he determined that decree should be granted in favour of the respondent.

Appellant's submissions

[14] The appellant moved that the appeal be sustained, the interlocutor of 5 March 2026 be recalled and the cause remitted to the sheriff. Counsel submitted that the overarching question for this appeal was whether the sheriff was entitled to grant summary decree. That was a matter of law and the issue for this court is whether the sheriff erred in applying the test in OCR 17.2(2), his assessment of the facts and overall fairness of the decision in the exercise of his discretion. While the sheriff made reference to *Grier*, he did not address the task for the court in deciding a motion of summary decree which included considering whether there were any real prospects of the defence succeeding, which is a necessary element of the test in OCR 17.2. OCR 17.2(4) requires that the sheriff, having determined that the ground in paragraph (2)(a) is made out, also considers and explains why paragraph (2)(b) is satisfied. The sheriff's failure to mention the second limb of the test in paragraph (2) or explain how he applied that process amounted to a fundamental error.

[15] In any event, the sheriff erred in finding that there were no prospects of success. It was noted that, per *Grier (supra)* at para [18], the court is not barred from pronouncing decree without considering the facts and circumstances of the case. However, the sheriff gave no consideration to the underlying invoices, save one mentioned by the appellant's solicitor. It was for the respondent to establish what was due; the appellant was not bound to accept the charges applied without scrutiny. It was accepted that the appellant had confirmed the action was defended on quantum only, but the respondent has responsibility to show what work was reasonably done. Reliance was placed on Macphail, *Sheriff Court Practice* (4th edition), at para [9.30] for the proposition that it is not necessary, to entitle the appellant to challenge the basis for the charges levied against it, for the appellant to specify the nature and extent of the work undertaken.

[16] The sheriff inferred from the withdrawal of objection by the appellant to one invoice that all such objections were a delaying tactic; he was not entitled to do so in circumstances where there was discussion (at the hearing) of detailed instructions having been relayed to the respondent's solicitor the day before the hearing. Thus the sheriff placed insufficient emphasis on other information that might have been available.

[17] The sheriff was not entitled to infer from the absence of a minute of amendment by the appellant that the defence lacked substance. It was apparent from the record and the basis upon which the action had proceeded since 8 January that the action was defended on quantum and that the appellant took issue with the level of specification provided in the invoices. Such is apparent from the pleadings at answer 10 and the appellant's second plea-in-law, directed at lack of specification. In any event, the sheriff was entitled to consider whether the case might be improved by amendment or adjustment; it was not necessary for the appellant to produce draft pleadings in order for him to do so.

[18] The sequence of events at the hearing on 5 March raised a natural justice concern.

The appellant identified disputed invoices, which were sent to the respondent's solicitor on 4 March. The sheriff arranged for the case to call at 3.45pm to allow parties an opportunity for discussion. It was not suggested that the appellant was not afforded an opportunity to make submissions. The nature of the dispute was not apt for summary judgment. By reference to *Henderson (supra)* at para [14], the complexity of the dispute on quantum was not amenable to resolution in the timeframe allowed on a summary basis. In order to take a proper view on quantum, the appellant requires detail of the charges made by the respondent. It is not disputed that there is an underlying liability, but it is not possible to investigate that on the basis of the invoices produced. It was accepted by counsel that no such argument was advanced before the sheriff.

[19] Had the sheriff considered he did not have sufficient material or clarity as to the matters under discussion, he had the power in terms of OCR 17.2(4) to order production of required documents or affidavits; he failed to do so. Had a proof been fixed, there would have been discussion and agreement on some facts; otherwise, a debate could have been fixed. The granting of decree without any proper analysis by the sheriff of the issues was draconian. He ought to have satisfied himself that there was near certainty that a defence on quantum was bound to fail. It was not open to the sheriff to reach that conclusion in this case; the appellant was entitled to an opportunity to challenge the invoices, even if it was not able to identify specific deficiencies in the invoices.

[20] Further, the sheriff's reasons for his decision were not adequately explained and there was an absence of proper analysis of the question whether the work was carried out and payment due.

[21] Responding to the submissions on behalf of the respondent, the appellant emphasised the need for adequate reasons to be given by the sheriff. In the present case, adequate reasons were not provided for the conclusion that the appellant had employed delaying tactics; that should have been further explained. Reference was made to the decision of this court in *Booth v Donald* [2024] SAC (Civ) 49 at para [49].

[22] The appeal should be allowed, the interlocutor of 5 March 2026 recalled and the cause remitted to the sheriff to proceed as accords. Expenses should follow success.

Respondent's submissions

[23] The respondent submitted that the sheriff had neither misapplied OCR 17.2(2) nor conflated the very poor conduct of the appellant with the lack of a substantive defence. In fact, his approach was to maintain clear boundaries between these issues. He dealt with the conduct issue by way of a punitive award of expenses, and with the substantive issue of the absence of a genuine defence by granting summary decree. Successive sheriffs had made efforts to allow the appellant the opportunity to demonstrate a substantive defence, but the appellant had declined to do so. A motion for summary decree had been refused (by the sheriff whose judgment is now appealed) on 8 January. It was only at that stage that it was clear the action was defended on quantum only. Thereafter, the appellant repeatedly failed to demonstrate a substantive case or provide any clear or credible explanation as to which invoices were challenged, or why. No substantive defence was advanced by the appellant at any stage. The only explanation tendered for challenging one invoice was almost immediately withdrawn at the hearing on 5 March. The sheriff was correct in holding that the appellant's unspecified complaints regarding the invoices did not amount to a substantive defence.

[24] Reference was made to the approach to applications for summary decree set out in *Grier*. The sheriff had applied the law without fault. Paragraphs 8 to 12 (*sic*) of the sheriff's note explain fully how the sheriff approached the test for summary decree. In those paragraphs the sheriff repeatedly raised the question whether a genuine defence was stated, consistent with the approach, which was referred to in terms, in *Grier*. He noted that the appellant had not sought to amend its pleadings to reflect its objections to any of the invoices relied on by the respondent. The reference in the final paragraph of the sheriff's note to "a delaying tactic" was not a rebuke for the conduct of the defence, but was based on the appellant's failure to state a defence or specify why any of the invoices were not payable. It amounted to a consideration of the second limb of the test in OCR 17.2(2), being that there was no other compelling reason why summary decree should not be granted. The appellant had failed to advance any argument to that effect.

[25] This action was squarely within that which Lord MacDonald had in mind in *McAlinden (supra)*. In that case, as in the case before the sheriff, the defender had been given many opportunities to explain what the statable defence was, but relied instead on procedural technicalities to delay prompt settlement of an unanswerable claim. In the present case, once it was clarified that the action was defended on quantum only, it was incumbent upon the appellant to specify what challenges were made to the amount claimed. That was not done. The granting of summary decree was a mark of the inescapable conclusion that there was no real defence offered to this claim; it was not a mark of the court's displeasure regarding the appellant's conduct of the case.

[26] The respondent moved that the appeal be dismissed, the sheriff's interlocutor upheld and the appellant found liable in expenses on the agent/client, client paying scale. Counsel confirmed that there was no criticism of the way in which the appeal had been conducted.

Rather, the issue relating to the expenses of this appeal was that it was, in effect, a delaying tactic.

[27] Guidance was sought from this court as to the proportionality and lawfulness of the granting of summary decree in circumstances where, following a second hearing on summary decree in an action where only quantum is in issue, a defender fails to establish what concerns it has in terms of quantification.

Discussion and decision

[28] The Note of Appeal focused on the alleged conflation by the sheriff of the absence of a substantive defence and the appellant's poor conduct of this litigation. In submissions, counsel rowed back somewhat from that position, submitting instead that the sheriff may have been "swayed ... by the unfortunate procedural background", noting that commentary on that occupied all but three paragraphs of the sheriff's note.

[29] OCR 17.2 sets out the test for the granting of summary decree. The court must be satisfied that there is no real prospect of success and that there is no other compelling reason why summary decree should not be granted at the stage when the motion is made. The court need not be certain that there are no real prospects of success, but that must be more than a mere probability. The court's task is to satisfy itself whether there is a genuine defence and not merely a relevant defence pled. If the defender does not offer to prove a defence, the court is not barred from pronouncing decree because the defender makes unspecific assertions that may, if established, provide a defence (*Grier*, at para [18]). It is clear from the language of OCR 17.2(4) that the decision whether to grant summary decree is a discretionary one. If the sheriff is not satisfied that there is a likely defence with some real

prospect of success and there is no other compelling reason not to grant summary decree, he may grant the motion.

[30] It is important to avoid conflating the poor conduct of the defence of this action, which was conceded by the appellant, with the absence of a genuine defence. In the pleadings, the appellant admits liability for a percentage of estate management charges and management charges, but denies liability for the sums sued for and called upon the respondent to vouch certain sums. It averred that vouching lodged in process, not being addressed to the respondent, was irrelevant, without further explanation.

[31] At the hearing on 8 January, the appellant confirmed the action was defended only on quantum, without further explanation. The opportunity afforded to parties to resolve matters by 6 February did not result in settlement, nor in narrowing the issues between them. At the hearing on 6 February, the appellant queried invoices produced by the respondent and submitted the issue between them was one of “accounting”, again with no further explanation. A further opportunity was given to parties to resolve matters.

[32] When the case next called, on 5 March, the appellant’s challenges to invoices had not been clarified. A challenge relating to a single invoice was stated and immediately withdrawn. It was for the appellant, having confirmed that the action was defended only on quantum, to explain in its pleadings, or by reference to such documents as were available, why the sum sued for was excessive. It failed to do so. No progress had been made to resolve the question of quantum, which was the only basis upon which the claim was challenged. The appellant’s solicitor conceded that the appellant’s conduct of the case was such that a motion for expenses on the agent/client, client paying scale, would not be opposed.

[33] It was against that background that the sheriff reviewed the history of the action since it last called before him on 8 January. He noted that until 22 January nothing had happened and that by 6 February, no detail of the basis upon which invoices were challenged had been provided to the respondent. Following that hearing, no instructions had been provided to the solicitor acting for the appellant that would allow discussions to take place by 5 March; instructions subsequently received were not conveyed to the respondent's agents until the day before the hearing on 5 March. At that hearing, the appellant was unable or unwilling to engage in any meaningful discussions, such that, again, no progress was made. No motion was made by the appellant to amend its pleadings.

[34] The sheriff was satisfied that the test for the granting of summary decree in *Grier* was met. He had regard to the history of the action; the events of 5 March and at the hearings on 8 January and 6 February; the state of the appellant's pleadings; the absence of any motion to amend; and the appellant's concessions that the litigation had been conducted poorly, such that a punitive award of expenses was appropriate, all of which is set out in his note.

[35] The sheriff was entitled on the information available to him on 5 March to reach the conclusion that there was no genuine defence to this action and that the defence, such as it was, had no reasonable prospect of success. It was not suggested by the appellant at any stage that there was any other compelling reason why summary decree should not be granted. The basis upon which the sheriff arrived at his decision is clear and well explained, and leaves the reader in no real doubt as to why he reached the view that he did and why summary decree was granted. I do not accept the appellant's criticisms, by reference to *Booth v Donald*, that adequate reasons for the sheriff's conclusion that the appellant

employed delaying tactics are not given. In any event, the sheriff's decision turned upon the absence of a genuine defence and any reasonable prospects of success. The sheriff cannot be said to have acted disproportionately in granting summary decree, having regard to the history set out above. Whether summary decree would be granted was a matter for his discretion, provided he was satisfied that the defence had no real prospect of success: and that there existed no other compelling reason why summary decree should not be granted. His reasoning in that regard is adequately explained.

Disposal

[36] The appeal is refused.

[37] The appellant submitted that expenses should follow success. The respondent sought an award of expenses on the agent/client, client paying scale. Counsel noted, however, that there was no criticism levelled at the way in which the appeal was conducted, save that it amounted to a further delaying tactic on the part of the appellant. I shall award the expenses of the appeal in favour of the respondent. I am not persuaded, however, that, in the absence of criticism of the conduct of the appeal, the expenses ought to be paid on the agent/client, client paying scale. I therefore find the appellant liable to the respondent in expenses as taxed.