SHERIFFDOM OF LOTHIAN AND BORDERS

Case Number: PD83/13 [Liv]

2014SCEDIN38

Judgment by

SHERIFF PRINCIPAL
MHAIRI M STEPHEN

in appeal
by

EUI LIMITED trading as Admiral
Defenders and Appellants

in the cause

MRS ANNA BIALAS-KRUG
Pursuer and Respondent

against

EUI LIMITED trading as Admiral
Defenders and Appellants

Act: Forsyth, Advocate
Alt: Henderson, Advocate

EDINBURGH, 14 August 2014

The Sheriff Principal, having resumed consideration of the cause, refuses the appeal; adheres to the sheriff's interlocutor of 2 April 2014; certifies the appeal as suitable for the employment of junior counsel; finds the appellants liable to the respondent in the expenses of the appeal; allows an account of expenses to be given in and remits same, once lodged, to the Auditor of Court to tax and to report.

(signed) *Mhairi M Stephen*

NOTE:

1. The pursuer and respondent in this appeal was injured in a road traffic accident on 30 April 2012 in Livingston when a vehicle driven by the appellants' insured collided with the rear of her vehicle.She sustained various injuries all as described in paragraph 5 of the statement of claim in the initial writ.The circumstances of the accident were straightforward commonly known as a "*rear-end shunt*". Her solicitors intimated a claim to the appellants to recover damages for solatium, patrimonial loss and other expenses incurred as a result of the accident.When the claim was not resolved in a satisfactory fashion the pursuer raised an action in Livingston Sheriff Court with a crave for damages of £25,000 and the expenses of the action.The initial writ was served on the defenders towards the end of September 2013.It appears to be accepted that the appellants had received service of the writ by

30 September 2013. When the induciae expired and no notice to defend had been lodged the pursuer minuted for decree in absence on 22 November 2013.Decree in absence was granted for the sum first craved together with expenses as taxed on 27 November 2013.On 20 February 2014 the appellants' solicitor lodged a reponing note.

2. The sheriff heard parties on the appellants' reponing note on 2 April 2014.This appeal is against the sheriff's interlocutor of 2 April 2014 refusing the reponing note.

3. Chapter 8 of the Ordinary Cause Rules governs reponing.The sheriff sets out the operative part of Rule 8.1 in paragraph [5] of her report.Paragraph (1) provides that the defenders *"may apply to be reponed by lodging…. a reponing note setting out his proposed defence….and explaining his failure to appear"*.Paragraph (3) sets out the sheriff's powers – *"the sheriff may, on considering the reponing note, recall the decree so far as not implemented subject to such order as to expenses as he thinks fit;…."*. Reponing and the rules relating to reponing procedure are special to ordinary cause procedure in the Sheriff Court.In the Court of Session (see RCS 19.2) and in summary cause and small claim procedure there is a right of recall of a decree in absence subject to certain conditions being met.(See Chapter 24 of the Summary Cause Rules and Chapter 22 of the Small Claim Rules).Reponing has been described as anomalous (*Macphail 7.24 fn 98*) as the procedure in the Sheriff Court is much more strict than in the Court of Session.Nevertheless, in Sheriff Court ordinary procedure at present there is no automatic right of recall of a decree in absence.The decision is a discretionary one for the sheriff who must apply OCR 8.1.

4. It is important to record that considerably more information and detail as to the past procedural and operational background to this case was provided to me than appears to have been given to the sheriff.This goes to the heart of the matter.The decision under attack must be judged on the material available to the sheriff as recorded in her report rather than the more polished and extensive timeline given to me.

5. In essence, the sheriff was told that the appellants had received the initial writ by 30 September 2013 and faxed it to their solicitors on 1 October 2013.The instructions had not been received and there was no follow up or system for following up that these instructions had been received and acted upon.The sheriff is critical of the appellants' explanation and the paucity of information provided to her.The fax covering sheet was not even provided (see paras [16] and [20]).The solicitor who addressed the sheriff was unable to explain the delay either.The sheriff notes that the appellants had been contacted by the pursuer's solicitors on 13 December 2013 regarding the decree in absence requesting proposals for settlement.There was no explanation for the further delay between December 2013 and February 2014 (when the reponing note was lodged).The sheriff records that the account of the expenses was lodged for taxation just prior to February 2014.That may have been the catalyst for the reponing note.

6. At the appeal hearing, an adjusted timeline was provided which *inter alia* indicated:-
    - That the appellants thought they had made an offer to settle the case on 15 August 2013 (pre litigation) however the e-mail was wrongly addressed and was not received by the pursuer's

agent.

- That this offer was re-sent to the correct e-mail address on 30 September 2013 once the writ had been served on the appellant.

- That the pursuer's agents did not confirm their client's instructions on that offer.

- That faxed instructions from the appellants to their Scottish solicitors sent on the correct fax number were not received due to technical problems with the fax.

- That following the pursuer's contacting the appellants regarding the decree in absence on 13 December 2013 the appellants re-faxed the original letter of instructions to their Scottish solicitors using the correct fax number but again not received or followed up.

- The pursuer's account of expenses was intimated to the appellants on 14 January 2014.

- The pursuer's account of expenses was e-mailed by the appellants to their Scottish solicitors successfully on 12 February 2014.

- 20 February 2014 reponing note lodged.

- Offers to settle made to pursuer's agents pre and post reponing hearing.

SUBMISSIONS

7. Mr Forsyth appeared for the appellants.He lodged written submissions which I do not propose to repeat and set out in detail.Observing that this is a discretionary decision Mr Forsyth briefly addressed the role of the appellate court in appeals against discretionary decisions.If I am satisfied that the sheriff fell into error then I may look at the reponing note of new and decide whether to recall the decree.Mr Forsyth argued that the sheriff misdirected herself in law in her approach to the adequacy of the reason or explanation for the failure to appear (see paras [15] to [20]) of her judgment).Her reference to a "reasonable" explanation discloses an error.She misdirected herself in law in considering whether the defence was a stateable one - the defence is clearly a stateable defence and an absolute defence on quantum.The sheriff was not entitled to consider that a defence on

quantum alone may explain a complacent approach to the rules. (See paras [21] and [22] of the judgment).

8. Furthermore, it was submitted that the sheriff had misused the facts in considering the explanation.The sheriff was not entitled on the facts to take the view that "no" explanation had been tendered.There was an explanation of sorts.The sheriff was not entitled to reject the suggestion that there had been a systems failure.There had been an attempt to explain what had happened. There was no basis upon which the sheriff could agree with the pursuer's suggestion that the defenders' approach was glib and showed no concern or intention to have regard to the court's time limits (paragraphs [17] and [18]).Mr Forsyth conceded that there may have been an incomplete account of the factual background, however, that deficiency had now been corrected by way of presenting at the appeal hearing what is described as "*an adjusted timeline*".The sheriff had confused the failure of the defenders to follow up the instruction to the solicitor for a lack of an explanation.

9. In approaching the balancing exercise the sheriff failed to carry out that exercise properly and took into account irrelevant considerations.Her approach to the quantum defence and her application of the case of *Smith* v *Greater Glasgow and Clyde NHS Health Board* [2013] SC OH 178 were significant but irrelevant considerations which undermine her decision.She failed to give sufficient weight to important matters such as the defence, and the *prima facie* injustice that firstly the pursuer would receive a windfall and secondly the defenders would be unable to present its defence on quantum.The sheriff failed to take into account the offers which had been made by the defenders and the suitability of an award of expenses as sufficient punitive sanction.Furthermore, the sheriff placed too much weight on the explanation for the defenders' failure to appear or lack of explanation. Her reference to reasonableness throughout her judgment taken with all these other factors indicate that she erred in law and this vitiates her decision.

10. I was referred to the following authorities *Forbes* v *Johnston* 1995 SC 220;*Thomson* v *Jardine* 2004 SC 590; *Wailes Dove Bitumatic Limited* v *Plastic Sealant Services Limited* 1979 SLT (Sh Ct) 41; *Smith* v *Greater Glasgow and Clyde NHS Health Board* [2013] SC OH 178 and *Macphail on Sheriff Court Practice Chs 7 and 18*.

11. I was asked to allow the appeal in respect that the sheriff misdirected herself in law and of new reconsider the reponing note based on the submissions, the adjusted timeline and information provided on appeal.I should recall the decree in absence allowing the appellants to be reponed.If successful the appellants sought the expenses of the appeal procedure but conceded that it was the appellants' shortcomings which necessitated the reponing note. This may suggest that expenses should be awarded against the appellants to the conclusion of the reponing procedure before the sheriff.I was asked to sanction the cause as suitable for the employment of junior counsel due to the importance of the matter to the client and the complexity.

12. For the respondent, Mr Henderson also provided written submissions and likewise I do not propose to restate in detail his submissions.

13. His motion is to adhere to the sheriff's interlocutor of 2 April; refuse the reponing note and award expenses against the appellants.Mr Henderson also sought sanction for counsel.Indeed, Mr Henderson considered that the appellants ought to be liable for the expenses of the cause including the appeal procedure whatever the outcome of the appeal.

14. Recognising the role of the appellate court in appeals against the exercise of judicial discretion I was reminded that the sheriff, of course, had a wide discretion on the circumstances presented to her on 2 April.

15. Mr Henderson addressed me on the matter of the new material which was not before the sheriff and which the appellants sought to place before me at the appeal hearing.I was referred to several authorities in the respondent's supplementary list of authorities in particular *Dryburgh* v *Currys Group PLC* 1988 SCLR 316 and *Ratty* v *Hughes* 1996 SCLR 160.These cases along with *Macphail* are authorities which state that the appeal court is not entitled to consider material that was not before the sheriff.

16. Mr Henderson made submissions on the requirements of OCR 8.1. The reponing note must explain the failure to appear and the proposed defence.The sheriff had duly considered both.An explanation is required.That explanation need not be a reasonable one but the sheriff must be satisfied with the explanation.The sheriff had not misdirected herself.She had regard to the legal test set out by the court in *Forbes* v *Johnston*.The Sheriff applied the *Forbes* test and in paragraph [23] of her report the sheriff in the context of her full decision did not apply or identify as persuasive *Smith* v *Greater Glasgow and Clyde NHS Health Board*.She made observations on that case.

17. With regard to the explanation Mr Henderson set out in detail the matters which were before the sheriff and her conclusions.The sheriff had reached an overall conclusion that the appellant had not provided an explanation for the failure to appear.She was therefore not in a position to reach a conclusion or view as to whether the appellants' failure to appear was due to "*reckless indifference or deliberate disregard of the rules of procedure*".The sheriff had noted the proposed defence; that it was a stateable defence and that it was an important factor she had to weigh in the balance.It was not determinative.The sheriff had weighed the facts and circumstances which the parties, in particular the appellants, had placed before her including the explanation, the proposed defence and the interests of justice.In the sheriff's report at paragraph [6] the sheriff records wrongly that a pre-litigation offer had been made but refused.She does so when dealing with the appellants' submissions.It is now accepted that no pre-litigation offer was made although there was an intention to make a pre-litigation offer on 15 August.The pursuers therefore refute that the sheriff failed to take account of or give sufficient consideration to the attempts made by the appellant to settle the claim either pre-litigation or after the solicitors had been instructed.There was thus no reason for this court to intervene to set aside the sheriff's exercise of her discretion.There was no misdirection;the sheriff took into account all relevant considerations and did not have regard to irrelevant considerations.She did not err in conducting the balancing exercise.The appellate court should not take into account any new material in considering whether the appeal should be allowed or refused and in the event that the court is prepared to find

that the sheriff's exercise of discretion should be set aside then I could consider the matter anew having regard solely to the material before the sheriff.

DECISION

18. The sheriff considered the reponing note and the submissions made to her by both parties.The sheriff had various authorities cited including the five judge Inner House decision in *Forbes* v *Johnston* 1995 SC 220.The sheriff at paragraph [14] refers to *Forbes* and recognises correctly its authoritative and binding effect. *Forbes* states the proper test which the court must apply when considering a reponing note.In *Forbes* the Inner House sets out the correct approach to the reponing note. It is not a two stage test.The court expressly disapproved of that approach. The court must consider all material factors and in particular must consider whether there is a stateable defence along with any explanation tendered for lateness.In other words, the party seeking to be reponed need not cross the hurdle of providing a satisfactory explanation for his failure to appear before he addresses the court on the proposed defence.Accordingly, the sheriff requires to consider the note in its entirety before deciding whether or not to exercise his or her discretion in favour of the party seeking to be reponed.*Forbes* emphasises the discretionary nature of the sheriff's decision and in the exercise of his discretion the sheriff requires to take into account all of the circumstances and to balance any considerations in favour of reponing (such as a stateable defence) against other considerations which may point against reponing (such as disregard of court rules and procedure).It is for the defender seeking to be reponed to provide the court with all material in support of his reponing note and upon which the sheriff is to exercise discretion (See Sheriff Principal Risk in *Ratty v Hughes* "*It seems to me that the defender must lay all his cards on the table at the outset*").

19. The sheriff correctly observes that there is no right to be reponed.Proper consideration of the rule of court and the decision in *Forbes* indicates that the sheriff must take into account and carefully weigh up the material available to the court before deciding the matter.As I have already observed in ordinary cause procedure there is no automatic right to recall of a decree in absence, as is provided for, in small claims and summary cause procedure, and in the Court of Session.To introduce such a right to recall would require the rules to be restated explicitly providing such a right.

20. The sheriff has recognised that there is a stateable defence, albeit, not a defence on the merits.The appellants seek to advance a defence on quantum as clearly they would have been entitled to do had they timeously lodged a note of intention to defend followed by defences.Nevertheless, as the sheriff observes, there is no defence on the merits.She was entitled to comment whilst recognising the defence on quantum.The appellants therefore accept liability for their insured's negligence in causing the collision and any injury and loss following upon that.Accordingly, there is no manifest injustice of a fundamental nature such as the wrong defender or that the appellants' insured's driving had not caused the collision.The correct defender has been called who admits liability to compensate the pursuer.

21. The sheriff has difficulty with the explanation.The sheriff observes that the rule does not require that the explanation be a reasonable one.Nevertheless, an explanation is a requirement.The appellants

were unable to explain why it had taken from the end of September 2013 until the middle of February 2014 before the appellants took effective steps to lodge the reponing note.

22. The sheriff has recorded the appellants and defenders submissions at paragraph [6] as follows:-

"It was the defenders' position that the note should be granted. It was accepted that the defenders were aware that the pursuer had intended to raise an action; a pre-litigation offer had been made but refused. The writ was received by no later than 30 September 2013 and was, I was told, then faxed to the defenders' solicitors (I was given to understand that that was the same firm as was representing it before me) on 1 October 2013. I was told, however, that those instructions were not received by the solicitors, although I was given no explanation about why that might be so or what steps, if any, had been taken to determine what had happened to those instructions."

There had been in the words of the appellants' agents "a catalogue of errors".

23. At paragraph [20] of her decision the sheriff considers this administrative error and has this to say:-

"*I was told that instructions had been sent to solicitors but there was nothing to vouch that. No fax cover sheet was produced; no copy letter; no diary entry to chase solicitors; nothing of that sort was provided to me. Miss McLean was able to produce the copy of a letter from the pursuer's solicitors but I was not told why there was nothing else or, for that matter, that it had been asked for but could not be found. There was no explanation about what steps had been taken to track down the instructions or to confirm that they had been sent but not received. In all the circumstances simply to say, as Miss Mclean did, that there was 'administrative errors is no explanation at all."*

24. A further difficulty for the appellants appears to me to lie in the inconsistency between the submission made to the sheriff and the narrative in paragraph 2 of the reponing note.In the reponing note it is stated that:-

"*The defenders have a system of instructing solicitors to defend proceedings once an initial writ has been served. On this occasion, due to 'administrative error', the initial writ was not sent to the defenders' solicitors for a notice of intention to defend to be lodged. Upon our investigations it was ascertained that no action had been taken to defend the proceedings".*

This appears to me to be somewhat at odds with the explanation tendered to the sheriff which mentioned there being a technical issue with the fax aligned with no system for following up instructions which are time sensitive. Before the sheriff it was stated that instructions were sent but not received. The reponing note says something quite different. The sheriff received no information about the investigations instituted by or on behalf of the defenders with regard to the progress of the litigation. No information on the system or systems which a motor insurer has with regard to defending litigation; or why there was no concern that more than four months would pass without a report on the conduct of the defence or request for further instructions.

25. It is not difficult to understand why the sheriff took the view that the information provided to her was in effect no explanation at all.The appellants had not taken the opportunity "to lay all their cards on the table" (see *Ratty* v *Hughes*). They had provided no fax covering sheet. They had provided no information about the technical difficulties with the receiving fax.However, whether the sheriff takes the view that there is "no" explanation in which case the provisions of the rule were not met or that the explanation was not satisfactory, an explanation for the delay is a requisite and important factor.The sheriff recognises that the explanation need not be a reasonable one but nevertheless it needs to be one that the sheriff is satisfied as to.If there was an explanation it amounts to this - that a major motor insurer had no system at all to deal with and ensure that important procedural time limits are met.The information provided at the appeal hearing that the appellants did take steps in December 2013 to contact their Scottish solicitors does not assist them at all. This is simply a repetition of a failure.A flawed method of communication which only serves to emphasis the lack of a system and a lack of care as to the litigation process.This was clearly an important matter for the sheriff.If a solicitor or repeat litigant fails to have a system they must take the consequences of that failure.If the respondent's solicitor had no system for ensuring that personal injury proceedings are raised timeously time-bar will apply and the client would lose the right to sue the wrong doer for damages.Accordingly, the lack of a system is an important issue.The sheriff did not require to conclude that the appellants had recklessly disregarded the rules of court and time limits however it would not be difficult to conclude that there had been reckless indifference to the litigation process.The repetition of the same failed process in December tends to indicate that the appellants did not learn from the errors and deficiencies which had led to decree passing in the first place.Accordingly, I consider that the sheriff applied the correct test on the adequacy of the reasons given for the failure to appear and did not misuse the facts presented to her.

26. It was argued that the sheriff's failure to consider whether an award of expenses might be sufficient punitive sanction was a factor which pointed to her failure to carry out the balancing exercise properly.Firstly, this does not appear to feature in the submissions made to the sheriff on 2 April.Secondly, in a case such as this where liability is admitted an adverse award of expenses for the appellants is rather a toothless sanction.Whether successful or not the appellants would be liable in expenses for the reponing procedure.If reponed with an adverse award of expenses the appellants are in no different position than they would have been apart from the expense of the reponing procedure necessitated by their own omissions.The respondent would be in no different position either unless expenses had been awarded on a different scale – and that was not argued.

27. New material presented on appeal provides more polish, more information and more detail than was given to the sheriff.Not all of the information can be said to benefit the appellant but it does provide the court with a significantly improved audit trail.I agree with the approach taken by the Sheriff Principal in *Ratty* and *Dryburgh*.It is not for the appellate court to take account of material that was not before the sheriff. To do so would undermine the function of the appellate court in appeals against discretionary decisions.Unless there is an error in law or the sheriff took account of an irrelevant factor or omitted to take into account a relevant factor or if the decision was unreasonable or unjudicial then the matter of reponing is not for me to decide afresh.Unless the appellant satisfies the appeal court that the sheriff has fallen into such error in reaching her decision on the material available to her I cannot fall into the trap of forming my own view of the facts and circumstances underpinning the reponing note.There is no right to be reponed.It is the essence of discretion that, on the same facts, two minds may come to differing conclusions without either being wrong or mistaken.

28. Accordingly, the function of the appellate court when considering appeals against discretionary decisions is well settled.See *Macphail in Sheriff Court Practice 18.110* onwards.The leading authority is *G* v *G* [1985] 1WLR 647 which was specifically approved by Lord President Emslie in *Britton* v *Central Regional Council* 1986 SLT 207. There is no basis to interfere on appeal unless it can be shown that the sheriff applied the wrong test or the wrong principle or came to a result that was clearly or plainly wrong.It is, of course, quite likely that another judicial mind may have placed more weight on the windfall effect for the pursuer but nevertheless that does not vitiate the sheriff's exercise of her discretion.The lack of or inadequacy of the explanation for the failure to lodge a notice of intention to defend and, indeed, the inconsistency demonstrated as to the purported explanation are clearly significant components in this case.

29. I was referred to a number of authorities.Clearly, the five judge decision in *Forbes* v *Johnston* sets the test which the court should apply.Providing the court follows that test it is emphasised that the matter of reponing is at the sheriff's discretion.

30. Comparing and contrasting the current circumstances with decisions in other cases is of little assistance.*Thomson* v *Jardine* is an important case which turns on the nature of the defence.Having decided that the sheriff did err in law in his approach to the proposed defence the issue of reponing was at large for the appellate court in *Thomson*.Reponing procedure by its nature is specific to each case.Providing the sheriff takes into account all relevant circumstances reponing is a matter squarely within the sheriff's discretion.Sometimes the outcome may appear harsh and on other occasions it may appear that any explanation gets you through the door.That is the nature of a discretionary decision.The appellants' counsel placed a degree of emphasis on *Wailes-Dove* (supra).That case involves quite different circumstances.The writ was served at the defender company's registered office being a firm of chartered accountants.The principal was on holiday and once discovered immediate steps were taken to instruct solicitors to protect the defenders' interests.The defenders were not regular litigants.

31. The sheriff considers the matter of the relative justice or fairness between the parties.It is recognised that the pursuer and respondent has received a windfall.The windfall is a factor and will be a factor in any case where a party seeks to be reponed.It cannot however be the determining factor in a procedure where there is no automatic right to be reponed.Pre-litigation the respondent had valued the case at £6,471.The pursuer's solicitors alerted the appellants to the decree and sought to discuss settlement in December 2013.A further medical report has been instructed and accordingly the actual valuation is unknown.The windfall is neither total nor absolute as liability to pay damages is conceded.The pursuer litigates as she has been involved in a road traffic accident and her claim has not been settled.On the other hand, the appellants are regular and frequent players in the court system.They retain solicitors to act on their behalf in the significant volume of litigation in which they are involved.They are familiar with or ought to be familiar with the requirements of the rules of court and the need to meet time limits and have systems in place for ensuring that their interests and those of their insured are represented.The relationship between a pursuer with a one-off action for damages and the appellants, who are insurers, has been described as "*an asymmetric relationship*".It is not difficult to understand why.

32. Against the procedural background the pursuer's solicitors referred to the recent decision of Lord Jones in *Smith* v *Greater Glasgow and Clyde NHS Health Board* [2013] SC OH 178.In *Smith* Lord Jones analyses the objectives behind Chapter 43 procedure in the Court of Session in respect of personal injury litigation.The purpose of the procedure was in part to encourage compliance with the procedural rules and address the mischief of a casual approach to the rules and timetabling.Chapter 43 and its equivalent in the Sheriff Court (Chapter 36) is designed to vest control over the pace and procedure of litigation in the court rather than with the parties. The Court Rules are designed to encourage compliance with the timetable requirements in personal injury cases.The respondent's solicitor considered that the decision in *Smith* reflected this new ethos and that it was no longer acceptable to give "*administrative error*" as a reason for non-compliance with court rules.A casual approach to compliance with the rules leads to expense and delay and in order to ensure compliance the court was prepared to apply the rules of procedure strictly.The sheriff comments on this at paragraph [23].I do not read para [23] as being other than commentary which reflects the worthwhile aim that litigation should be conducted efficiently and to influence that the court should have the power to control the conduct and pace of the cases before it.The sheriff's decision comes in para [24].

33. In the circumstances of the present case, in my opinion there is no basis for concluding that the Sheriff misdirected herself or misused the facts in her approach to the requirement for an explanation or the proposed defence. Consideration of the manner in which the Sheriff weighed up the material available to her does not disclose a flawed balancing exercise in the sense that she had regard to the important and relevant considerations before her. The factors which were not strictly in point such as the court's approach to compliance with other procedural rules do not form part of the sheriff's decision. As I have indicated they are nevertheless worthy of comment at a time when close attention is being paid to effective case flow management by the court in PI cases. It follows therefore that the appeal is refused.

34. The expenses of the appeal should be awarded in favour of the respondent. Both parties sought sanction for the employment of counsel. That issue is rather finely balanced.The law on appeals against discretionary decisions is well settled. Reponing is a speciality of Sheriff Court Ordinary procedure but not unduly complex. The correct approach by the court is laid down in *Forbes* and depends largely on the factors set out by the party seeking to be reponed. As such the sheriff brings his or her judgment to bear on these facts and circumstances. I recognise however that the outcome is important to both parties and will certify the appeal as suitable for the employment of junior counsel.

(signed) *Mhairi M Stephen*