



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 60
XA45/17

Lady Clark of Calton

OPINION OF LADY CLARK OF CALTON

in the Application for Leave to Appeal

by

WESLEY MITCHELL

Applicant

against

HUGH COLIN SOMERVILLE & ANOTHER

Respondents

Applicant: Party

Respondents: Bell; Somerville & Russell

4 October 2017

History of Proceedings

[1] The pursuer and applicant in this case is Mr Mitchell. He raised proceedings in the Sheriff Court at Edinburgh as a party litigant in which he sought *inter alia* decree reducing the Wills of Willamina Scoular Waugh.

[2] The history of the case is explained by Sheriff Ross in some detail in his Note.

According to that Note, the case was assigned to Debate on 21 June 2016. On that date, the pursuer is recorded by the sheriff (paragraph 3) as accepting “that his case could not stand

as it was..." He was granted leave to amend and found liable for the expenses of the Debate. A further continuation was granted to the pursuer on 13 September 2016. The pursuer did not amend his pleadings. In paragraph 13 of the Note, Sheriff Ross explained that the pursuer:

"... was unable to indicate what further information would be available to repair the gaps in his case, or where it might come from. He could not disagree that what he was seeking was a deferment to see if something would turn up. This is not a strategy which any court can encourage. It is critical that a pursuer, in choosing to raise an action, comes to court in a position to both state a case which is capable of succeeding, and to lead evidence, or at least identify what evidence will be led, at a subsequent proof. This is particularly important when, as in this case, the pursuer makes serious allegations of fraud and wrongdoing against people whose livelihood depends on their trustworthiness and integrity. Such allegations cannot be made casually or frivolously. The pursuer's case is vulnerable to such description. No further information is offered or predicted. It is always open to the pursuer to return to court if such material exists."

At a hearing before Sheriff Ross on 9 December 2016, the defenders sought summary decree. For the reasons summarised in paragraph 15 of his Note, the sheriff considered that the relevant Ordinary Court Rule 70.2 was satisfied and granted summary decree.

[3] The sheriff also dealt with the pursuer's objections to the audited account and explained his reasoning in paragraph 11 of his Note.

[4] The pursuer appealed to the Sheriff Appeal Court from the decision of the sheriff.

On 3 April 2017, his appeal was refused and expenses awarded to the defenders. On 10 May 2017 Sheriff Stewart refused leave to appeal to the Court of Session and awarded expenses to the defenders.

[5] The pursuer who remains a party litigant sought leave to appeal to this court. That application came before me on 4 August 2017. Unfortunately by administrative error, which was no fault of the pursuer, proper intimation of the application was not made to the defenders and there was no appearance in court on their behalf. I proposed to the pursuer

that I explore consideration of the application on the basis of the papers only but the pursuer did not wish this. Accordingly a new date, 25 August 2017 was fixed to accommodate the convenience of the pursuer.

Grounds put Forward for Leave to Appeal to the Court of Session in Form 40.2

[6] In the written application grounds on which the pursuer sought to rely are as follows:

- “2.1. The appeal raises an important point of principle or practice as the applicant was denied the opportunity to be legally assisted, thus denying him justice in what is a complex case in terms of fact and law. The applicant as the paying party in an award of expenses was denied the opportunity to present objections at diet of taxation in that crucial information was withheld. There is a compelling reason for the Court of Session to hear the appeal because the applicant has been denied justice in the Sheriff Court.

3. The grounds on which the applicant seeks leave to appeal [against the refusal of leave to appeal] to the Court of Session are as follows:
 - 3.1 At leave to appeal hearing on 10 May 2017, the Appeal Sheriff stated that ordinary cause rule 17.2 (b) was not satisfied, when the action was dismissed on 9 December 2016. This was not the case, as there was no change in the applicant’s legal aid status from hearing on 13 September 2016 when motion for dismissal was considered and the matter continued pending outcome of applicant’s legal aid application. The Sheriff stated on 13 September, it was in the interests of justice the applicant be legally assisted, considering complexity of the case in fact and law. Thus, ordinary cause rule 17.2 (b) was still satisfied when dismissal was granted and accordingly decree of dismissal should not have been granted, denying the applicant justice.

 - 3.2 The Appeal Sheriff erred in that she considered the applicant had access to Counsel’s fee note prior to diet to taxation. This was not the case. Thereby denying the applicant the opportunity of obtaining advice on objections for diet of taxation.

4. The grounds on which the applicant seeks to appeal against the decision of the Sheriff Court of 9 December 2016 are as follows:
 - 4.1 In interlocutor of Sheriff Reith QC of 13 September 2016, the applicant was granted time to apply for legal aid. At debate the Sheriff advised

the applicant to seek immediate legal aid, which he did. A legal aid application was being considered with reasonable prospects of success when Sheriff dismissed the action on 9 December 2016, thereby denying justice for the applicant.

- 4.2 The Sheriff erred in that the applicant did not have full disclosure of defenders account of expenses prior to taxation. As the paying party, the applicant submitted it is a principle of justice that he should not be denied the ability to make objections at diet of taxation, particularly as he is the paying party.
5. Applicant lodged a caveat against confirmation in October 2014. Caveat triggered and a commissary hearing was held February 2016 to hear objections against confirmation of Will for the late Miss Williamina Waugh. Applicant was advised by commissary Sheriff he was required to raise an action for reduction. Action for reduction was raised under ordinary cause rules chapter 54. A debate was held in June 2016. The applicant sought legal assistance, requested a sist for legal aid, which was refused. The cause was continued several times pending the outcome of the legal aid application to 9 December 2016 when action was dismissed."

Consideration by the Court of the Application for Leave to Appeal

[7] This court had available the Note from Sheriff Ross which dealt with the merits of the substantive issues dealt with by Sheriff Ross namely his decision for a hearing on the pursuer's objections to the taxed account of the defenders' expenses relating to a debate held on 21 June 2016 and, more importantly for the pursuer, the decision of the sheriff to grant the defenders' motion for summary decree of dismissal. The Sheriff Appeal Court had not provided any written opinion. On 26 July 2017 a request from this court was made to the Sheriff Appeal Court for "a brief note" about the decision. Unfortunately, partly because of administrative mistakes, no written note about the merits of the appeal or the decision to refuse leave was available at the time of the hearing before this court. As parties were in a position to advise me about what happened before the Sheriff Appeal Court and the reasons given orally by the Sheriff Appeal Court, the hearing proceeded on that basis. In preparation for his oral submission, the pursuer helpfully prepared a detailed "written case" and I was

provided a copy of that. In the “written case”, marked 11 of process, the pursuer set out in detail his concerns about the history and events surrounding the making of a Will by Ms Willamina Waugh. The pursuer highlighted all the difficulties which he had encountered as a lay person and the efforts which he had made to obtain legal aid. He submitted that he thought that because the legal aid application was being processed in the normal way, the court would not determine the action in a situation where the Legal Aid Board had released funding for counsel’s opinion and the opinion of counsel had been sought but not obtained. In paragraphs 5 and 6 the pursuer set out in detail his submissions as to why the Sheriff Appeal Court erred in an important point of principle. In paragraph 7 the pursuer set out his reasons as to why the Sheriff Appeal Court erred in its decision making about the auditing process, in particular the failure to provide the pursuer with a copy of relevant fee notes prior to the Note of Objections. In paragraph 8 the pursuer advanced what he described as legally compelling reasons for the Court of Session to hear the appeal.

[8] As I understand the submissions of the pursuer the main ground of his appeal relates to the dismissal of the action. The pursuer sought to rely *inter alia* on the absence of legal assistance in a complex case; an outstanding legal aid application which he claims had reasonable prospect of success; he was awaiting an opinion of counsel; and that there was misunderstanding about his legal aid status which resulted in the dismissal of the action on 9 December 2016 thereby denying him justice and creating a collapse of fair procedure. In oral submissions the pursuer sought to go beyond the grounds set out in form 40.2 and submitted that there was no concession by him that the grounds of the action as presently pled were irrelevant or that there were grounds for summary decree. I merely observe that on my interpretation of the written application which is the foundation of this case, I find it difficult to identify any proper basis for this. I also observe that the Grounds of Appeal

which were before the Sheriff Appeal Court and the basis of the consideration by the Sheriff Appeal Court are narrowly focused. They state:

- “(i) In the interlocutor of 13 September 2016, the court gave the appellant time to apply for legal aid. The sheriff erred in his discretion in that summary decree of dismissal was granted while the appellant's legal aid application was ongoing.
- (ii) The sheriff erred in his discretion in considering the auditor of the court's report, number fourteen of process. In that parts of the report were excessive.”

[9] In response, the defenders set out detailed written answers objecting to the grant of leave. These were adopted and explained in oral submissions by counsel for the defenders. The main submission by counsel for the defenders was that the pursuer failed in respect of both Grounds of Appeal to raise any issue of principle or practice to satisfy the relevant section 113 appeal test and for the reasons set out in his written application the proposed Grounds of Appeal were wholly without merit.

[10] After the oral hearing, I was provided with “Note by Appeal Sheriff”. I asked for that to be circulated to parties. Both parties provided written responses which have been marked [13] and [14] of process. I have considered this further information along with all the written and oral submissions in reaching my decision.

Decision

[11] In terms of section 113 of the Courts Reform (Scotland) Act 2014, (The 2014 Act) the Court of Session may grant permission to appeal against a decision of the Sheriff Appeal Court constituting final judgment in civil proceedings only if this court considers that

- (a) The appeal would raise an important point of principle or practice or
- (b) There is some other compelling reason for the Court of Session to hear the appeal.

[12] In the present case it appears that the pursuer has raised proceedings for reduction based on pleadings and materials which require to be properly assessed by a lawyer to consider whether there is a proper legal foundation for such an action and how that should be reflected in the pleadings. As presently drafted, the pleadings in my opinion are not in a proper form to proceed to a proof and found an action of reduction of various wills. The pursuer was given time and opportunity in the Sherriff Court to amend the pleadings and has failed to do so. Months have passed in this litigation.

[13] I consider that the proposed Grounds (4.1) and (5) of Appeal are without merit. In relation to Grounds of Appeal (2) and (3) directed against dismissal, it appears that the pursuer chose to embark upon what he himself considers to be a complex action in circumstances which he concedes that there has as yet been no proper legal assessment. In my opinion the Sheriff Court has been generous in the exercise of discretion in favour of the pursuer and the Sheriff Court was under no obligation to continue the case even longer in the mere hope that eventually the pursuer might obtain legal aid and might be able to properly found and focus the case.

[14] In relation to the Ground of Appeal insofar as relevant to taxation issues, Sheriff Ross deals in detail with the pursuer's objections to the audited account and I am unable to identify any legal error raised by the pursuer which undermines the sheriff's decision making.

[15] In any event even if I was persuaded, which I am not, that there are arguable Grounds of Appeal, the application does not satisfy the terms of section 113 of the 2014 Act. The appeal grounds identified by the pursuer are all fact specific to this particular action and relate to issues of judicial discretion and expenses where considerable judicial latitude is permitted. The absence of legal aid anor the refusal to grant further delay in the proceedings

in all the circumstances does not provide a compelling reason in terms of section 113 in a case such as this where dismissal has been granted.

[16] For these reasons I refuse leave to appeal.