SHERIFF APPEAL COURT

[2017] SAC (Civ) 20
GLW-PD616-14

Sheriff A MacFadyen

OPINION OF THE COURT

delivered by SHERIFF ALASDAIR MACFADYEN

in appeal by

MRS DEE COMFORT MACGUIRE, 31 Hillside Crescent, Newarthill, Motherwell ML1 5DL

Pursuer and Appellant

against

GRANT & WILSON PROPERTY MANAGEMENT LIMITED, 65 Greendyke Street, Glasgow G1 5PX

Defender and Respondent

Pursuer and appellant: Party
Defender and respondent: Connor; Messrs Clyde & Co

EDINBURGH, 8 MARCH 2017

The Appeal Sheriff:

a) Having considered the opposed motion for the appellant to make an appeal against an extracted interlocutor of the sheriff at Glasgow dated 26 August 2016; and

b) Having heard the appellant personally and the solicitor for the respondent on that motion;

Considers that cause has been shown, grants the motion and makes the following orders:

1. Relieves the appellant from the consequence of her failure to comply with Rule 6.3 of the Act of Sederunt (Sheriff Appeal Court Rules) 2015;
2. Recalls the extract decree dated 4 October 2016;
3. Allows the note and grounds of appeal against the interlocutor of 26 August 2016 tendered by the appellant to be received, although late;
4. Allows the appeal to proceed as if the failure had not occurred and as if the note and grounds of appeal had been lodged on this date;
5. Finds the appellant liable to the respondent in the expenses of this motion as the same may be taxed, allows an account thereof to be given in and remits same, when lodged to the Auditor of Court to tax and to report.

NOTE

[1] This is a motion by the pursuer/appellant to be given permission to mark an appeal, although late, against decree of dismissal granted at Glasgow Sheriff Court on 26 August 2016. It is therefore an application to this court, in terms of Rule 2.1 of the Act of Sederunt (Sheriff Appeal Court Rules) 2015, to relieve the appellant from the consequences of her failure to comply with Rule 6.3 by not making the appeal within 28 days after the date of the decision of 26 August 2016.

[2] On that date an action at her instance for personal injuries against the defender/respondent called as a peremptory diet, following the withdrawal from acting of her former solicitor.

[3] The appellant was neither present nor represented at court on 26 August 2016 and the sheriff granted the motion by the respondent for dismissal of the action with expenses against the appellant.

[4] The time limit for marking an appeal against that decree of dismissal expired on 23 September 2016 and the decree was thereafter extracted on 6 October 2016.

[5] This motion and the proposed grounds of appeal were lodged with this court on 11 November 2016.

[6] There is conflicting authority on the question of whether an appeal can competently be granted after a decree has been extracted. In *Alloa Brewery Ltd* v *Parker* 1991 SCLR 70, a decision of the Inner House of the Court of Session, it was held that it was not competent to exercise the dispensing power to allow an appeal to be marked late if the decree has been extracted (That was however subject to the "noteworthy feature" identified by Sheriff Principal Kerr QC in *Trad Hire & Sales Ltd* v *Campbell* 2003 SLT (Sh Ct) 41 of an absence of any suggestion of procedural irregularity or incompetency in the manner and circumstances of the granting of the interlocutor on which the extract decree had proceeded). In *Database Publications* v *McQueen Ltd* 1990 SLT (Sh Ct) 47 Sheriff Principal O'Brien QC held that the court had no power to recall a decree upon which an *ex facie* valid extract had proceeded. He came to that conclusion even though the decree on which the extract had proceeded had been granted without any knowledge on the part of the defenders of the motion being made. Had the decree not been extracted, the Sheriff Principal indicated that he would have had no hesitation in allowing the appeal to be marked late, recalling the decree and remitting the cause to the sheriff to proceed as accords.

[7] A similar line was taken by Sheriff Principal Cox QC in *Wagon Finance* v *O'Lone* 1995 SCLR 149 in which it was held that the rule that there can be no appeal against an interlocutor

which has been extracted is absolute and that such an interlocutor cannot be challenged. He refused the appeal in that case as incompetent.

[8] A recent decision of a bench of three in this court, *Hamilton* v *Glasgow Community and Safety Services* includes another example of the application of the principle that there can be no appeal against an interlocutor which has been extracted, again however subject to the qualification that there was, in that case, "no suggestion that the extract decree had been improperly or incompetently issued."

[9] In contrast, *Millar* v *Millar* 1992 SLT (Sh Ct) 69 was a case in which a series of errors had led to the granting of a decree in circumstances in which it should not have been. Sheriff Principal Hay held that he was able to competently exercise the dispensing power and allow the appeal to be marked although late, even though it had already been extracted. In doing so he said:

> "In my opinion the interlocutor…was invalid and so therefore was the extract."

[10] In *Zlatarits* v *Zlatarits* 2008 SCLR 818 Sheriff Principal Dunlop held that there was no authority directly supporting the proposition that an extract obtained by a party in bad faith would afford a sufficient ground for the recall of that extract on a motion to allow an appeal to proceed late. He also, at paragraph [17] noted that

> "whatever the precise scope of the exceptions to the general rule [that once a decree is extracted, appeal is incompetent], it is in my view important to note that in every case it has been the actions of the court or its administrative staff that have been impugned…"

[11] In *Trad Hire & Sales Ltd* v *Campbell* 2003 SLT 41 there was a similar factual situation to the present case, namely that decree had passed against the defender ignorant of its pronouncement and thereafter extract had been issued. In that situation Sheriff Principal

Kerr expressed the view that the sheriff principal had the power not only to recall the sheriff's interlocutor but also in the circumstances of that case the extract proceeding upon it.

[12] In the present case, I was informed that the peremptory diet of 26 August 2016 had purported to have been intimated by both recorded delivery and first class post to the appellant at the address disclosed in the instance. The solicitor for the respondent fairly conceded that track and trace enquiry disclosed that the recorded delivery letter had not been signed for. However there had been nothing to indicate that the first class letter had not been delivered and on that basis the motion for decree of dismissal in the absence of the appellant had been made and granted.

[13] The appellant informed me that she had received no intimation of the peremptory diet following the resignation of her former solicitor. She had been in touch with the sheriff clerk on 9 August 2016, making it clear that she wished to continue with the action. She said that she was told by a named individual in the sheriff clerk's office that the proof, previously discharged was now assigned for 12 to 15 December 2016. She had experienced difficulty with receiving mail at her address and had told the sheriff clerk's office of that difficulty (That was confirmed in an email from her to the sheriff clerk's office dated 9 August 2016). She contacted the sheriff clerk's office on 8 November 2016 to be told that decree of dismissal had been granted at a peremptory diet on 26 August 2016. Her position was that she was devastated to discover that her action had been dismissed and as soon as she made that discovery she had lodged this motion. To refuse it would amount to a miscarriage of justice.

[14] The solicitor for the respondent submitted that no matter what view I took of the competency of allowing an appeal against an extracted interlocutor, the circumstances were such that I should not exercise the dispensing power under Rule 2.1, to allow the appeal to

be marked although late. She submitted that the appellant had failed to demonstrate that her failure to make the appeal timeously was due to mistake, oversight or other excusable cause, as required by Rule 2.1(2). She informed me that she had written to the appellant on 8 August 2016 informing her that the court would shortly be fixing a peremptory diet. The appellant should therefore have been aware that there would be a development in the near future. However, Ms Connor heard nothing from the appellant until 8 November 2016, the date of lodging of the instant motion. The application was therefore some 46 days out of time. The respondent was entitled to some finality in the proceedings. She invited me to refuse the motion.

[15] In my view, the following is at least arguable: the rule that an appeal cannot be competently marked against an interlocutor after it has been extracted must be subject to an exception in the case of a decree which has been granted in the complete ignorance of the party against whom it has been granted when the requirement for intimation of the diet at which decree might be granted had not been complied with and that was known to the court. It could be argued that a decree granted following on such a procedural irregularity is not itself a competent decree. The issuing of an extract might not cure that incompetency and convert it into an enforceable order. While the defender and society at large has a need for certainty and finality in court actions, it might be said that that cannot in circumstances of such an irregularity take precedence over the interests of justice and fairness.

[16] In the present action it seems inconceivable that the sheriff would have granted decree of dismissal on 26 August 2016 had he been aware of what are said to be the true circumstances, namely that the pursuer intent on pursuing her damages claim was unaware of the calling of her case on that date.

[17] The court played a part in the situation in that it granted decree without the benefit of proof of effective postage by recorded delivery of intimation of the peremptory diet, as required by the interlocutor of 10 August 2016. That interlocutor assigned the peremptory diet on 26 August 2016, ordained the appellant to be present thereat and appointed the solicitor for the respondent to:

> "intimate a copy of this interlocutor and notice in the form G10 to the pursuer ***by recorded delivery*** [my emphasis] in order that he (sic) may be present or represented at the said diet, giving notice that if he fails to do so the action may be dismissed and expenses awarded against him."

Accordingly, the sheriff being aware that the recorded delivery intimation of the interlocutor and form G10 had been ineffective, the action of the court in granting the decree of dismissal is itself being impugned as procedurally irregular. In principle, therefore I am of the view that this case could be said to fall within the exception to the general rule that appeal against an extracted interlocutor is incompetent.

[18] The issue remains however, as to whether the respondent's entitlement to finality should be outweighed by the allowing of the appeal to be lodged so long after the expiry of the period of 28 days for lodging a note and grounds of appeal. I have sympathy for the respondent in this case and their solicitor's conduct cannot be faulted. However, it seems to me that the relevant material to have regard to in approaching the question of whether to allow the appeal to be marked, although late, is as follows:

- The appellant's solicitor intimated his withdrawal from acting on her behalf to the sheriff clerk on 9 August 2016.
- The appellant was in contact with the respondent's insurer and thereafter with their solicitor.

- For some reason the appellant advised the respondent's solicitor that she did not want her to contact her again.
- On 9 August 2016 the appellant made contact with the sheriff clerk and was told that the action was next due to call as a diet of proof on 12 to 15 December 2016. The appellant on that date informed the sheriff clerk that she was experiencing difficulty in receiving mail at her home address and requested that future communication with her be by way of email.
- On the appellant's former solicitor intimating to the court and the respondent that he had withdrawn from acting, the sheriff on 10 August 2016 assigned a peremptory diet, in terms of Ordinary Cause Rule 24, of 26 August 2016.
- The appellant did not receive the recorded delivery intimation of the peremptory diet.
- The appellant now alleges that she did not receive the first class letter intimating the peremptory diet, citing previously intimated difficulties with receiving her mail.
- The appellant contacted the sheriff clerk on 8 November 2016 to be told that decree of dismissal had been granted on 26 August 2016.
- On being informed that decree of dismissal had been granted, the appellant immediately lodged the instant motion and proposed grounds of appeal.

In those circumstances, it seems to me that the appellant has an argument that she should be reponed and allowed to continue with her claim. It seems, if she is being honest, that she was labouring under the misapprehension that her action was still live and a diet of proof in place. The respondent's solicitor faulted her for not making positive inquiries as to the progress of the case between 9 August and 11 November 2016. In that regard, however, I

would be inclined to afford the appellant the benefit of the doubt as during that period she did not have legal representation. It is correct that she made an assumption that the action was still ongoing and had she had the benefit of legal advice during that period she could not have been excused for doing so. The only factor pointing towards fault on the appellant's part was that she had been warned by the respondent's solicitor that she would shortly receive a communication.

[19] However of significance is the fact that as early as 9 August 2016 the appellant had made the sheriff clerk aware that she was experiencing difficulties in receiving mail at her address. There is therefore information which, if believed, tends to support her assertion that she had no knowledge of the peremptory diet at all.

[20] All of those factors, taken together, persuade me that, notwithstanding the extended period before the Note of Appeal and motion were lodged, the appellant's total lack of knowledge, as an unrepresented pursuer, of the peremptory diet, amounts to an excusable cause for her failure to make the appeal timeously. It seems to me that to disadvantage a party litigant to the extent suggested by the respondent for not checking as to whether a peremptory diet had been assigned is a step too far.

[21] It seems that her case is a cause to try and therefore I am willing to grant this motion and allow the note and grounds of appeal to be lodged, although late. That necessitates the recall of the extract decree.

[22] The procedure since the grant of decree has been occasioned through the ignorance of the appellant. I have decided that, so far as the lodging of the Note of Appeal is concerned, it was excusable. However, no fault attaches to the defender and it has been put to unnecessary expense. The solicitor for the respondent told me that until the marking of the appeal she had been unaware of the appellant's claim that she was having problems

receiving mail. There was no requirement in terms of the Ordinary Cause Rules for communication between the parties and between the parties and the sheriff clerk to be only by email. The solicitor for the respondent complied with the rules in that regard. The appellant did not help herself by requesting that there be no communication with her from the respondent's solicitor: such communication is essential in any litigation and the appellant appears to have had a greater expectation of the sheriff clerk than the rules dictate.

[23] In all those circumstances, the respondent is entitled to the expenses of the motion.

[24] I have therefore exercised the dispensing power in favour of the appellant, granted the motion and allowed the appeal to be made. The appellant has helpfully along with the motion lodged a note and grounds of appeal. The appeal can therefore now proceed along conventional lines with the date of this judgment being treated as the date of lodging of the note and grounds of appeal.