SHERIFF APPEAL COURT

[2019] SAC (Civ) 27
INV-A50-16

Sheriff Principal Abercrombie QC
Sheriff Principal Pyle
Appeal Sheriff Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL PYLE

in appeal by

WALTER FINLAYSON AND CATHERINE FINLAYSON

Pursuers and Respondents

against

GORDON MUNRO

Defender and Appellant

Defender and Appellant: Gardiner, advocate; Currie Gilmour & Co
Pursuers and Respondents: Thomson; Harper Macleod LLP

27 June 2019

[1] This action concerns a dispute between neighbours over the boundaries between their respective properties. The appeal was set down for a hearing today. Before being addressed by counsel for the appellant, the court drew parties' attention to the terms of the sheriff's last interlocutor in which he dealt with two of the three craves for each respondent and the corresponding pleas-in-law, but continued consideration of the remaining craves, both of which were craves for decree ordaining the appellant from removing from the disputed areas of land. The other craves were for declarator and interdict. The sheriff had

granted the declarators sought but had refused to grant final interdicts preventing the appellant from entering upon the disputed areas of land.

[2] On any view, the sheriff's interlocutor was not a final one. No leave to appeal had been sought from or granted by the sheriff.

[3] Section 110 of the Courts Reform (Scotland) Act 2014 is in the following terms:

> "(1) An appeal may be taken to the Sheriff Appeal Court, without the need for permission, against—
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> (a) a decision of a sheriff constituting final judgment in civil proceedings, or
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> (b) any decision of a sheriff in civil proceedings—
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> (i) granting, refusing or recalling an interdict, whether interim or final,
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> (ii) granting interim decree for payment of money other than a decree for expenses,
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> (iii) making an order ad factum praestandum,
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> (iv) sisting an action,
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> (v) allowing, refusing or limiting the mode of proof, or
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> (vi) refusing a reponing note.
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> (2) An appeal may be taken to the Sheriff Appeal Court against any other decision of a sheriff in civil proceedings if the sheriff, on the sheriff's own initiative or on the application of any party to the proceedings, grants permission for the appeal…"

[4] It is plain that the sheriff's interlocutor in this appeal does not constitute final judgment in the proceedings. It follows that the appeal is incompetent in the absence of leave, unless it falls within one of the exceptions set out in sub-section 110(1)(b).

[5] Counsel for the appellant submitted that as the sheriff's interlocutor included in it the refusal of the craves for final interdict, no matter that this part of the interlocutor was not included in the grounds of appeal, the effect was that the interlocutor was appealable without leave as falling under the exception in sub-section 110(1)(b)(i).

[6] We reject that submission. The exception which applies to refusal of interdict is of the sheriff's *decision*, not the interlocutor. The latter is merely the vehicle for expressing that

decision. In the same way, if an appeal court decides to reject an appeal it "refuses the appeal" and only then adheres to the interlocutor complained of. Or if it decides to allow the appeal, again it "sustains the appeal" and only then recalls the interlocutor.

[7] In our opinion, there are sound policy reasons behind section 110. It is important that litigation is conducted within the appropriate level of the judicial hierarchy and is dealt with expeditiously at whatever level Parliament has decided is appropriate. That principle would be undermined if at any point in the process an aggrieved party were entitled to appeal to a higher court an interlocutory decision of the court below. The reason for the exceptions reinforces that principle, in that they are all decisions which are of material importance or would affect the status quo of the parties (Macphail, *Sheriff Court Practice*, 3rd edit., para 18.31).

[8] We are also reinforced in our view when we consider the very different terms of the previous rule as contained in section 27 of the Sheriff Courts (Scotland) Act 1907, which provided for exceptions in similar terms to section 110, but against the *interlocutors*, rather than the decisions. Sheriff Principal Ireland in *MacColl* v *MacColl* 1992 SCLR 187, in holding as competent an appeal against an interlocutor which contained orders both for interim interdict and interim aliment but in respect of which the appeal was against only the decision on interim aliment, said this (at p188):

> "I have a strong suspicion that the result is not what the draftsman meant to say, since the general drift of section 27 is that interlocutory appeals without leave are to be permitted only when they relate to some matter which cannot easily be put right if the appeal is postponed until after final judgment."

It would appear that Parliament took these comments to heart when considering the rule to be introduced in the 2014 Act.

[9] At one point counsel for the appellant prayed in aid the dispensing power contained in Rule 2.1 of the Ordinary Cause Rules 1993, but he eventually accepted (rightly in our view) that such power is, as the rule states, to "relieve a party from the consequences of a failure to comply with a provision in *these Rules* [italics added]", not a provision in the 2014 Act. In any event, the failure would be not seeking leave of the sheriff, which of itself makes no difference unless he had in fact granted the motion, which cannot just be assumed.