EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 68
XA66/17

Lady Clark of Calton

OPINION OF LADY CLARK OF CALTON

in the application

for leave to appeal under Court Reform (Scotland) Act 2014 section 113

by

KS

Appellant

Defender and Appellant: Party
First Respondent: Catto (sol adv); Addleshaw Goddard
Second and Fourth Defenders and Respondents: McSherry (sol adv); DWF

14 November 2017

Summary

[1] The applicant in this case sought leave from this court to appeal against a decision of the Sheriff Appeal Court made on 12 June 2017 in which the Sheriff Appeal Court refused to allow an appeal to be received late. The background to that decision is as follows:

> "[2] ... On 24April the appellant lodged ground of appeal but these failed to comply with Rule 6.6(3) in that they did not state whether the appellant considered the appeal should be appointed to the standard appeal procedure or the accelerated appeal procedure and the appeal was returned to the appellant.
>
> [3] An appeal requires to be lodged within 28 days of the day after the decision appealed against is given. Rule 6.3. This means that the time starts to run on the day

following the decision, in this case 12 April. The appeal must therefore be lodged within 28 days of that date. Accordingly the ground of appeal required to be lodged with the Sheriff Appeal Court in Edinburgh by 10 May to comply with the Rules. The appellant only re-lodged the ground of appeal in correct form on 16 May and was accordingly late. His explanation being that his ill health had prevented him from lodging the grounds timeously. The extract decree against the first, second and fourth defender was issued on 11 May 2017.

[4] Having regard to *Alloa Breweries* v *Porter* 1991 SCLR 70 there is generally no appeal against an extracted judgment. An appeal can only be considered if there is some impropriety in the issuing of the extract decree. There was no suggestion here of any impropriety. In the circumstances I was not prepared to allow the appeal to be received late, the appeal post-dating the issue of extract decree.

[5] As I explained had extract not been issued I should have been sympathetic to the appellant's motion for the appeal to have been received late in the circumstances as he narrated them. His ill health after the return of the defective grounds of appeal by the court may well have persuaded me to exercise my discretion to allow the appeal to be received late had extract not been issued. But I took the view that the law was clear and recognising the need for certainly and finality there was no basis to allow a late appeal where there was no challenge to the extract having been properly issued. In all the circumstances I however determined no make no award of expenses in relation to the appeal."

The applicant unsuccessfully sought leave from the Sheriff Appeal Court to appeal to this court.

The Application to this Court

[2] The relevant test to be considered by this court is set out in section 113 of the Courts Reform (Scotland) Act 2014 ("the 2014 Act") which states:

"(1) An appeal may be taken to the Court of Session against a decision of the Sheriff Appeal Court constituting final judgment in civil proceedings, but only—

(a) with the permission of the Sheriff Appeal Court, or

(b) if that Court has refused permission, with the permission of the Court of Session.

(2) The Sheriff Appeal Court or the Court of Session may grant permission under subsection (1) only if the 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...."

[3] The applicant accepted that the appeal does not raise an important point of principle or practice but submitted that there was some other compelling reason to hear the appeal because the applicant had suffered a miscarriage of justice by being denied substantive justice. The errors of law identified were as follows:

> "(2) the Learned Sheriff erred in law in deciding that the applicant failed to lodge his application to appeal within the 28 day time limited prescribed by statute.
>
> (3) the Learned sheriff erred in law in refusing to exercise the wide discretion available to him in terms of Rule 2(1) of the Sheriff Appeal Court Rule 2014 and permit the application to appeal to be received although late.
>
> (4) the Learned Sheriff erred in law in refusing to exercise the wide discretion available to him in any event under Rule 2(1) as aforesaid."

[4] I am grateful to the applicant for agreeing to give to the court and parties' representatives his written notes which formed the basis of his oral submissions. The applicant gave a well focused submission and drew attention to the conjoined appeals cited under *Hamilton* v *Glasgow Community and Safety Services* 2016 SC (SAC) 5 and *Macguire* v *Grant and Wilson Property Management Limited* [2017] SAC (Civ) 20.

[5] In oral submissions, the applicant accepted that the application was not concerned with the merits of the dispute and his focus was properly on the decision making and reasons of the Sheriff Appeal Court which refused to allow the appeal late and thus declined to hear a substantive appeal. It is not in dispute that the applicant lodged timeously form 6.2 as a Note of Appeal setting out grounds of appeal. This is not a case where the grounds of appeal are criticised as inadequate for not complying with the rules. The only criticism made of the applicant's attempt to comply with the Rules of Court relating to appeals is contained in the letter sent on behalf of the Sheriff Appeal Court dated 24 April

2017. This letter informed the applicant that the Note of Appeal which was received was being returned and advised

> "the note of appeal requires to state within section 4, whether the appellant considers that the appeal should be appointed to the standard appeal procedure or accelerated appeal procedure, taking into account Rule 6.6(3)."

The applicant was invited to resend the Note of Appeal duly completed.

[6] The applicant did not dispute that the letter dated 24 April 2017 had been sent and received at the address he gave for correspondence. He explained that it was not opened by him until a later date, after extraction, because his partner, who was very concerned about his ill health, had kept correspondence from him for a period to try to safeguard him. The applicant said he was ill during this period and had been so diagnosed by his medical practitioner. He understood that his appeal was lodged and was not expecting any correspondence. The applicant submitted that immediately he became aware of the difficulties in relation to the Rules, he had sought to put matters right; the delay was short; he had followed the advice given to seek leave to appeal late; the Sheriff Appeal Court were sympathetic to his position; the problem was the extract which he had no reason to know about. He submitted it was plain from the case law that the court had allowed late appeals even after extract.

[7] The solicitor advocates for the respondent adhered to their Answers, relied on the reasoning of the Sheriff Appeal Court in the opinion dated 12 June 2017 and submitted that there was no error of law and no compelling reason.

Decision and Reasons

[8] Accepting for present purposes that what was said by the applicant was true, I consider that the applicant made a powerful submission to the effect that because of a minor

infraction of the Rules, in circumstances where he had no actual knowledge, he was left in a position where his substantive appeal had not been heard and determined by the Sheriff Appeal Court.

[9] I accept that there are some restricted circumstances under the law, as it has developed to date, in which the court has power to grant late leave to appeal even after an interlocutor has been extracted. The difficulty for the applicant is that the power of the court is not a matter of open discretion dependent upon all the circumstances of the case. The scope of exception to the normal rule is limited to circumstances where there is some incompetence or irregularity. It appears that the Sheriff Appeal Court did have some sympathy for the positon of the applicant and I also have sympathy for his position. Nevertheless I am unable to identify any error of law by the Sheriff Appeal Court. In my opinion, the Sheriff Appeal Court properly identified that there were recognised exceptions to the general rule that there could be no appeal against an extracted interlocutor and concluded that the circumstances of the present case did not fall within the exceptions. It is not in dispute in the present case that the interlocutor of the sheriff was extracted and the decision making of the Sheriff Appeal Court must be considered against that background. The general rule which the courts require to apply is that set out by the Inner House in *Alloa Brewery Company Limited* v *Parker* 1991 SCLR 70. In the present case the applicant accepted that he had not complied with all the relevant rules prior to extract, albeit he submitted there was only a minor infraction. I accept that the failure was minor but nevertheless the rules were not complied with. In my opinion the problem did not arise because of any act or omission on behalf of the sheriff court administration or of the respondents. I cannot find in any of the case law any support for an exception in the circumstances described by the appellant. I accept that a litigant, especially perhaps a party litigant, may suffer problems

and pressures and one may often sympathise with that. Nevertheless if a party chooses to raise a litigation against other parties, I consider that it is incumbent upon such a litigant to organise their affairs in such a way that even if illness or other misfortune supervenes, there is a strategy in place in relation to correspondence about the legal action.

[10] In section 113 of the 2014 Act the words "compelling reason" has a particular legal meaning. It does not merely mean compelling in the general sense. A starting point for what may be a compelling reason is an arguable material error of law. I am not persuaded that the Sheriff Appeal Court did make any error of law in this case and therefore the application for leave to appeal falls at the first hurdle. Further in relation to the submissions that there is a collapse of fair procedure, I think it is relevant to take into account that the action raised by the applicant was dismissed. It is a matter for him whether or not he wishes to consider re-raising the action. It was not submitted that there were any timebar problems.

[11] Accordingly the application for leave to appeal is refused.