



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 42  
XA32/23

Lord Doherty

OPINION OF THE COURT

delivered by LORD DOHERTY

in the Application by the First Defender for Permission to Appeal to the Court of Session  
under s 113 of the Courts Reform (Scotland) Act 2014 against the decision of the Sheriff  
Appeal Court dated 5 July 2023

in the cause

THE ROYAL BANK OF SCOTLAND PLC

Pursuers

against

MOHAMMED ASLAM

First Defender

and

THOMAS CAMPBELL MACLENNAN

Second Defender

**Pursuers: Foyle, Sol Adv; Shoosmiths**  
**First Defender: Party, with Richard Thorburn (Lay Representative)**

15 November 2023

**Introduction**

[1] In this application for permission to appeal against a decision of the Sheriff Appeal Court the first defender is a party litigant. He applied to the court in terms of rule of court 12B.2 for permission for Richard Thorburn to appear as his lay representative at the

hearing on 3 November 2023. Both he and Mr Thorburn had completed Form 12B.2. In Part 1 the first defender described Mr Thorburn's experience as "formerly professionally qualified lawyer". In Part 2 Mr Thorburn amended declaration (d) to state "I declare that I have no previous criminal convictions (other than minor road traffic infringements)." Neither the first defender nor Mr Thorburn disclosed in the form that in 2009 Mr Thorburn had been found guilty of professional misconduct and had been struck off the roll of solicitors. Nor did they disclose that in another case in 2016 this court had refused a previous application by the first defender to have Mr Thorburn as his lay representative (*Mohammed Aslam v Glasgow City Council* [2016] CSIH 78, at paras [5] to [8]). Candour required that they should have done so. It does not reflect well on them that they did not. It should not have been left to the court to discover these facts through its own researches (which it did) or through information provided by the pursuers.

[2] The first defender tendered a written submission in support of his motion. The crux of the submission was that Mr Thorburn was his only remaining option for assistance of any sort. There was no-one else who could help him. He had made extensive enquiries, without success, to try to obtain legal representation. There was a real imbalance of power and resources, and an inequality of arms, between the parties. Allowing Mr Thorburn to appear as his lay representative would go some way to redress that, would assist the court, and would be in the interests of justice. The pursuers opposed the motion, maintaining that Mr Thorburn would be unlikely to assist the court, for the reasons discussed in *Mohammed Aslam v Glasgow City Council*, at para [8].

[3] I granted permission for Mr Thorburn to appear as lay representative at the hearing on 3 November, albeit I had very considerable misgivings about doing so. I was conscious that the hearing could well be the end of the road for the first defender, and that he and his

wife might lose their home. It was plain to me that Mr Thorburn had prepared the written submissions which were already before the court, and that in those circumstances I was likely to obtain more assistance from him about their content than I would from questioning the first defender. I was also mindful of the need for justice to be seen to be done, and that the court could withdraw permission during the course of the hearing if it became clear that Mr Thorburn's submissions were of no assistance. Those considerations led me to conclude that it was in the interests of justice that permission be granted, notwithstanding my reservations. As I indicated to Mr Thorburn at the time, the allowance of the motion ought not to be regarded as being in any way a precedent to be relied upon in any future applications concerning him. Nor should it be viewed as in any way an endorsement by the court of his suitability for the role of lay representative.

### **Background**

[4] The pursuers' predecessors advanced loans to the first defender. The first defender granted standard securities over several properties owned by him to the pursuers' predecessors, including a standard security over the home where he and his wife reside, and of which he is the heritable proprietor. That standard security was granted on 27 May 2008. It is for all sums due and that may become due by the first defender. The first defender was sequestrated with effect from 26 September 2008. The second defender is the Trustee in sequestration.

[5] Since his sequestration the first defender has instigated a tsunami of litigation. On 22 March 2019 this court declared him to be a vexatious litigant (*Lord Advocate v Mohammed Aslam* [2019] CSIH 17). Some of the litigations up to that time are listed in para [4] of the court's Opinion. In one of them the first defender sought damages from the pursuers for

selling 27 of his properties for less than their market values in breach of their duties as security holders. That action was dismissed by Sheriff Deutsch on 17 October 2017. An appeal was refused by the Sheriff Appeal Court on 18 January 2018. On 27 June 2018 this court refused permission to appeal (*Mohammed Aslam v Royal Bank of Scotland* [2018] CSIH 47).

[6] The first defender defaulted on the loan repayments. No repayments have been made since 2018. The pursuers' predecessors demanded repayment of the loans in full. They served a notice of default and raised proceedings to enforce the standard security. Decree was granted. The first defender's appeal to this court was refused. Before that decree was enforced, the United Kingdom Supreme Court issued its decision in *Royal Bank of Scotland plc v Wilson* 2011 SC (UKSC) 66. That decision clarified that where the default relied upon was a failure to pay money a calling-up notice required to be served. In light of that decision the pursuers did not seek to enforce the decree. They began again. They served a calling-up notice on the first defender requiring payment of the outstanding monies within 2 months, failing which to allow them to exercise their rights as heritable creditors. The notice period elapsed without the first defender having taken any steps to reduce or challenge the notice or tender payment of the sums due.

### **The summary application**

[7] The pursuers lodged a summary application in the sheriff court at Glasgow craving the court (i) to find and declare that the first defender is in default in terms of standard condition 9(1)(a) of the standard security and that they have a right to enter into possession of the security subjects; (ii) to grant warrant to them to enter into possession of those subjects by virtue of s 24 of the Conveyancing and Feudal Reform (Scotland) Act 1970; and

(iii) to ordain the defenders and any person occupying the subjects to vacate them and to grant warrant for summary ejection. In Article 5 of the application the pursuers stated that all of the obligations set out under the Home Owner and Debtor Protection (Scotland) Act 2010 had been complied with, and an appropriate certificate of completion of those requirements was produced (Act of Sederunt (Sheriff Court Rules)(Enforcement of Securities over Heritable Property) 2010, Schedule 1, Form 11C). In the same article the pursuers aver that the first defender had suggested that his son should purchase the security subjects for a price which was below the market value using funds which the first defender proposed the pursuers should lend his son; that the pursuers rejected the offer; and that the first defender wrote to them (in a letter dated 7 August 2021) saying:

“If the bank does not want to bring the ongoing matters to an end, then we can continue the matter through the courts for possibly another 10+ years...the property could become seriously fire damaged or demolished before bringing matters to an end. For your information I do NOT have any home insurance.”

Reference was also made to an earlier letter (dated 18 May 2018) where the first defender had stated:

“Should you wish to proceed with court action it will go through the whole court process all the way to the UKSC and European Court of human rights and Could (*sic*) take several years, by the time I will make sure that the property will not be worth half the mortgage value because I will knock down the property to ground level and then I restart (*sic*) the court proceed (*sic*) all over again.”

[8] Only the first defender entered appearance and lodged defences in the summary application process. He stated a plea of *res judicata*, maintaining that the matters raised had been adjudicated upon in the previous proceedings. Answer 3 contained a bald denial that the first defender was in breach of his obligations under the standard security. He averred that if an amount remained due to the pursuers “which is not known and not admitted” it was because the pursuers had failed in their statutory duty (Conveyancing and Feudal

Reform (Scotland) Act 1970, s 25) to take all reasonable steps to ensure that they obtained the best prices which could reasonably be obtained for other security subjects which they sold when enforcing standard securities over them. The first defender averred that “the pursuer is accordingly prevented from proceeding with this application under the principle of personal bar.” He further averred that as at 20 October 2008 there was a balance of in excess of £50,000 in his current account with the pursuers “which sums are or were available to service or set off” against his mortgage account. In those circumstances it would be unreasonable for the court to grant the orders sought. Both parties had pleas to the relevancy and specification of the other party’s pleadings.

#### **Sections 24 and 25 of the Conveyancing (Scotland) Act 1970**

[9] Sections 24 and 25 of the Conveyancing (Scotland) Act 1970 provide:

**“24 Application by creditor to court for remedies on default.**

(1) Without prejudice to his proceeding by way of notice of default in respect of a default within the meaning of standard condition 9(1)(b), a creditor in a standard security, where the debtor is in default within the meaning of that standard condition or standard condition 9(1)(c), may apply to the court for warrant to exercise any of the remedies which he is entitled to exercise on a default within the meaning of standard condition 9(1)(a).

(1A) Subsection (1) above does not apply in relation to a creditor in a standard security over land or a real right in land used to any extent for residential purposes.

(1B) A creditor in a standard security of that kind may, where the debtor is in default within the meaning of paragraph (a), (b) or (c) of standard condition 9(1), apply to the court for warrant to exercise any of the remedies which the creditor is entitled to exercise on a default within the meaning of standard condition 9(1)(a).

...

(5) The court may, on an application under subsection (1B) above, continue the proceedings or make any other order that it thinks fit; but it may not grant the application unless it is satisfied that—

(a) the creditor has complied with subsection (1C) above; and

(b) it is reasonable in the circumstances of the case to do so.

...

### **25 Exercise of power of sale.**

A creditor in a standard security having right to sell the security subjects may ... exercise that right either by private bargain or by exposure to sale, and in either event it shall be the duty of the creditor to advertise the sale and to take all reasonable steps to ensure that the price at which all or any of the subjects are sold is the best that can be reasonably obtained."

### **Procedure before the sheriff**

[10] On 20 May 2022 the sheriff assigned 21 July 2022 for a debate on the *res judicata* plea. At the debate the plea was repelled and the sheriff assigned 4 October 2022 as a further diet of debate on the relevancy pleas. He allowed 21 days for the first defender to adjust his pleadings, 14 days for the pursuers to respond, and a further 7 days for both parties to make final adjustments. He ordered that notes of argument were to be lodged no later than 7 days before the diet. The first defender sought leave to appeal the interlocutor of 21 July 2022. He also moved to sist the cause. On 2 September 2022 the sheriff refused both motions. He allowed further adjustment of the pleadings until 27 September 2022. On 30 September 2022, at the first respondent's request, the sheriff discharged the diet of debate assigned for 4 October 2022 (on the basis that the first defender had another court case in Edinburgh the same day) and assigned 29 November 2022 as a fresh diet of debate. On 23 November 2022 the sheriff refused a further motion by the first defender to sist the cause. In his Note prepared following the debate on 29 November 2022 the sheriff says that at the hearing on 23 November he advised the parties that if they proposed to refer to any documentation at the debate hard copies should be brought to court because the IT facilities in some

courtrooms were “of limited assistance”. There was some discussion of the possibility of the first defender wishing to alter his pleadings. The sheriff explains:

“I advised the [first defender] that if it was his intention to adjust his pleadings further then it would require to be dealt with in a formal fashion, as the time to adjust ... had long expired. At no time did I suggest that any adjustment would be allowed.”

[11] On the afternoon of 28 November 2022 the first defender emailed to the sheriff clerk a document headed “Note of Adjustments”, an Inventory of Productions, and written submissions. These were uploaded to ICMS before the debate. The first defender did not provide the sheriff with hard copies of any of these documents at the debate. Most of the “Note of Adjustments” concerned an expansion of the averments in Answer 3 that the pursuers had failed to comply with their s 25 obligation when selling properties secured under further standard securities. In relation to some properties, there were more specific averments of the respects in which it was averred that there had been non-performance with that obligation. The Inventory of Productions contained, *inter alia*, some documents referred to in those averments. The written submissions were to the effect that the court required to be satisfied that it is reasonable in the circumstances to grant the remedies sought (1970 Act, s 24(5)). The first defender had averred that it was not reasonable to do that because the pursuers had breached their s 25 obligations when they sold other security subjects. That was not an issue which could be resolved at debate. A proof before answer would be required.

[12] At the debate the first defender moved that he be allowed to lodge the “Note of Adjustments” and the Inventory of Productions. The pursuers opposed those motions. The sheriff refused the motions on the grounds that the proposed adjustments and additional productions came too late before the debate and appeared to be of questionable relevance to



the issues which required to be determined at the debate. The debate proceeded. The sheriff described how it ended:

“In the course of the debate I sought to discuss with the [first defender] certain submissions advanced by the [pursuers’] agent. In particular submissions concerning the reasonableness of the orders sought. The [first defender] responded to my enquiry inappropriately. He reacted hysterically. He started to shout and swear at me and at the [pursuers’] agent. He began a tirade littered with profanities and accusations. He accused me of being corrupt. He accused me of racism. He threatened repeatedly to ‘torch’ the subjects. He demanded that I call the police to attend the courtroom and have him arrested in order that he could put me in the witness box and examine me. His behaviour lasted some minutes before he left the room. The enquiries I made of the appellant were polite, and could in no way be construed as hostile or unreasonable. In my opinion they were necessary in order to progress the diet of debate.”

The pursuers moved for decree by default on the basis that the first defender had deliberately absented himself from a peremptory diet. The sheriff granted decree. In doing so he had regard to the deliberate absence and the background of repeated motions on the first defender’s part to delay the proceedings and his stated determination in correspondence to delay them. The pursuers moved for immediate extract, which the sheriff granted because of the first defender’s threats to “torch” the security subjects. On further reflection the sheriff acknowledged that he ought not to have granted immediate extract, but should instead have invited the pursuers to intimate their motion to the first defender to allow him to make representations.

### **The appeal to the Sheriff Appeal Court**

[13] The first defender appealed to the Sheriff Appeal Court. The grounds of appeal blamed the sheriff for the first defender’s conduct and departure and contended that the sheriff had erred in law in treating the first defender as being in default. Alternatively, if the first defender had been in default, the sheriff had erred in granting decree by default. No

reasonable sheriff would have done so in the circumstances. The sheriff had also erred in law in granting immediate extract without first giving the first defender the opportunity to make representations about that.

[14] On 12 May 2023 the Sheriff Appeal Court refused the appeal. It held that the sheriff was entitled to treat the first defender as being in default and to grant decree by default. The circumstances were not dissimilar to those in *Bridging Loans Limited v Hutton* [2018] CSIH 63, 2018 Hous LR 83. Nevertheless, the court considered whether in the whole circumstances the interests of justice required that the decree should be recalled. It concluded that they did not. In that regard the court observed:

“[20] ... I accept the description by the sheriff of the behaviour at the diet of debate coming against the background of repeated and unjustified motions to delay the process and a stated commitment to do so ... It is not in the interests of justice to allow a further delay occasioned entirely by Mr Aslam’s wilful and unacceptable behaviour.”

It was common ground before the Sheriff Appeal Court that the sheriff had been wrong to grant immediate extract. However since by the time of the appeal the first defender had had ample notice, the court held that immediate extract could now be granted.

### **The application for permission to appeal**

[15] Section 113 of the Courts Reform (Scotland) Act 2014 provides:

#### **“113 Appeal from the Sheriff Appeal Court to the Court of Session**

(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.

...”

The first defender’s application to the Sheriff Appeal Court for permission to appeal was refused on 5 July 2023. The first defender then applied to this court for permission to appeal.

[16] The first defender submitted that there were two grounds of appeal which would raise important points of principle or practice. In the event that it was not accepted that the first ground raised such a point, it provided some other compelling reason for the Court of Session to hear the appeal.

[17] The first ground was that the root cause of the first defender’s behaviour at, and departure from, the hearing had been the sheriff’s failure to manage the hearing properly. A consequence was that the sheriff had an interest to protect his reputation, which had been undermined. It was plain from the terms of his Note that he had been improperly influenced by that. The Note was self-justifying and confused. It did not adequately explain his reasons. It contained an “untruth”: *viz.* it stated that the first defender had made repeated applications to sist the cause before the application to sist of 23 November, when in fact there had only been one such application before that date. The Note did not summarise fairly what had taken place at the hearings of 23 and 29 November – it was “not reliable”. At the hearing of 23 November there had been “an implied invitation” by the sheriff to the first defender to further adjust his pleadings. That was why his refusal to allow the adjustments had perplexed and annoyed the first defender. It had been wrong of the sheriff

to have regard to what the first defender was alleged to have said in correspondence, and it had been wrong of him to grant immediate extract. In the circumstances he ought to have recused himself when the motion for decree by default was made. The Sheriff Appeal Court had erred in law in failing to recognise that. This ground raised an important point of principle or practice because “the integrity of the judicial system” was at stake.

[18] The second ground was that the sheriff, and in turn the Sheriff Appeal Court, had erred in law in failing to consider whether it would be reasonable in the whole circumstances for decree by default to be granted. Section 24(5) of the 1970 Act applied even where a party was in default. It had still been necessary for the sheriff to consider whether it was reasonable in all the circumstances to grant decree. There was no indication in his Note that the sheriff did that. The failure was an error of law, and the Sheriff Appeal Court erred in law in failing to recognise that. The Sheriff Appeal Court’s reliance on *Bridging Loans Limited v Hutton* was misguided. The case was distinguishable because it could be inferred that the sheriff there had been satisfied of the reasonableness of making the orders before the defender’s default occurred. If it was not distinguishable and if it was authority for the proposition that s 24(5) was not applicable where a motion for decree by default was made, it had been wrongly decided. There was doubt as to the correctness of the decision in *Bridging Loans* and as to whether or not s 24(5) applied where a defender was in default. Those were important points of principle or practice which this ground of appeal raised.

[19] The pursuers submitted that permission to appeal should be refused. The first defender, not the sheriff, was to blame for what occurred. There was no reason for the sheriff to recuse himself. Nor were any of the other criticisms of the sheriff well-founded. The decisions which the sheriff had made at the hearing on 29 November had all been decisions which he had been entitled to make in the exercise of his discretion. He had not

erred in law in making them (apart from the procedural irregularity of granting immediate extract without giving the first defender the opportunity to make representations in relation to that matter). The sheriff had been entitled to grant decree by default. It was incorrect to suggest that he did not have in mind the s 24(5) requirement to be satisfied that it was reasonable to grant decree in the circumstances. The first defender had averred that the reason it would not be reasonable to grant decree was that the pursuers had failed to comply with their s 25 obligations when they sold other subjects. The pursuers had averred that they had complied with their statutory obligations and had set out in considerable detail the steps which they took in relation to each sale. The sheriff had been entitled to be, and was, satisfied on the basis of those averments and the productions that the s 24(5) requirement was met. The Sheriff Appeal Court had been right to refuse the appeal. It had not erred in law in placing reliance upon *Bridging Loans Limited v Hutton* or in any other respect. The grounds of appeal were not arguable. More importantly, neither of them raised an important point of principle or practice, and there was not some other compelling reason for the Court of Session to hear the appeal.

### **Decision and reasons**

[20] The requirements of s 113(2) are not satisfied.

[21] The first ground of appeal does not raise an important point of principle or practice.

The law in relation to the need for a judge to be impartial, and to appear impartial to the objective informed observer, is not in doubt. The first defender blames the sheriff for his outburst and his departure from the hearing. The sheriff and the Sheriff Appeal Court disagree.

[22] Nor does the first ground give rise to some other compelling reason for the Court of Session to hear the appeal. This is not a case where it can be said that the Sheriff Appeal Court was plainly wrong. On the contrary, the ground of appeal has no real prospects of success, for the following reasons.

[23] The first defender's substantial proposed "Note of Adjustments" and his Inventory of Productions were intimated to the court and to the pursuers the day before the hearing on 29 November 2022. Their receipt was opposed by the pursuers. The sheriff was entitled to exercise his discretion in the way which he did to refuse to allow them to be received. The first defender was entirely responsible for what occurred at the hearing. The sheriff was not to blame for the first defender's deplorable behaviour, or his departure from the hearing. Nothing which the sheriff said or did before the departure caused or justified the first defender's actions. Only by taking a skewed view of the facts may it be argued otherwise.

[24] There was no good reason for the sheriff to recuse himself from further involvement in the case after the first defender's outburst and departure. It is important to stress that the issue which the sheriff had to decide was not whether the first defender's outburst was a contempt of court. Had it been he could not have adjudicated upon it, because the alleged contempt would have been *in facie curiae* (in the face of the court), and it would have been directed at the sheriff personally as well as at the administration of justice (*Robertson v Gough* 2008 JC 146, at [79] and [85]; *Macphail's Sheriff Court Practice* (4<sup>th</sup> ed.), paragraphs 2.30 to 2.32). What the sheriff had to decide was much more straightforward - whether the first defender's departure from a peremptory diet was a default and whether decree by default should be granted. The sheriff remained calm and composed during the first defender's outburst and departure. There is nothing to indicate that he was motivated by an impulse of reprisal. Nor, in the whole circumstances, would a fair-minded and impartial observer,

aware of the judicial oath, doubt the sheriff's impartiality. It was the sheriff's duty to continue to preside over the hearing and deal with the pursuers' motion for decree by default. The proposition that he erred in law in not recusing himself, and that the Sheriff Appeal Court erred in law in not recognising that, is ill-founded.

[25] In any case, the Sheriff Appeal Court was undoubtedly impartial. It recognised (para [20] of its Opinion) that it required to consider the whole circumstances of the case for itself to determine whether the interests of justice indicated that the decree should be recalled. It did that and it concluded that the decree should not be recalled. That was a view it was entitled to reach. The first defender suggests that that conclusion was fatally flawed because it proceeded on the erroneous assumption that there had been three unsuccessful attempts to sist the cause by the first defender when in fact there had only been two. There was a mistake by the sheriff when he referred to there being two unsuccessful attempts to sist prior to the motion of 23 November 2022: but it was no more than a slip. The Sheriff Appeal Court repeated the mistake. However, in neither case was the error material. It did not undermine the substance of either court's observations about the first defender's attempts to delay the proceedings and his statements in correspondence indicating an intention to obstruct and protract enforcement proceedings. The first defender's description of this slip as "an untruth" was wholly inappropriate. The suggestion that its consequence ought to be that everything the sheriff said should be rejected is extravagant and absurd.

[26] I turn to the second ground of appeal. It is erroneous to suggest that *Bridging Loans Limited v Hutton* is authority for the proposition that s 24(5) does not apply in the context of a motion for decree by default. On the contrary, it is clear from this court's Opinion in that case that the sheriff (para [6]) and the Sheriff Appeal Court (para [7]) were both satisfied that

it was reasonable in all the circumstance for decree to be granted. The Sheriff Appeal Court in the present case did not err in following the guidance in *Bridging Loans*. The correctness of that decision is not in doubt. Nor is it in doubt that s 24(5) applies even where a defender is in default. It follows that the second ground of appeal does not raise an important point of principle or practice.

[27] While that is sufficient to dispose of the application it is right to add that, even if the second ground had raised an important point of principle or practice, it would have had no real prospect of success. The sheriff was well aware of the import of s 24(5). The suggestion that he ignored it is untenable. Just before the first defender began his tirade the sheriff had been exploring the issue of reasonableness with him. The pursuers averred (Article 3) that the prices obtained for the properties had been the best which could be achieved by them in the market at the relevant times; that the properties were advertised and were sold on the open market; that they obtained valuations from surveyors; and that they followed all advice given to them by their surveyors and their marketing agents. They set out in some detail the steps they had taken in relation to each of those sales, the valuations they had obtained, and the sales prices achieved. They further averred that they had complied with their whole obligations under the 1970 Act, and that in all the circumstances it was reasonable to grant the orders sought. When the motion for decree by default was made the sheriff was entitled to proceed on the basis of what the pursuers averred about reasonableness. It may reasonably be inferred that that is what he did. In the grounds of appeal to the Sheriff Appeal Court the s 24(5) reasonableness issue was mentioned only incidentally (in ground 2.5 as part of a criticism that the sheriff appeared to treat the debate as if it were an evidential hearing). The summary of the first defender's submissions in the Sheriff Appeal Court's Opinion does not suggest that the ground now advanced was



founded upon before that court, which would explain the absence of specific reference to it in the court's reasoning. The Sheriff Appeal Court determined that the sheriff was entitled to exercise his discretion in the way which he did in all the circumstances - which circumstances included the pursuers' averments about reasonableness. Moreover, the Sheriff Appeal Court went on to consider for itself whether in all the circumstances the decree should be recalled, and it decided that recall would not be in the interests of justice. It was well aware of the terms of s 24(5) and the terms of the pleadings.

[28] The application is refused.