



SHERIFF APPEAL COURT

**[2017] SAC (Civ) 3
SAC/2017/WCK-F34-15/**

Sheriff Principal D L Murray

OPINION OF THE COURT

Delivered by Sheriff Principal D L Murray WS

In Appeal by

JM

Pursuer/Appellant

Against

JW

Defender/Respondent

**Appellant: Sloan, solicitor; Inksters
Respondent: No appearance**

9 January 2017

NOTE:

[1] This case called for the court to consider a motion for the late lodging of an appeal. The motion was not opposed and no appearance was made by the respondent. The case however has a convoluted and unfortunate background which is as follows. The action commenced in Wick Sheriff Court in 2015. The appellant sought a joint residence order in respect of a child KC, following the action having been commenced negotiations proceeded between the parties which resolved the matter. In or about November 2016 the respondent's solicitors intimated a motion moving for the action to be dismissed for want of insistence. This motion was subsequently amended, as a consequence of an omission in the motion to deal with the recall of the sist, which had been granted in the action. The e-mail of 7 November 2016 from the respondent's solicitors intimating the amended motion stated that formal intimation of the motion was in the post and the e-mail did not include the Form G 7. The appellant's agents never received the complete papers enclosing the Form G 7. The appellant's agents never established when the motion was to call. The parties however informally agreed that the respondent's agents would not oppose a motion to allow the appellant's opposition to the motion dated 7 November to be received although late. The appellant's agents then intimated a motion in those terms together with Form G 9 intimating opposition to the respondent's motion. However due to an administrative oversight by the appellant's agent the Form G 6 was not signed. The motion was not processed, by the court, as a result of this omission. The sheriff, as set out in the interlocutor of 15 November 2016, granted the respondent's motion unopposed, recalled the sist and dismissed the action with expenses.

[2] The interlocutor of 15 November was however not intimated to parties or sent out to the appellant's agents until 14 December 2016. This followed enquires having been made of the sheriff clerk's office by the appellant's agents about the position in the case. Thus the terms of the interlocutor only became known to the appellant's agent after the expiry of the time limit for lodging an appeal against the interlocutor on 15 November. On Friday 16 December the appellant submitted a motion to the Sheriff Appeal Court to allow the appellant to appeal although out of time, this motion being received by the Sheriff Appeal Court on Monday 19 December. The extract decree was intimated to parties by the Sheriff Court at Wick on 19 December.

[3] Mr Sloan referred me to *Macphail* 3rd Edition 18.19 and to a number of authorities in particular *Anderson Brown & Co. v Morris* 1987 SLT (Sh Ct) 96, *Wagon Finance v O'Lone* 1995 SCLR 149 and *Wanderers World Ltd v Marco's Leisure Ltd* 2000 SLT (Sh Ct) 79. He confirmed the appeal is restricted to the question of expenses. He submitted that while the general rule is that there could be no appeal where an extract had been issued the authorities demonstrated that if the extract was issued incompetently or improperly then an appeal was competent. He submitted that where a motion had been made to allow an appeal to be lodged late that the extract was issued improperly. He further submitted that there was impropriety in the failure to intimate the interlocutor on 15 November. In relation to the motion to allow the appeal to be lodged late he submitted that this had been done expeditiously by the appellant on becoming aware of the terms of the interlocutor against which appeal was sought. He invited me to exercise my discretion in the circumstances to recall the extract decree and allow the appeal to proceed.

[4] This case has arisen as a result of a number of unfortunate features compounding. The underlying principle which was approved in *Alloa Brewery Co Ltd v Parker* 1991 SCLR 70 is that there can be no appeal against an extracted interlocutor. The extra division in the *Alloa Brewery* case however recognised and made no criticism of the decision of Sheriff Principal Sir Frederick O'Brien, Q.C., in *Anderson Brown & Co. v Morris*. There a decree had been extracted after a motion to allow a late appeal to proceed had been lodged and the Sheriff Principal held the issue of the extract to be incompetent. It is stated in Macphail 3rd edition 18.19 there can be no appeal against an extracted interlocutor unless it has been improperly and incompetently issued. As is seen in *Anderson Brown & Co v Morris* where the extract has been issued after the appeal procedure initiated the extract is fatally flawed and does not prevent the appeal proceeding. The facts of the instant appeal are on all fours with the situation in *Anderson Brown & Co. v Morris*, the motion for late lodging of the appeal having been lodged prior to the issue of the extract.

[6] Prior to the introduction of the Sheriff Appeal Court, an application to appeal late would have been received at the Sheriff Court and one might expect in normal course that the Sheriff Clerk's staff should identify that an extract should not be issued pending the determination of that motion. Motions for late appeal are now however lodged with the Sheriff Appeal Court in Edinburgh. The case management system should therefore update the local court's case management system so as a check can be made as to whether an appeal has been lodged, or indeed, an application for late lodging of an appeal has been lodged. It would seem that in the instant case the fact of the motion for an appeal to be lodged late was not identified by the staff in Wick Sheriff Court. It is important that a check should be undertaken to avoid this situation being replicated in future.

[7] As noted by Sheriff Principal Dunlop in *Zlatarits v Zlatarits* 2008 SCLR 818 the authorities are divided on whether an extract is a bar to an appeal if the interlocutor itself is incompetently granted. The instant appeal was not presented on that basis and I express no opinion.

[8] I am however satisfied that the extract decree was issued incompetently, a motion for late appeal having been lodged. In the circumstances of a lack of intimation to the appellant's agent and their expeditious actions on becoming aware of the position, I am also prepared to exercise my discretion to allow the motion for late lodging of the appeal. Accordingly the extract decree shall be recalled and the appeal appointed to the accelerated procedure.