SHERIFF APPEAL COURT

[2018] SAC (Civ) 17
ABE-PD2-18

OPINION OF SHERIFF PRINCIPAL D C W PYLE

in appeal by

ROBERT BYRES

Pursuer and Respondent

against

PHILIP MOORE

Defender and Appellant

Pursuer and Respondent: McCarter; Digby Brown LLP
Defender and Appellant: Cleland, advocate; Clyde & Co

29 June 2018

[1] This is an appeal from the decision of the sheriff in Aberdeen to refuse a reponing note. I indicated at the end of the hearing that I intended to allow the appeal. Counsel for the appellant requested that I write on it. He said that the insurance industry was concerned about the practice which had developed in the Sheriffdom of Lothian and Borders as a result of the decision of the sheriff principal in *Bialas-Krug* v *EUI Limited*, unreported, 2014 SC Edin 38 (and other decisions by sheriffs: *Smith* v *Lothian Supply Co Ltd*, unreported, Sheriff Mackie, 14 September 2016; *Innes* v *VUK Holdings Ltd, trading as Velux*, unreported, Sheriff McGowan, 22 December 2016; *A & B Taxis* v *The Co-operative Insurance*, unreported, Sheriff W M Wood, 10 February 2017) and would welcome clarification from this court, albeit a single bench

decision. Given that I have taken a different view from that of the sheriff principal, I accepted that it would be better that I set out my reasons in writing.

[2] The appeal is in an action for damages in respect of injuries sustained by the respondent during an accident in April 2017 when he was the front seat passenger in a vehicle driven by the appellant. According to the respondent's averments the appellant lost control of the vehicle as a result of which it rolled, causing loss, injury and damage to the respondent. The crave was for £12,000, with interest, for solatium, past services and inconvenience. Decree in absence was granted on 7 February 2018. The reponing note was lodged on 21 March 2018. The failure to lodge a notice of intention to defend timeously was human error, in that the correspondence from the respondent's solicitors had been passed to the wrong team within the administrative structures of the insurers.

[3] Reponing is governed by Rule 8.1 of the Ordinary Cause Rules, which provides that there should be set out in the reponing note the proposed defence and an explanation of the failure to appear. The rule also provides that the sheriff may, on considering the reponing note, recall the decree. As was explained by the Inner House in the Full Bench decision of *Forbes* v *Johnstone* 1995 SC 220, from 1990 there has been no requirement in the rules for the sheriff to be "satisfied with the defender's explanation". The crucial point made by that court is as follows (at p 225):

> "It is unlikely that a sheriff will be willing in the exercise of his discretion to recall the decree unless he is satisfied that the proposed defence is a stateable one. As for the explanation, it is not a requirement of the rules that he must be satisfied that it provides a reasonable excuse for the non-appearance. The sheriff in the present case has pointed out that defenders may fail to enter appearance timeously for various reasons, some of which may be inexcusable. But it might result in an injustice if a defender who had a perfectly sound defence were to be denied the opportunity of entering the process simply because the explanation for his non-appearance was not a reasonable one."

It seems to me that the necessary consequence in practice of this construction of the rule is that if the sheriff is satisfied that the defence is stateable (a matter of judgment or evaluation, not discretion) and an explanation is given, no matter how short or unworthy, the sheriff *must* grant the reponing note. But their Lordships went on to say this:

> "As the matter is at the sheriff's discretion he is entitled, in such a case, to take account of all the circumstances and to balance one consideration against another in deciding whether to allow the reponing note."

The question which arises is this: what are "all the circumstances"? It is difficult to envisage any which would not be in the context of the explanation for the failure, which the court has expressly excluded. The problem may well be in the rule itself, in that it creates a discretion when on the face of it there is no room for one. It is noteworthy that there is no equivalent rule in the Court of Session where there is a right to recall a decree within seven days on the lodging, *inter alia*, of defences. The issue of a stateable defence arises only in the special circumstances of service of a summons on a person furth of the United Kingdom (Court of Session Rules, r 19). Presumably the drafters of the sheriff court rule had some circumstance in mind, but it is not immediately obvious to me what it might be other than a problem with the explanation, which, as I have said, the Inner House has expressly excluded.

[4] An example of the rule working in practice is *Thompson* v *Jardine* 2004 SC 590. The principal issue in that case was whether there was a stateable defence, but having decided there was one and that therefore the exercise of the discretion was at large for the court the Inner House stated (at para [30]):

> "It is, of course, also necessary to consider the explanation offered for the failure to enter appearance, as part of the assessment of the circumstances of a reponing note. As to that, it was not seriously contended that the mishap which had occurred in the present case was something which could never be excused. It appears to us that it was little more than an unfortunate oversight said to have been the result of staff shortages and pressure of business within the offices of the defender's agents. In all

> of these circumstances we have come to the conclusion that we should exercise the discretion which is now available to us to grant the reponing note."

The difficulty I have with that passage is that it is implicit in it that if the mishap had been inexcusable the reponing note would have been refused. There therefore remains a test of the worthiness or quality of the failure, which *Forbes* v *Johnstone* appeared to have excluded. It is scarcely surprising then that the sheriff in the instant case and the sheriff and the sheriff principal in *Bialas-Krug* v *EUI Limited* took into account a whole series of factors which ought to apply in testing the worthiness or quality of the failure – in other words, whether the explanation was satisfactory or reasonable.

[5] In *Bialas-Krug* v *EUI Limited* the sheriff principal took into account a number of factors which for present purposes I merely summarise as follows: first, the defence related to quantum of damages, not liability; secondly, the lack of explanation of a delay of over four months; thirdly, gaps in the explanation, from which the sheriff principal agreed with the sheriff that there had been no explanation at all; fourthly, the fact that the fault lay with the insurers who were regular and frequent players in the court system; and, fifthly, the worthwhile aim that litigation should be conducted efficiently and that the court should have the power to control the conduct and pace of the cases.

[6] In the instant case the sheriff took a similar approach. The factors he took into account were: first, the defence related to quantum of damages, not liability; secondly, the fact that the fault lay with the insurers who have a significant presence in the insurance market and deal with claims and litigation relating to the risks for which they offer insurance cover; and, thirdly, the insurers will be aware of the modern emphasis on the efficient and effective management of personal injury claims and litigation.

[7] The difficulty I have with all of these factors is that they are to all intents and purposes matters which should be regarded as testing the reasonableness of the explanation for the failure. The sheriff principal recognises the concept of the explanation being no explanation at all, but with due respect I do not consider that this is a fair description, however tempting it is to characterise the failures of the insurers as little more than that.

[8] I do recognise that the conclusion which I have reached might be said to run contrary to the approach taken by the Inner House in *Thompson* v *Jardine*, but I consider that I am bound by the decision of the Full Bench in *Forbes* v *Johnstone* – or, at least, my interpretation of it.

[9] I should add that if I am wrong in my view on the correct construction of the rule, I would readily agree with the approach taken by the sheriff and sheriff principal in *Bialas-Krug* v *EUI Limited* and the sheriff in the instant case. Counsel for the appellant complained that it was unfair to treat insurers as being a different class of litigant to those individuals who only rarely are involved in court proceedings. I do not agree with that submission. If it is necessary to test the worth of the explanation for the failure, it seems to me to be entirely sensible that the experience and knowledge of the litigant are matters to take into account. Counsel also submitted that the sheriff ought to have greater regard to the effect of the decree on the appellant himself in terms of the modern practice of credit scoring. I accept that this might be a relevant factor to take into account, even to the extent of treating the *risk* of an adverse credit score as being within judicial knowledge, but it is one thing to accept that there is a risk, quite another to accept it as a material factor without a detailed explanation of what that risk is in practice and, in particular, the level of it in relation to the appellant himself. As the sheriff records, no information was provided other than a general assertion that the decree might have consequences for the appellant in terms of his ability to

obtain credit in the future. In any event, such a circumstance might sound a claim in damages against the insurers for negligence or breach of the contract of insurance. Counsel also complained that it was wrong to take into account that the proposed defence was restricted to quantum. I agree that a defence on quantum is just as relevant as a defence on the merits. However, the sheriff principal in *Bialas-Krug* v *EUI Limited* was not suggesting otherwise; the point she was making was that the consequences to a defender would be less than where, for example, the wrong party had been sued and that it was no more than one of many factors which the court was entitled to take into account. For my part, I would regard it as a factor of little weight, but I would not characterise it as not a factor at all.

[10] Counsel for the appellant moved for the expenses of the appeal. Normally expenses should follow success, but in the special circumstances of this appeal I decided that justice would be better served by finding the expenses to be expenses in the cause. I also refused the appellant's motion for sanction for the employment of junior counsel. While I was grateful to counsel for his submissions, I did not consider that the subject matter of the appeal could not have been as satisfactorily dealt with by a competent solicitor.