SHERIFF APPEAL COURT

[2023] SAC (Civ) 19
DUN-A79-11

Sheriff Principal N A Ross
Appeal Sheriff W A Sheehan
Appeal Sheriff I M Fleming

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in the appeal in the cause

INGRID GRAY and CATHERINE DEENEY or SWEATON

Pursuers and Respondents

against

JOHN CAPE T/A BRIGGATE INVESTMENTS

Defender and Appellant

Defender and Appellant: Kydd; Gilson Gray LLP
Pursuers and Respondents: Macrae; GFM Law

10 May 2023

[1] If a pursuer in a sheriff court action lodges a pursuer's offer, and the defender does not accept it, there is a risk for the defender. If judgment is later pronounced which is at least as favourable in money terms to the pursuer as the terms offered, then the pursuer may make a motion for payment of an extra sum. That sum is significant - it is likely to correspond to half of the charges allowed on taxation of the pursuer's account of expenses. The matter is regulated by Ordinary Cause Rule ("OCR") 27A. The sum is not, however, automatically awarded, and must be enrolled for. There is a time limit.

[2] In the present action, the respondents delayed enrolling such a motion under OCR 27A. They initially enrolled for the expenses of the action; for taxation on an agent and client basis; for interest on the taxed expenses and for a percentage uplift of 50 per cent on fees as taxed (being an uplift under the Taxation of Expenses Rules 2019 rule 5.2, not an extra payment under OCR 27A.8.(3)). Decree for those sums was granted on 20 June 2022.

[3] Thereafter they enrolled a motion for a payment under OCR 27A. On 17 November 2022, the sheriff granted decree for payment under OCR 27A. The appellant appeals that interlocutor as incompetent, because the respondents did not timeously enrol for payment. To be timeous, the motion must be lodged "no later than the granting of decree for expenses as taxed" (OCR 27A.8(4)).

[4] In turn, the respondents challenge this appeal as coming too late. The respondents submit that the decree awarding the sum under OCR 27A is a final interlocutor, which was not challenged timeously. The appellant submits that the decree was not a final interlocutor, that leave was accordingly required, that leave was timeously sought and granted, and that the appeal is not late.

[5] There are two principal issues on appeal. The first is whether the interlocutor issued by the sheriff on 17 November 2022 was an interlocutor giving "final judgment" as that term is defined by section 136(1) of the Courts Reform (Scotland) Act 2014 (the "2014 Act"), such that leave to appeal was required from the sheriff to appeal to this court. The second is, if the appeal survives that challenge, what does "no later than the granting of decree" mean, for the purposes of OCR 27A.8(4)?

Background

[6] This case previously called before this court on an appeal. Having dealt with the merits, this court remitted the cause to the sheriff to decide matters of expenses. The sheriff issued an interlocutor on 6 January 2022 which assigned a hearing on expenses for 11 February 2022. On 11 January 2022, the respondents enrolled a motion for expenses, for an additional fee, for interest and for taxation on a solicitor and client basis.

[7] Following sundry procedure, the sheriff duly issued his decision on expenses on 20 June 2022, finding the respondents entitled to the expenses as taxed, on an agent and client basis, with interest, together with a percentage uplift in fees (unrelated to OCR 27A).

[8] There matters rested until the respondents enrolled a further motion on 14 October 2022 which sought a payment in terms of OCR 27A and for the relevant dates to be fixed. That motion was opposed as being out of time. The respondents made an additional motion to prorogate the time for lodging an account of expenses beyond the four month deadline prescribed by OCR 32.1A(1)(a).

[9] The sheriff found in favour of the respondents. He considered that the natural point for consideration of whether a penalty should be exacted is when the court has some idea of the scale and impact of the award. That would be a difficult exercise to undertake if a motion had to be immediately enrolled upon a finding of liability in expenses, prior to taxation.

[10] An interlocutor reflecting the above was duly granted on 17 November 2022 ("the November interlocutor") including the following terms:

> "on pursuers verbal motion (made on 27/10/22) to extend the time for lodging an account of expenses albeit late, finds the reason for the error to be excusable but the extension sought too long and therefore allows an account of expenses to be lodged with the court within 2 months from this date, all in terms OCR 32(1)(a)(1b);

> Finds the pursuers motion no 7/9 of process to be timely and competent; that a Pursuers offer was made, not withdrawn and never accepted; the final judgment, as adjusted by the Sheriff Court of Appeal, was at least as favourable in money as the terms offered; the offer was a genuine attempt to settle the proceedings; Therefore grants decree against the defender for payment to the pursuers of a sum corresponding to half the fees (including the additional fee allowed) allowed on taxation of the pursuer's account of expenses, in so far as those fees are attributable to the relevant period, or in so far as they can be reasonably attributed to that period; and in furtherance thereof to find and declare that the appropriate date is 15th September 2017 and the relevant period is 15th September 2017 to 27th February 2020; all in terms of OCR. 27A.9"

The sheriff's decision on leave to appeal

[11] Following the hearing on 17 November 2022 the appellant initiated steps to appeal that interlocutor. They were, however, unsure whether it was a final judgment as defined by section 136(1) of the 2014 Act. If it was, then section 110(1) of the 2014 Act applied and no leave from the sheriff was required to lodge an appeal. If so, any appeal would need to have been made by 15 December 2022. If leave was required, the appellant required to a lodge a motion with the sheriff court no later than 24 November 2022 (section 110(2) of the 2014 Act). The appellant initially pursued both routes as a means to protect their position. An appeal was marked and later dropped. A motion for leave to appeal was heard and granted on 19 December 2022. The sheriff exercised the dispensing power of OCR 2.1 relieving the appellant from the lateness of their motion seeking leave to appeal. He thereafter granted leave to appeal the November interlocutor to this court. The appellant duly lodged their note of appeal, in a fresh appeal, the following day.

Ground of Appeal

[12] The appellant appeals to this court on the ground that the motion for the additional payment was too late and not competent standing the terms of OCR 27A.8(4). The appellant challenges only that aspect of the 17 November 2022 interlocutor.

[13] As a preliminary point, however, the respondents submitted that the appeal had not been timeously marked. They submitted that the 17 November 2022 interlocutor was "a final judgment" as defined by section 136(1) the 2014 Act so leave to appeal was not required. The appellant submitted that for an appeal to be timeous it should have been lodged by no later than 15 December 2022, being 28 days from the date of decision.

Submissions: whether this appeal is late

[14] The appellant submitted that the 17 November 2022 interlocutor was not "a final judgment" as defined by section 136(1) the 2014 Act and that the "final judgment" was, in fact, the 20 June 2022 interlocutor as that was the decision which established liability for expenses in the action. On that basis, section 110(2) of the 2014 Act was engaged and leave was required. The sheriff had granted leave and the appellant lodged their note of appeal within one day of leave being granted. The appellant's position, therefore, was that the appeal had been made timeously. If, however, the court were to find the November interlocutor was "a final judgment" as defined by section 136(1) the 2014 Act, then the appellant moved the court to apply its dispensing power and allow the appeal to be heard, although late.

[15] The respondents accepted that the starting point was to ask whether the interlocutor was a final judgment. They submitted that it was. Any note of appeal required to be lodged with this court no later than 15 December 2022. It is possible to have more than one

interlocutor which together constitute "final judgment" (*Siteman Painting and Decorating Services Limited* v *Simply Construct (UK) LLP* [2019] SAC (Civ) 13). The respondents opposed the exercise of any dispensing power, in the light of the history of the action.

Submissions: whether the motion for additional payment was late

[16] The question of lateness turns on the meaning of the phrase "no later than the granting of decree for expenses as taxed" in OCR. 27A.8(4).

[17] The appellant submitted that this referred to the pre-taxation award, not the post-taxation decerniture. The respondents ought to have enrolled a motion no later than the 20 June 2022 interlocutor, which made a finding of liability for expenses. The sheriff ought to have had all the information available to him when he considered the issue of expenses on 20 June 2022, including knowledge of the pursuers' offer. This was in contrast to rule 34A.8(4) of the Court of Session which allows a pursuer to enrol a motion seeking decerniture for a sum calculated in accordance with rule 34A.9 up to 21 days after the later of either (i) the date of the auditor's report or (ii) the date of the interlocutor disposing of a note of objection. The two rules were expressly different. The appellant submitted that distinction between OCR 27A.8(4) and rule 34A.8(4) could be explained in that, in the former, the sheriff was seised of the situation.

[18] The respondents submitted that decerniture for the sum calculated in accordance with rule OCR 27A.9 was a separate award of expenses, albeit the sum allowed under OCR 27A.9 was calculated with reference to the pursuers' account of expenses. They submitted that there was no need for the respondents to lodge such a motion prior to the remainder of the expenses being dealt with. Indeed, to the contrary, it was necessary for the sheriff to issue an interlocutor dealing with the general expenses before the respondents

could determine whether to make a motion under chapter 27A. It was possible for example, that expenses could have been awarded on a no expenses due to or by basis which would have meant there was no basis to enrol a motion seeking for the sum decerned for in terms of OCR 27A.9.

[19] The respondents submitted that the proper interpretation of OCR 27A.8(4) was that a pursuer could enrol such a motion no later than the granting of decree for decerniture of expenses as taxed. From a practical point of view a pursuer in reality had 14 days from the date the auditor issued their decision on the account of expenses, being the time allowed to a defender to lodge a note of objections against the auditor's decision with reference to OCR 32.3A(3) and OCR 32.4.

[20] They referred the court to paragraph 19-05 of Macphail *Sheriff Court Practice 4th Edition* which sets out the standard procedure for taxation. First, an interlocutor is issued which makes a finding in liability for expenses, and allows an account to be lodged and remitted to the auditor of court to tax and report. Once taxed, the account is returned to the sheriff who, if no note of objections is received, will issue a second interlocutor decerning for payment of the taxed amount of expenses. The respondents submitted that the deadline being the second interlocutor would be consistent with Macphail. In the majority of cases, while an interlocutor is issued making a finding in liability for expenses, the issuing of the second interlocutor decerning for expenses after taxation is unnecessary. Most often a defender is inclined to agree and pay an account to avoid a decree decerning for their payment.

[21] The respondents made three further motions:

i. First, they formally moved this court to amend the sheriff's interlocutor in respect of the relevant period, to alter the term of the relevant period from 15 September

2017 to 27 February 2020 to 15 September 2017 to 18 October 2021. This submission was made notwithstanding that no cross-appeal had been marked by the respondents against the 17 November 2022 interlocutor.

ii. Second, they moved this court to make a determination that the time period for lodging an account of expenses under OCR 32.1A(1) is interrupted pending resolution of an appeal before this court. The respondents maintained their position that the November interlocutor was "final judgment" for the purposes of section 136(1) of the 2014 Act and that, as such, the 4 month period for lodging the account in terms of OCR 32.1A(1)(a) started on 17 November 2022 and was interrupted by the lodging of this appeal. The respondents advised the court, however, that the auditor had taken a different view.

iii. Third, the respondents moved this court resolve the issue of liability for the expenses of the motions of 17 November 2022 and 19 December 2022, reserved by the sheriff in his interlocutor of 19 December 2022.

Decision - late appeal

[22] The issue of lateness turns on the provisions of sections 110 and 136 of the 2014 Act, which provide:

> **"110 Appeal from a sheriff to the Sheriff Appeal Court**
>
> (1) An appeal may be taken to the Sheriff Appeal Court, without the need for permission, against –
>
> (a) a decision of a sheriff constituting final judgment in civil proceedings, or
> (b) any decision of a sheriff in civil proceedings –
> (i) granting, refusing or recalling an interdict, whether interim or final,
> (ii) granting interim decree for payment of money other than a decree for expenses,
> (iii) making an order ad factum praestandum,

(iv) sisting an action,
(v) allowing, refusing or limiting the mode of proof or,
(vi) refusing a reponing note.

(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."

"136 Interpretation
(1) In this Act, unless the context requires otherwise –……
'final judgment', means a decision which, by itself, or taken along with previous decisions, disposes of the subject matter of proceedings, even though judgment may not have been pronounced on every question raised or expenses found due may not have been modified, taxed or decerned for…"

[23] Sections 110 and 136 of the 2014 Act were considered in the opinion of this court in *Siteman Painting and Decorating Services Limited* v *Simply Construct (UK) LLP* [2019] SAC (Civ) 13. In that appeal an interlocutor was issued in December 2018 granting decree *de plano* against the appellant and finding the appellant liable to the respondent in the expenses of the action as taxed and made the usual remit to the auditor of court to tax and report. Subsequently, the respondent enrolled a motion seeking sanction for the instruction of junior counsel in relation to the cause and also for an uplift in fees. That motion was initially opposed, but an agreement was reached and an interlocutor was issued in January 2019 sanctioning the cause as being suitable for the instruction of junior counsel, finding the appellant liable in the expenses of the respondent's motion and making the usual order for remit of the account to the auditor to tax and report.

[24] The appellant then lodged a note of appeal on 30 January 2019 challenging both the December 2018 and January 2019 interlocutors. The respondent argued that the appeal was not timeous. The respondent contended that the interlocutor issued in December 2018 was "final judgment" in terms of section 136(1) of the 2014 Act such that no leave to appeal was

required, and any appeal required to be made within 28 days under rule 6.3 of the Sheriff Appeal Court Rules 2021.

[25] The court agreed with the respondent that the December 2018 interlocutor was "final judgment" in terms of section 136(1) of the 2014 Act. That being so, the appeal made by the appellant in *Siteman* was marked out of time; however, the court allowed the appeal to be received, although late.

[26] We note from *Siteman* that:

> "…where liability for expenses is determined but modification expressly reserved in the same interlocutor, it may be said that the ensuing interlocutor (unless purely executorial) satisfies the statutory definition of a 'final interlocutor' notwithstanding the fact that the earlier interlocutor may also do likewise. However, if, as in the present case, the interlocutor has dealt with liability for expenses without reservation the situation is different. Furthermore, this is not a case in which there was any dispute over a matter relating to expenses. When one examines the January 2019 interlocutor closely, the sheriff was not called upon to make a decision…"

[27] In any given case there can be more than one interlocutor which meets the definition of "final judgment". Applying that logic to the chronology and history of this case, the 20 June 2022 interlocutor was a "final judgment" within the meaning of section 136(1) of the 2014 Act. Indeed, the interlocutors of 27 February 2020 and 20 June 2022 together constitute "final judgment" for the purposes of section 136(1) of the 2014 Act. The question is then whether the 17 November 2022 interlocutor also fulfils the definition of "final judgment". The 20 June 2022 interlocutor did not reserve expenses. To that extent, the positions in this case and in *Siteman* are the same. Where matters diverge from *Siteman* in this appeal, however, is that the subsequent interlocutor - the 17 November 2022 interlocutor - was issued following a further dispute over expenses. The sheriff was called upon to make a decision. Notwithstanding that difference, we consider that the 17 November 2022 interlocutor was not a "final judgment" for the purposes of section 136(1) of the 2014 Act. It

did not relate to liability for expenses, but rather the amount of expenses that were due to the pursuers. It did not dispose of the subject matter of proceedings. Accordingly, section 110(2) of the 2014 Act applied and the appellant required to seek the leave of the sheriff to appeal to this court. The appellant duly did so timeously, was duly granted leave, and accordingly we find the appeal was made timeously.

[28] In any event if we had concluded the 17 November 2022 interlocutor was a final judgment for the purposes section 136(1) of the 2014 Act, we would have exercised our dispensing power to allow the appeal late. The appellant made diligent efforts to comply with the appeal deadlines.

Decision – compliance with time limit under OCR 27A.8(4)

[29] OCR. 27A.8 states the following:

> **27A.8** (1) **"**This rule applies where—
>
> (a) a pursuer's offer has been made, and has not been withdrawn;
> (b) the offer has not been accepted;
> (c) either—
> i. the sheriff has pronounced judgment; or
> ii. in the case of a jury trial, the verdict of the jury has been applied;
> (d) the judgment or verdict, in so far as relating to the craves specified in the pursuer's offer, is at least as favourable in money terms to the pursuer as the terms offered; and
> (e) the sheriff is satisfied that the pursuer's offer was a genuine attempt to settle the proceedings.
>
> (2) For the purpose of determining if the condition specified in paragraph (1)(d) is satisfied, interest awarded in respect of the period after the lodging of the pursuer's offer is to be disregarded.
>
> (3) On the pursuer's motion the sheriff must, except on cause shown, decern against the defender for payment to the pursuer of a sum calculated in accordance with rule 27A.9.
>
> (4) Such a motion must be lodged no later than the granting of decree for expenses as taxed.
>
> (5) Where more than one defender is found liable to the pursuer in respect of a crave specified in the offer, the sheriff may find those defenders liable to contribute

> to payment of the sum referred to in paragraph (3) in such proportions as the sheriff thinks fit."

[30] In the Court of Session, the applicable rule for non-acceptance of offers is contained at rule 34A.8. It provides that no such motion may be enrolled after the expiry of 21 days after the later of (a) the date of the Auditor's report of the taxation of the pursuer's account of expenses; and(b) the date of the interlocutor disposing of a note of objection. Accordingly, in the Court of Session there is express provision that the equivalent motion can be enrolled following taxation.

[31] The issue is: which decree – pre-taxation award or post-taxation decerniture - does OCR 27A.8(4) refer to? The language is ambiguous and does not clearly direct one particular result.

[32] In our view, a purposive approach clearly indicates that the rule refers to post-taxation decerniture, for a number of reasons. First, the motion is for payment of a sum calculated (OCR 27A.9) as a sum corresponding to half the charges allowed on taxation of the pursuer's account. That sum is unknown until taxation has taken place. Second, the sheriff requires to be in a position to decide whether there is "cause shown" (OCR 27A.8.(3)) for them to depart from the default rule that the sum be awarded. If such cause were to arise during taxation, but a decision had already been made, cause may exist but not be capable of reflection in the award, coming too late. Third, it is consistent with the rule in the Court of Session, and there appears to be no cogent reason for there to be a difference between the taxation procedure in the Court of Session or the Sheriff Court. It is inherently desirable for consistency between the two regimes, unless good reason exists to the contrary. Fourth, it does not involve any recall of decerniture (see Macphail; *Sheriff Court Practice* (4th

ed) paragraph 19-09; *UCB Bank Plc* v *Dundas & Wilson CS and Others* 1990 SC 377 and *Mains* v *Uniroyal Englebert Tyres Limited (No. 2)* 1995 SC 538).

[33] We find that "…no later than the granting of decree for expenses as taxed" in OCR 27A.8(4) means no later than the decree decerning for payment of expenses as taxed.

Respondents' further motions

[34] We deal with the respondents' further motions as follows. First, in relation to the motion to amend the relevant period, we refuse the motion. That is because there was neither motion before the sheriff, nor a cross-appeal in the present appeal.

[35] Second, the respondents moved for clarification of timescales. We cannot do so in the absence of a motion for a legal remedy. An appeal court does not have a consultative function. The motion is refused as incompetent.

[36] Third, the respondents moved for the expenses of two motions, each for leave to appeal, where the expenses were reserved at first instance. The first was enrolled on 25 November 2022, prior to an appeal being marked. It did not lead to any hearing. We make no award of expenses for that motion, as neither side was vindicated. The second was enrolled on 7 December 2022 seeking leave to appeal. The respondents marked opposition. The motion was heard on 19 December 2022 and was granted. We will therefore find the respondents liable to the appellant in the expenses of that motion, following success. An order to that effect will included in this court's interlocutor.

Disposal

[37] We refuse the appeal, and adhere to the interlocutor of the sheriff dated 17 November 2022. Parties agreed that expenses of the appeal should follow success. We

will find no expenses due to or by either party in respect of the motion 7/10 of process, find the respondents liable to the appellant for the expenses of motion 7/11, and find the appellant liable to the respondents in the expenses occasioned by the appeal as taxed.