SHERIFF APPEAL COURT

[2023] SAC (Civ) 20
GLW-B370-22

Appeal Sheriff A M Cubie

OPINION OF THE COURT

delivered by APPEAL SHERIFF ANDREW M CUBIE

in the appeal in the cause

ROYAL BANK OF SCOTLAND PLC

Pursuer and Respondent

against

MOHAMMED ASLAM

First Defender and Appellant

and

THOMAS CAMPBELL McLAREN, Insolvency Practitioner of FRP Advisory, Trustee to the Sequestrated Estate of the First Defender

Second Defender

First Defender and Appellant: Party
Pursuer and Respondent: Shoosmiths LLP

12 May 2023

Introduction

[1] This is an appeal by Mohammed Aslam, (Mr Aslam) against the decision of the sheriff at Glasgow to grant decree by default and to grant immediate extract in an action raised against him by the Royal Bank of Scotland (The Bank). The sheriff granted decree by

default at a diet of debate, after Mr Aslam left the court room during the debate. The appeal was dealt with by way of written submissions.

[2] In advance of the appeal diet fixed for 3 March 2023, there had been an exchange of emails between the sheriff clerk at Glasgow and Mr Aslam indicating the possibility of a motion to discharge the hearing and to sist, and to have the matter dealt with by way of an in person hearing. In the event, no such motion materialised. The authorities to which Mr Aslam referred in his written submissions were not tendered until after the final date for lodging submissions but the respondents took no issue with these being received late and they were received by interlocutor of 17 March 2023.

Background

[3] The Bank raised a summary application for recovery of possession of heritable property. Mr Aslam defended these proceedings. A diet of debate was fixed for 29 November 2022. There was a procedural hearing on the 23 November 2022 where the sheriff (the same sheriff who presided over the debate) refused the appellant's motion to sist the cause. At that hearing, clear guidance was given by the sheriff about the need to provide any documents to be relied upon at the diet of debate in hard copy. As I read the sheriff's note, the appellant was advised than any alteration to the pleadings would need to be by way of amendment ie seeking the permission of the court to make any such alterations, rather than by way of adjustment when leave of the court is not required.

[4] Nonetheless, at the diet of debate on the 29 November 2022, Mr Aslam sought to alter his pleadings by seeking to lodge what he called "adjustments". These were opposed by the respondent and refused by the sheriff, as coming too late and being of doubtful

relevance. In doing so the sheriff acted consistently with his observations of 23 November 2022.

[5] Mr Aslam also sought to lodge productions, copies of which were not provided. He had lodged written submissions. He did not provide a copy of these. The sheriff was accordingly unable to consider these documents in advance of, or during, the debate.

[6] The debate thereafter proceeded. As I read the note, the sheriff during the course of the Bank's submissions raised the question of the reasonableness of the order sought. He was entitled to do so. It was at that stage that the appellant's behaviour deteriorated.

[7] The sheriff described Mr Aslam's behaviour as "inappropriate" and "hysterical"; he began to shout and swear, made accusations of corruption and racism; he threated to "torch" the subjects of the proceedings; he demanded that the police be called. He left the courtroom before the debate had concluded.

[8] After Mr Aslam left, the sheriff found that Mr Aslam was in default and granted decree by default. He granted immediate extract. Mr Aslam appeals against that decision.

Submissions

Mr Aslam's submissions

[9] In a helpful, if elaborate written submission (with which Mr Aslam had by his own admission received some assistance), he argued the following. The ordinary court rules did not apply, so the sheriff did not have power to grant decree by default. There was in any event no default. Even if there was, the granting of decree was inappropriate. Immediate extract should not have been granted

The Bank's submissions

[10] The Bank argued that the sheriff was entitled to find Mr Aslam in default and that the order made was an appropriate exercise of his discretion. They agree that the sheriff should not have granted immediate extract but that, notice now having been given of their intention, immediate extract should be granted in the event that the appeal is refused.

Reasons for determination

[11] I consider that the appeal can be crystallised into four questions:

- Was it open to the sheriff to grant decree by default at the hearing?
- If so, was there a default?
- If so, did the sheriff err in granting decree as a result of any such default?
- If not, was the sheriff correct to grant immediate extract?

Was it open to the sheriff to grant decree by default at the hearing?

[12] There is no doubt that the sheriff had the power to grant decree by default. That is confirmed by the decision of the Inner House in the case of *Bridging Loans Limited* v *Hutton* [2018] CSIH 63. The circumstances in that case were similar to the present appeal. It was a summary application for the recovery of possession of heritable property. The defence was that the order sought was not reasonable. The defender absented herself from a peremptory diet. The Inner House accepted the entitlement of the sheriff to grant decree by default in the circumstances.

[13] Although Mr Aslam's written submission make much of the sheriff's reference to OCR rule 16 and the fact that it is not applicable in Summary Application procedure, it is not necessary for me to determine in the absence of detailed submission whether rule 16 applies.

That is because the power to grant decree by default is in any event contained in the general power to make such order as the sheriff thinks fit for the progress of the application (Rule 2.31 of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999), as confirmed by *Bridging Loans Limited*. I consider that any apparent error of expression in relation to basis on which the decision to grant decree by default was made is not such as to vitiate the order. In a summary application, in the event that the sheriff considers that there has been a default, it is open to the sheriff to grant decree of default. There is no competency issue.

Was there a default?

[14] Mr Aslam argues that he did in fact appear, and as such cannot be in default for failing to appear; in any event he argues that there was not so much a default as an overwhelmed, inexperienced party litigant reacting wrongly, but understandably, to the circumstances which arose at the hearing. I do not accept that characterisation; proceeding on the basis of the sheriff's report there was a defiant, oppositional reaction to the sheriff's conduct of the debate, culminating in the unilateral withdrawal by Mr Aslam from the proceedings, proceedings which he knew were not concluded and which were peremptory. A party cannot simply chose to exit the proceedings because of dissatisfaction at the way matters are developing. His leaving was against a backdrop of his attempting to lodge adjustments, of a failure to provide hard copies of documents and recent previous attempts to discharge or adjourn proceedings. All of that was relevant context for the sheriff to assess the nature extent and timing of Mr Aslam's behaviour. The sheriff was entitled to consider that there had been a default.

Did the sheriff err in granting decree as a result of any such default?

[15] I have regard to the text in Macphail 4th edition paragraph 14.14. The sheriff should consider whether the default is that of the party personally. Plainly it was the fault and responsibility of Mr Aslam and no one else. I recognise that more leeway will normally be afforded to a party litigant, but there is a limit to the leeway to be afforded (see *Wilson* v *North Lanarkshire Council* 2014 CSIH 26 at paragraphs 13–15 and *Barton* v *Wright Hassall* 2018 UKSC 12 at paragraph 18)

[16] I note the decision in *Mullan* v *Les Brodie Transport* 2005 1 WLUK320 (IH) referred to in Macphail paragraph 14.14 where a succession of failures to comply with the rules resulted in a dismissal of an action by a party litigant, even where there was an admission of liability.

[17] Mr Aslam argues that the remedy was disproportionate and that any overreaction by him is explicable and excusable. The fact is that Mr Aslam absented himself from a peremptory diet before its conclusion. The Bank is entitled to expect the court to deal with matters in an even handed manner. As has been observed the sheriff requires to do justice both to the defaulter and the innocent party (*Chas Stewart Plumbing and Heating* v *Lowe* 2005 SCLR 235 at paragraph [29].

[18] There is no discernible error by the sheriff; there was a default, arising from actions when might on one view constitute contempt of court. The sheriff did not take into account anything irrelevant or exclude anything relevant. The decision was well within the exercise of his discretion; it is difficult to determine what else the sheriff could have done in the deliberate absence of Mr Aslam. The appeal must fail on the basis that Mr Aslam has failed to show that there is any basis for the appeal court to intervene.

[19] I am also mindful of the observations in Macphail at paragraph 14.15:

> "An appeal against a decree by default differs from other appeals in that its proper object is to repone the appellant, that is, to restore him to the position in which he was before his default. … It is always a matter in the discretion of the appeal court whether the appellant is to be reponed, and if so, upon what conditions as to expenses or otherwise. The appeal court is not constrained by the need to identify an error in the sheriff's approach, nor restricted by the information available to the sheriff. The appeal court may entertain an explanation for the default; why there was no appearance and give consideration to the question of whether there is a prima facie defence and the strength and substance of that defence."

[20] The appeal court has more flexibility to determine if a failure to appear can be excused. That flexibility is understandable when the court may not have information to explain why a party has not appeared. I consider that the circumstances are entirely different when a party deliberately leaves a hearing which is in progress. If I am wrong in the interpretation of the passage, that requires an examination of the whole circumstances in order to determine whether the interests of justice require the recall of the decree (*Bridging Loans Limited* at paragraph [10] referring to *Coatbridge Health Studios* v *Alexander George & Co* 1992 SLT 717 at 720). I determine that it is not in any event in the interests of justice to allow the appeal. I accept the description by the sheriff of the behaviour at the diet of debate coming against background of repeated and unjustified motions to delay the process and a stated commitment to do so (paragraph 2.7 of the sheriff's note). It is not in the interests of justice to allow a further delay occasioned entirely by Mr Aslam's wilful and unacceptable behaviour.

Was the sheriff correct to grant immediate extract?

[21] Parties were in agreement that he was not. The sheriff did so err. I accept the Bank's argument in the appeal that the purpose of the rule being to provide the requisite notice, immediate extract can be granted in relation to this matter, the appeal having been refused in relation to the merits.

[22] I have reserved expenses to be dealt with by way of written submissions as provided for in the interlocutor. Although the Bank addressed expenses in their submission, Mr Aslam did not and in any event there is arguably an element of divided success because the sheriff erred in relation to the issue of immediate extract.