SHERIFF APPEAL COURT

[2023] SAC (Civ) 6
HAM-SG102-22

Sheriff Principal Anwar

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL AISHA Y ANWAR

in appeal by

DAVID BELL

Appellant

against

STEPHEN FARMER and HELEN FARMER

Respondents

Appellant: Mr Buttery, Whyte Fraser & Co, Solicitors
Respondents: Self-represented

8 February 2023

Introduction

[1] Is there a right of appeal against the refusal to grant an application for recall in simple procedure actions? That is one of the central questions in this appeal.

[2] The appellant agreed to carry out painting and plastering work at the respondents' property. The respondents allege that the work was unsatisfactory and seek re-payment of the sums paid to the appellant, the cost of remedial work and certain other losses, totalling £4,338.

[3] The respondents made a claim in terms of the Simple Procedure Rules contained in Schedule 1 to the Act of Sederunt (Simple Procedure) Rules 2016/200 ("the SPR"). In terms of Rule 4.2(1) of the SPR, the appellant required to lodge a Response Form. The appellant did not do so by the last date for a response. The respondents applied for a decision in terms of Rule 7.4(2). Decree was granted in favour of the respondents in the sums claimed.

[4] The appellant lodged an application for recall. He explained that he had instructed solicitors to act on his behalf and that owing to an administrative oversight, his solicitors had failed to lodge the Response Form timeously. The application was opposed by the respondents. Following a hearing on the application on 26 May 2022, the summary sheriff refused the application. The appellant appeals against that decision.

The sheriff's decision

[5] In his Appeal Report, the sheriff explained that at the hearing on 26 May 2022, he had sought further information in relation to the nature of the administrative error referred to in the application for recall. The solicitor attending the hearing was unable to assist. Being unsatisfied with the information presented, the sheriff refused the application for recall on 26 May 2022.

[6] The sheriff narrates that on 24 June 2022, the appellant sought to appeal the decision of 26 May 2022. The sheriff refused the appeal and issued an interlocutor in the following terms:

> "The Sheriff, having considered the Simple Procedure Appeal Form submitted by the [appellant's] agent, under the Simple Procedure Rules 13.5 finds the application incompetent and refuses same, in that there is no mechanism for appeal of refusal of an application to recall a decision. Separatim, the Simple Procedure Appeal Form gives no details of any error in law. . . . ".

[7] The sheriff subsequently provided an Appeal Report for this court. Put shortly, the sheriff explained that he formed the view that an appeal is competent from a "decision" in terms of Rule 16 of the SPR. The refusal of an application to recall was not a "decision". He referred to the definition of "decision" contained in Paragraph 3 of the Act of Sederunt (Simple Procedure) 2016 and to the meaning of the word "decision" contained within the glossary in Part 21 of the SPR. He explained that Part 13 of the SPR contained an "exhaustive account" of the decision making powers of the sheriff; these did not include a refusal of an application to recall. He noted that Rule 13.7 set out what is to happen when a sheriff decides to recall a decision but made no provision for what is to happen if an application is refused. He concluded that Parliament did not intend to confer upon a respondent a right of appeal upon refusal of such an application.

[8] The sheriff posed the following question for the opinion of this court:

> "The [appellant] attempted to appeal my refusal of his application to recall the decision: did I err in finding that attempted review to be incompetent?"

Submissions

[9] On behalf of the appellant, it was submitted that the sheriff had been wrong to conclude that a refusal to recall a decision was not a "decision" in terms of the SPR. While there was no express provision relating to such an appeal, the sheriff had misinterpreted the Rules; paragraph 3(1) of the Act of Sederunt and Part 13 of the SPR did not support the sheriff's interpretation. In particular, the heading to Rule 13.7 specifically refers to what happens when a sheriff "decides" to recall a decision. If in allowing recall, a sheriff makes a decision, a refusal to do so must also be a "decision".

[10] It was submitted that the sheriff had erred in law as to his role; he had no locus to refuse an appeal.

[11] In relation to the decision to refuse the application to recall, the sheriff had failed to provide reasons for his decision. The sheriff did not explain, by reference to Rule 1.8(4), why he formed the view that the respondents could not be relieved from the consequences of failing to lodge a Response Form. The Response Form had been lodged 8 days late. Upon being advised that decree had been granted, an application to recall had been lodged within days. The appellant had explained that there had been an administrative oversight by the appellant's solicitor. Such an oversight ought to have permitted relief from compliance with the Rules on such condition or orders relating to expenses as the sheriff had considered appropriate. Reference was made to the approach of the courts when dealing with reponing notes in ordinary actions (*Kevan Smith Ltd* v *E.Tevendale* 2009 SLT (Sh Ct) 21; *Whiteford* v *SP Power Systems Ltd* 2009 GWD 2-25). The sheriff had failed to specify the principles he applied to his decision to refuse the application to recall or why he considered the explanation provided to have been unsatisfactory. The appellant had explained the basis of his proposed defence. The sheriff had failed to apply the principles of simple procedure set out in Rule 1.2(3) as he had failed to treat the parties even-handedly.

[12] The respondents were self-represented. They agreed with the sheriff's conclusion on the question of competency and with his decision on the application to recall. They invited me to refuse the appeal. They explained that they had acted in accordance with the SPR and had been entitled to seek a decision when the Response Form had not been lodged.

Discussion

The competency of the appeal against the order to refuse recall

[13] When considering whether a right of appeal against the decision of an inferior court is competent, the guiding principle remains that set out by Lord Trayner in *Harper* v. *Inspector of Rutherglen* (1903) 6 F. 23 at page 25: "every judgment of an inferior court is subject to review, unless such review is excluded expressly or by necessary implication."

[14] Section 82 of the Courts Reform (Scotland) Act 2014 deals with appeals from simple procedure cases. It provides as follows:

> "(1) An appeal may be taken to the Sheriff Appeal Court under section 110 on a point of law only against a decision of the sheriff constituting final judgment in a simple procedure case.
>
> (2) Any other decision of the sheriff in such a case is not subject to review."

[15] Section 82 can be contrasted with the more extensive rights of appeal available under section 110 of the 2014 Act. Section 82 is clearly intended to prevent the interruption of simple procedure cases until a sheriff has made a decision constituting final judgement. That is consistent with the principles of simple procedure, which include that cases are to be resolved as quickly as possible, at the least expense to parties and the court (Rule 1.2 of SPR). Appeals are restricting to those which raise a point of law. A review of any other decision is expressly excluded.

[16] Rule 16.2 of the Simple Procedure Rules provides as follows:

> "**16.2 How do you appeal a decision?**
>
> (1) A party may appeal a decision within 4 weeks from the Decision Form being sent.
>
> (2) A party may appeal a decision by sending a completed Appeal Form to the sheriff court.

> (3) That party must at the same time send a copy of the completed Appeal Form to the other party.
>
> (4) The Appeal Form must set out the legal points which the party making the appeal wants the Sheriff Appeal Court to answer.
>
> (5) A party may not appeal a decision if that party can apply to have that decision recalled (see Part 13)."

[17] Where the sheriff has made a decision following the failure to lodge a Response Form, a party may apply to have that decision recalled in terms of Rule 13.5(1)(b). Rule 16.2(5) expressly excludes a right of appeal against a decision made in terms of Rule 13.5(1)(b) in such circumstances. Put shortly, the only avenue open to a respondent who wishes to defend a claim and who has failed to lodge a Response Form, is to proceed by way of an application to recall.

[18] Simple procedure replaced small claims and most summary cause actions in the sheriff courts. In both small claim and summary cause procedure, the sheriff was obliged to recall the decree, upon the first such application by a party; a right of appeal was unnecessary and the circumstances in the present case would not arise (Act of Sederunt (Small Claim Rules) 2002, Rule 22.1(8); Act of Sederunt (Summary Cause Rules) 2002, Rule 24.1(12)). No doubt, the intention behind these rules was to prevent unnecessary appeals and the resultant delay and expense to litigants. There is no such mandatory provision obliging the sheriff to recall a decree (or decision) in simple procedure, instead whether to allow recall is a matter for the sheriff in the exercise of his discretion (Rule 13.6(4) of the SPR).

[19] In my judgment, in the exercise of that discretion, the sheriff is clearly making a "decision" as that term is properly understood in terms of the 2014 Act and the SPR. I have no doubt that litigants appearing in simple procedure cases would identify the exercise of

that discretion as a "decision" both in terms of its practical effect and in terms of the normal usage of that word in the English language. I am not persuaded by the sheriff's reasoning to the contrary. The sheriff referred to the definition of "decision" in Paragraph 3 of the Act of Sederunt (Simple Procedure) 2016. That provision defines particular types of decision (for example "a decision which absolves the respondent"; "a decision which orders the respondent to deliver something to the claimant"). It does not assist. The sheriff's description of Part 13 of the Rules as containing an "exhaustive account" of the decision making powers of the sheriff is incorrect. That is clear from the language of Rule 13.4(1). Indeed, Rule 1.8(6) provides that a sheriff may make decisions about the form, location and conduct of a discussion in court, case management discussion or hearing.

[20] The sheriff notes that Rule 13.7 sets out what is to happen if recall is granted but makes no provision for what is to happen if it is refused. That is unsurprising; if a sheriff refuses recall, there are no further orders for the sheriff to make.

[21] The sheriff's reasoning, adopted by the respondents, is a precarious basis upon which to conclude that Parliament had not intended to confer a right of appeal in such circumstances.

[22] The question which then falls to be considered is whether a decision to refuse to grant recall falls within section 82(1) or (2) of the 2014 Act. The former would confer upon a party a right of appeal, the latter would exclude it.

[23] In my judgment, a decision to refuse an application to recall falls within the definition of a "final judgment in a simple procedure case" in terms of section 82(1). The 2014 Act defines a "final judgment" as 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 discerned for. Clearly, a decision issued following a hearing at which the dispute is resolved, constitutes a final judgment in a simple procedure case. However, where a sheriff dismisses a claim because a claimant has failed to send the court an Application for a Decision, makes a decision because a respondent has failed to send a Response Form or any or all parties have failed to attend a discussion or hearing, a right of appeal is expressly excluded (Rule 16.2(5)) precisely because of the ability to apply for recall. Where a party has applied unsuccessfully for recall, the sheriff's decision on the application constitutes a final judgement in a simple procedure case. That decision, taken along with the previous decision to dismiss a claim or grant the orders sought by the claimant, disposes of the subject matter. Were it otherwise, having exhausted the recall procedure, a party would likely require to seek to lodge a late appeal against the sheriff's decision dismissing the claim or granting the orders sought, leading to unnecessary hearings on opposed motions to have appeals allowed late and unwelcome delays in resolving disputes.

[24] I am not persuaded, in the absence of an express provision, that Parliament intended to exclude a right of review against a decision to refuse recall, nor that a right of review has been excluded by a clear or necessary implication of the provisions of the 2014 Act or the SPR.

[25] I accept that this conclusion may sit uncomfortably with the definition of a 'final judgment' contained in section 110 of the 2014 Act. However, section 110(1)(a) applies to final judgments in "civil proceedings", whereas section 82(1) applies to "final judgments in simple procedure cases". The appeal provisions relating to simple procedure must be understood and applied having regard to the provisions of the SPR.

[26] The appeal is accordingly competent.

The sheriff's order of 27 June 2022

[27] It is for this court to determine the question of the competency of an appeal. The process for doing so is set out in Rule 6.9 of the Act of Sederunt (Sheriff Appeal Court Rules) 2021. Once an appeal is lodged, the sheriff is *functus officio;* he no longer has authority to pronounce any further orders, except to the limited extent provided by the SPR. In terms of Rule 16.3 of the SPR, the sheriff must prepare a draft Appeal Report and deal with ancillary matters related to the same. He has no discretion to refuse to prepare a draft Appeal Report nor *ex proprio motu* (or on an application by any party) to entertain questions about the competency of the appeal. It is undoubtedly helpful, particularly where party litigants are involved, for the sheriff to draw any questions of competency to the attention of the Sheriff Appeal Court in his report. However, he has no locus to determine those questions.

[28] The sheriff's order of 27 June 2022 purported to refuse this appeal. It is incompetent. The question posed by the sheriff falls to be answered in the affirmative.

The refusal of the application to recall

[29] The gravamen of this appeal is the issue of whether the sheriff has erred in the exercise of his discretion by refusing to grant the application to recall on 28 May 2022. The Form 16A lodged by the appellant made it clear that the appellant sought to appeal the sheriff's order of 28 May 2022, refusing the application to recall. There is no reference in the Form 16A to the decision of 27 June 2022. Properly framed, the question posed by the sheriff for an opinion of this court ought to have related to the decision of 28 May 2022. The question of the competency of this appeal has been afforded misguided and unnecessary prominence by the sheriff and indeed by the appellant. No amendments to the sheriff's

Appeal Report and in particular to the question posed for this court appear to have been requested.

[30] The sheriff has however addressed his reasons for refusing the application for recall, both parties addressed the issue in submissions before this court and the Form 16A clearly sought to appeal the sheriff's decision of 28 May 2022. In the particular circumstances of this case, and having regard to the prejudice in terms of delay and expense which might be caused to the parties, I have little difficulty in addressing what I regard as the correct question for this court without remitting the cause to the sheriff with an order to produce a supplementary report. The correct question, in my judgment is: did the sheriff err in law in refusing to grant the application for recall? That question falls to be answered in the affirmative.

[31] The sheriff's reasons were brief. He explained he was not satisfied with the explanation provided by the appellant's solicitor which did not expand upon the explanation in the written application to recall. The exchange between the sheriff and the appellant's solicitor appears to have been rather fraught. The sheriff did not explain what further information he required and the solicitor did not seek time to provide it. The sheriff makes no reference to the terms of the appellant's proposed defence.

[32] Before this court, the appellant's agent explained that the appellant had instructed his solicitor upon service of the claim. A consultation had taken place. The solicitor had mis-diarised the date by which a Response Form was due to be lodged. The error was administrative and inadvertent.

[33] In my judgment, the sheriff has erred in refusing to grant recall. The appellant had instructed solicitors upon receipt of the Claim Form. He had understood that his solicitors had acted upon his instructions to dispute the claim. Owing to an error on the part of his

solicitors in diarising the last date for lodging a Response Form, it was completed and lodged with the court eight days late. Upon being advised that decree had been granted, an application to recall had been lodged within days. Neither the appellant nor his agents had taken a dilatory approach to the claim; the failure to lodge the Response Form timeously was inadvertent. The appellant does not accept that the work he carried out had been unsatisfactory; there is a *prima facie* defence to the claim. In those circumstances, the sheriff acted unreasonably in refusing to exercise his discretion to grant the application.

Decision

[34] Accordingly, I shall recall the sheriff's orders of 27 June 2022 and 28 May 2022, grant the appellant's application for recall and remit the cause to the sheriff to proceed as accords. Parties were agreed that in that event, neither party would seek its expenses. I shall find no expenses due to or by either party.