SHERIFF APPEAL COURT

[2021] SAC (Civ) 27
PIC-PN928-20

Sheriff Principal M M Stephen QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL MHAIRI M STEPHEN QC

in appeal by

FERGUS MURPHY

Pursuer and Appellant

against

(FIRST) OGILVIE CONSTRUCTION

(SECOND) NUWALLS LIMITED

Defenders and Respondents

Appellant: Fitzpatrick, Advocate; Digby Brown LLP
First Respondent: Gallacher; DAC Beachcroft Scotland LLP
Second Respondent: McDougall; BLM

2 July 2021

[1] This appeal is concerned with an action for damages raised by the appellant in the All Scotland Sheriff Personal Injury Court ("ASSPIC") following an accident he sustained whilst at work on 8 June 2017. The first defender is, or appears to be, the principal contractor for the works at the site where the accident occurred. The second defender was also working on site as a sub-contractor. The action was warranted on 11 May 2020. On 25 January 2021 the sheriff sitting in ASSPIC granted the first defender's motion to find the

pursuer in default in respect of his failure to comply with the timetable in the action, in particular, his failure to lodge a statement of valuation of claim which ought to have been lodged by 8 September 2020. The motion was unopposed with no appearance by or on behalf of the pursuer. The sheriff dismissed the action and found the pursuer liable to the defenders in the expenses of the cause as taxed.

[2] The pursuer now appeals that decision by note of appeal lodged with this court. The note of appeal narrates various oversights or failures on the part of the appellant's solicitor, including his failure to represent the appellant at the hearing on 25 January. It is narrated *inter alia* that the appellant is not in a position to raise a fresh action as any further proceedings would be time barred. The appellant himself should not be prejudiced due to failures on the part of his solicitor. There would be little, if any, prejudice to the respondents if the court exercised its discretion to allow the action to proceed by recalling the sheriff's interlocutor. It would be in the interests of justice for the appeal to be allowed. The appeal is opposed on the basis that there was no error on the part of the sheriff who was entitled to conclude that the appellant was in default and that the action should be dismissed. In their answers the respondents narrate the steps taken by them to alert the appellant's agents to their failings in respect of the court timetable and steps of process that required to be complied with. There would indeed be prejudice to the respondents if the appeal were allowed. Liability remains in dispute. The accident occurred four years ago.

[3] In preparation for the appeal all parties lodged written notes of argument, which were supported by authorities. The first respondent prepared a timeline in relation to the action proceeding in ASSPIC. This was not disputed and is attached to this opinion by way of an appendix. Additionally, the first respondent lodged and referred to four emails sent by the solicitor acting on behalf of the first respondent to the solicitor acting for the

appellant. Those emails are dated 19 and 30 November and 2 December 2020 and 8 January 2021. No issue is taken with these emails. In short, the emails remind the appellant's agents that the statement of valuation of claim has not been lodged and enquire in relation to both the medical evidence and the valuation for the pursuer. The third email refers to an adjusted record intimated by the agent for the appellant observing that the adjustments and the record are, of course, late. The email of 2 December 2020 also enquires about the statement of valuation of claim, which if not lodged within seven days, would lead to a motion for decree of dismissal due to the pursuer's default. The email of 8 January intimates that a motion seeking dismissal will be enrolled on 14 January 2021.

[4] **Ordinary Cause Rules 1993 – Chapter 36 – Actions for damages**

Part AI – special Procedure for Actions for, or Arising from Personal Injuries

…

Allocation of diets and timetables

36.G1.–(1) The sheriff clerk, shall, on the lodging of defences in the action or, where there is more than one defender, the first lodging of defences-

(a) allocate a diet of proof of the action, which shall be no earlier than 4 months (unless the sheriff on cause shown directs an earlier diet to be fixed) and no later than 9 months from the date of the first lodging of defences; and

(b) issue a timetable stating –

(i) the date of the diet mentioned in subparagraph (a); and
(ii) the dates no later than which the procedural steps mentioned in paragraph (1A) are to take place.

(1A) Those procedural steps are –

(a) application for a third party notice under rule 20.1;

(b) the pursuer serving a commission for recovery of documents under rule 36.D1;

(c) the parties adjusting their pleadings;

(d) the pursuer lodging a statement of valuation of claim in process;

(e) the pursuer lodging a record;

(f) the defender (and any third party to the action) lodging a statement of valuation of claim in process;

(g) the parties each lodging in process a list of witnesses together with any productions upon which they wish to rely; and

(h) the pursuer lodging in process the minute of the pre-trial meeting.

(1B) …

…

(2) A timetable issued under paragraph (1)(b) shall be in Form P15 and shall be treated for all purposes as an interlocutor signed by the sheriff; and so far as the timetable is inconsistent with any provision in these Rules which relates to a matter to which the timetable relates, the timetable shall prevail.

(3) Where a party fails to comply with any requirement of a timetable other than that referred to in rule 36.K1(3), the sheriff clerk may fix a date and time for the parties to be heard by the sheriff.

(4) The pursuer shall lodge a certified copy of the record, which shall consist of the pleadings of the parties, in process by the date specified in the timetable and shall at the same time send one copy to the defender and any other parties.

(5) The pursuer shall, on lodging the certified copy of the record as required by paragraph (4), apply by motion to the sheriff, craving the court –

(a) to allow to parties a preliminary proof on specified matters;

(b) to allow a proof; or

(ba) to allow a jury trial;

(c) to make some other specified order.

Applications for sist or for variation of timetable

36.H1.-(1) The action may be sisted or the timetable varied by the sheriff on an application by any party to the action by motion.

(2) An application under paragraph (1)-

(a) shall be placed before the sheriff; and

(b) shall be granted only on cause shown.

(3) Any sist of an action in terms of this rule shall be for a specific period.

(4) Where the timetable issued under rule 36.G1 is varied under this rule, the sheriff clerk shall issue a revised timetable in Form PI5.

(5) A revised timetable issued under paragraph (4) shall have effect as if it were a timetable issued under rule 36.G1 and any reference in this Part to any action being taken in accordance with the timetable shall be construed as a reference to its being taken in accordance with the timetable as varied under this rule.

Statements of valuation of claim

36.J1.–(1) Each party to the action shall make a statement of valuation of claim in form PI6.

(2) A statement of valuation of claim (which shall include a list of supporting documents) shall be lodged in process.

(3) Each party shall, on lodging a statement of valuation of claim–

(a) intimate the list of documents included in the statement of valuation of claim to every other party; and

(b) lodge each of those documents.

…

(5) Without prejudice to paragraph (2) of rule 36 L1, where a party has failed to lodge a statement of valuation of claim in accordance with a timetable issued under rule 36.G1, the sheriff may, at any hearing under paragraph (3) of that rule–

(a) where the party in default is the pursuer, dismiss the action; or

(b) where the party in default is the defender, grant decree against the defender for an amount not exceeding the pursuer's valuation.

[5] Counsel for the appellant adopted his written note of submissions and invited the court to take into account the full circumstances relating to the appellant's default, described as "sundry procedural failures" on the part of the appellant's agents. Thereafter, the court

should exercise its discretion to allow these failures to be rectified by allowing the appeal and remitting the cause to ASSPIC for that court to set a new timetable and proceed as accords.

[6] An explanation of sorts was offered for the various failures on the part of the appellant's agent to lodge a statement of valuation of claim; the record and, indeed, to engage with the respondent's email communication. Counsel referred to personal difficulties on the part of the appellant's solicitor which form a basis for understanding why he delayed in addressing the requirement to lodge a statement of valuation of claim on behalf of the appellant. Another difficulty appears to relate to medical evidence and "finalising" the medico-legal reports, in particular, from the consultant psychiatrist. There were also COVID related issues which caused difficulties for any solicitor but the appellant's solicitor in particular. The usual checks and balances of office based litigation practices were adversely affected by COVID. The requirement to work from home led to the appellant's agent encountering various pressures and stress of a personal nature due to work, home and child care responsibilities.

[7] It was counsel's submission that these failures should be excused when the interests of justice overall are considered. The court should take into account these wider considerations given that the sheriff was not aware of the full picture when he heard the unopposed motion (see *General All Purpose Plastics Limited* v *Young* [2017] SAC (Civ) 30).

[8] Moreover, the interests of justice should consider the relative prejudice to the appellant and the respondents. The appellant has a claim that he should be permitted to vindicate based on various statutory breaches by the respondents. The appellant would be substantially prejudiced as he could not raise another action due to prescription. On the other hand, the respondents would suffer little prejudice as they are covered by insurance in

respect of liability. There were various indemnity contracts between the main contractor and subcontractors. Any additional costs could be met by an award of expenses.

[9] It being recognised that the pursuer, if unsuccessful, would have a remedy against his solicitors, nevertheless, that would cause further prejudice and difficulty for the appellant who is a "one time" litigant. He would require to instruct solicitors with experience in professional negligence and who were prepared to take the case on a speculative basis. That might be challenging for him. His claim would be for the loss of the opportunity of proceeding to settle his claim or proceeding with his action to a successful outcome. An action in respect of professional negligence is intrinsically different from one for reparation. There would be delay, uncertainty and further expense. There would be a diminution in the value of his claim due to uncertainty. Taking all of these factors into account the appeal should be allowed; the sheriff's interlocutor of 25 January 2021 recalled and the cause remitted to ASSPIC for a new timetable and further procedure.

[10] The solicitor for the first respondent's motion is to refuse the appeal and adhere to the sheriff's interlocutor. She adopted her note of argument. She took the view that the correct approach was that adopted by the Inner House in *Moran* v *Freyssinet Limited* 2016 SC 188. It is necessary that the appellant point to an error on the part of the sheriff. The sheriff had not erred in the sense defined in *Thomson* v *Corporation of Glasgow* 1962 SC (HL) 36 (Lord Reid at page 66). The sheriff was entitled to exercise his discretion in terms of the Ordinary Cause Rules 1993 ("OCR") 2.1, even though the appellant was not represented and unable to offer an explanation. It can readily be ascertained from the court process that the appellant or his agent had made a conscious decision not to seek to vary the timetable or fulfil the requirements of the timetable. The importance of the statement of valuation of claim is emphasised in *Moran*. There is no dispute that the statement of valuation ought to

have been lodged by 18 September 2020 and the only explanation advanced appears to relate to a decision to await further information from one of the experts. The appellant's agent had received reminders and prompts from the respondent's agents by email. The first respondent had given notice of intention to lodge a motion for decree by default and then lodged that motion on 8 January 2021 when no response was received. No opposition was lodged. Another sheriff in ASSPIC was not prepared to grant the motion unopposed in chambers without hearing parties and fixed a hearing for 25 January 2021. That diet was intimated to the parties in an email of 18 January which included a link to allow agents to attend the online hearing of the motion. These are all important facts and circumstances which point to the appellant's agents having made a decision not to follow proper procedure in this case. It is difficult to categorise serial failures as oversight. This was not a mistake, oversight or other excusable cause.

[11] The Appeal Court should follow the approach in *Moran* v *Freyssinet* where the Inner House decided it was constrained by the principles set out in *Thomson* rather than the approach in *Battenburg & Others* v *Firm of Dunfallandy House & Others* [2010] CSIH 41. In that case the Inner House, in a reclaiming motion against decree by default in an ordinary action applying the Rules of the Court of Session 1994 ("RCS") 38.11(2), determined that the appellate court could exercise a discretion of its own when deciding whether to recall a decree granted due to default. The appellate court could consider of new the whole facts and circumstances. In this case the sheriff was exercising his discretion in relation to a personal injury action in terms of OCR Chapter 36 (being the equivalent of RCS 43 which was under consideration in *Moran*). There is a distinction to be drawn between default in terms of Chapter 43 and other causes pending before either the Court of Session or Sheriff Court. The proper functioning of personal injury procedure requires compliance with the

rules and, in particular, the timetable. If parties do not follow the timetable requirements the procedure does not work and other parties are prejudiced. The court should therefore adopt Lady Paton's reasoning in *Moran*.

[12] In any event, the pursuer has another remedy as a result of the failures by his solicitor. If the appeal is allowed the respondents would be prejudiced. There has been delay. An award of expenses against the appellant would not be sufficient to meet the prejudice to the respondents and would be no real sanction in respect of apparently deliberate failures on the part of the appellant's agents to follow Chapter 36 procedure. There has, in effect, been no active participation by the appellant or his agents in these proceedings since the action was warranted and served. The appeal should be refused.

[13] The solicitor for the second respondent adopted not only his note of argument but a similar approach to that of the first respondent. The court should apply the narrow test but even if the broader test adopted in *Dunfallandy* is appropriate the appeal should still be refused. There had been serious failings on the part of the appellant or his agent which *in cumulo* amount to a failure to follow regular procedure and undermined Chapter 36 procedure. If all the circumstances are taken into account prejudice is but one factor. There may be prejudice to the pursuer in so far as he cannot raise a new action against the defenders. However, he has not just a potential action against his solicitors but a gold plated one or rather a "slam dunk" at least for loss of opportunity to settle or succeed with his action.

[14] As a matter of principle the appeal should not be allowed as there has been a complete failure to follow the timetable. The importance of the timetable has already been referred to (see *Moran*).

[15] There would be prejudice to the defender if after four years they had to prepare for proof. There remain difficult issues with regard to contractual indemnity. In essence, there had been no error on the part of the sheriff who came to a decision he was fully entitled to make in the circumstances. It cannot be suggested that the sheriff should have been more indulgent or lenient with the appellant in view of the serial failures to comply with the requirements of the rules. The appellant and his agent have had numerous opportunities and prompts to put matters right and have failed to take any of these. Taking either a narrow or wider approach the appeal should be refused.

Decision

[16] The interlocutors in this action disclose that the timetable issued by the court in terms of OCR 36.G1 is dated 12 June 2020. In terms of that timetable the appellant required to lodge his statement of valuation of claim in process on or before 18 September 2020. That did not happen. The timetable was varied in terms of OCR 36.H1 on the second respondent's motion in September 2020. As a result of that variation the defender's statement of valuation of claim was due to be lodged by 27 November 2020 at the same time as the close of the adjustment period. It appears that the timetable was varied again in December on the second respondent's motion there having been no statement of valuation of claim lodged on behalf of the appellant. It was not suggested that the appellant had lodged his statement of valuation or had attempted to do so. An explanation was offered – medico-legal reports required to be finalised. Indeed, no record has been lodged either and it is for the pursuer to lodge a record in a case proceeding under Chapter 36 (OCR 36.G1(4) and (5)). There can be no dispute that the appellant or his agent had failed to comply with the timetable requirements of Chapter 36 procedure. Chapter 36 procedure in the Sheriff Court

is essentially the same as Chapter 43 of the Rules of the Court of Session. The sheriff court, in effect, adopted Chapter 43 procedure in 2009 prior to the establishment of ASSPIC in 2015. Practitioners, therefore, ought to be familiar not only with the operation of the personal injury rules but the philosophy which underpins personal injury procedure.

[17] The importance of the statement of valuation of claim should not be underestimated. This much is clear not only from the sanction imposed by OCR 36.J1(5) but also from the dicta of Lady Paton in *Moran*. In that case the defenders lodged no valuation of any sort prior to the proof. Having unsuccessfully tried to discharge of the proof the defenders made a motion to vary the timetable to allow the late lodging of a statement of valuation (or nil valuation) at the proof. That valuation was subsequently altered to one with some content or value. The Lord Ordinary refused the defender's motion and allowed the pursuer's motion for decree in the sum concluded for in the summons. Lady Paton, who gave the opinion of the court in the defender's reclaiming motion, refusing same, sets out, in some detail, the origins of Chapter 43 procedure and the significance of the statement of valuation of claim. The purpose of the statement of valuation is discussed at paragraphs [26] to [28]. It is unnecessary to elaborate further on Lady Paton's observations, which I adopt, other than to remind practitioners of the nature of Chapter 36 procedure which has been described as case flow managed procedure whereby the court relies upon a responsible approach to compliance with the rules by personal injury practitioners. It is a feature of Chapter 36 procedure that a high percentage of the cases involve practitioners who have significant experience in this area of litigation. In that regard I include, of course, the appellant's agents. Chapter 36 procedure in ASSPIC involves a very significant and high volume of actions which do not require to be actively judicially managed given the nature of the procedure and the requirements of the timetable. The timetable steps guide parties as to

procedural time limits. In general terms sheriffs at procedural hearings in ASSPIC determine and sanction as appropriate the consequences of default or non-compliance with timetable requirements. As Lady Paton observes at paragraph 28 in *Moran*:

> "[28] In practice, following the introduction in 2003 of the Ch 43 rules, many personal injuries cases have been resolved speedily and efficiently, with a minimum of court time involved. But a key feature of the success of Ch 43 of the Rules of Court has been the responsible approach adopted by personal injuries practitioners. That responsible approach is fundamental to the operation of Ch 43."

[18] As in *Moran* the conduct of the appellant's agent in this case is an example of failure to comply with the rules which "could, if widely adopted, lead to the unworkability of the rules". Counsel for the appellant in his note of argument when referring to the background to appeal states

> "the appeal is necessitated due to the consequences of sundry procedural failures made by the Appellant's agents which are noted in the Sheriff's Interlocutor and discussed in the Pursuer's Grounds of Appeal".

To describe the appellant's failures as "sundry procedural failures" discloses a misunderstanding of the importance not only of the Chapter 36 rules but of the reasons why compliance with the rules by experienced practitioners is of vital importance to the interests of justice including the interests of both parties and the court by ensuring that personal injury cases are dealt with fairly, effectively and where appropriate expeditiously.

[19] The circumstances as narrated before me indicate that the appellant simply failed to follow or comply with the timetable requirements. He also failed to take steps to vary the timetable which was open to him if, indeed, the compilation of medical evidence was proving difficult to manage in order to prepare the valuation. The rules provide tools for practitioners to avoid the harshest consequences of failure to comply. The second respondent twice enrolled motions to vary the timetable. The appellant could have joined

that discussion with a motion of his own to obtain a solution to any difficulty with obtaining medical reports. That did not happen.

[20] Counsel for the appellant advanced what, in effect, were mitigating circumstances on behalf of the appellant's solicitor. He was under significant pressure and stress due to his own domestic arrangements during COVID. He did not have the benefit of in-office systems which may have assisted him. Whilst it must be acknowledged that many have suffered stress and have required to work under difficult situations during the recent pandemic it is difficult to avoid the conclusion that this does not explain why there was a complete failure to engage with proper procedure in this case. Throughout the pandemic practitioners have had to adapt to different working practices, as has the court. COVID has, in many respects, accelerated procedures which facilitate and assist practitioners to engage readily, remotely and electronically with the court. Arguably, it is now easier for practitioners to comply with timetable requirements by lodging documents electronically either from home or from an office. It was not suggested that the appellant's solicitor was unable to do so. It appears from the email thread with the first respondent's solicitor that, although many of the reminders were ignored the appellant's agent was able to engage with regard to late adjustments to the pleadings. The circumstances of this case are perplexing as to why an experienced solicitor in a large firm of solicitors with vast experience in Chapter 36 and 43 procedure failed to respond to these prompts not only from the respondent but from the court. The clerk in ASSPIC communicated directly with parties regarding the first respondent's motion which, though unopposed, required to call in order that the sheriff could be satisfied as to how he should exercise his discretion in terms of OCR 36.J1(5). By interlocutor of 12 January 2021 the court assigned a hearing on the pursuer's failure to lodge a record and ordained the pursuer to lodge and intimate a written

explanation why the timetable had not been complied with. If further warning of danger for the pursuer was required that was it. There has been no satisfactory explanation for the prolonged inaction on the part of the appellant's solicitor. The appellant was patently in default and the sheriff was manifestly entitled to grant the motion and dismiss the cause against both defenders. The sheriff had regard to the lack of compliance with the timetable not only from the representations made on behalf of the respondent but from the process itself. The sheriff observes:

> "[6] Separately, I noted from the e-process there had been a failure by the pursuer to lodge a record not later than 18 December 2020, in terms of the timetable. By interlocutor of 12 January 2021 the court had assigned 8 February 2021 as a hearing, ordaining the pursuer to lodge a written explanation as to why the timetable had not been complied with."

Of course, the sheriff heard the motion on 25 January by which time the appellant had not only had intimation of the motion for dismissal due to default but the court's interlocutor ordaining him to lodge a written explanation as to the failure to lodge a record. Although the inaction may appear unfathomable it nonetheless represents a fundamental disregard for the rules which the respondents were clearly entitled to draw to the court's attention and seek dismissal of the action.

[21] Accordingly, applying the narrow ratio of *Thomson* v *Corporation of Glasgow* (*supra*) there is no question of error on the part of the sheriff. I would reject any submission which suggests that he came to the wrong decision.

[22] Nevertheless, in *Moran* v *Freyssinet* the reclaiming motion sought to challenge the decision of the Lord Ordinary at proof to grant decree against the defender who had failed to lodge the statement of valuation of claim. The Lord Ordinary had heard both parties and therefore had a full explanation, or at least, there had been an opportunity for a full explanation by both parties as to that failure and its consequences. In these circumstances,

there was no doubt as to the defender's position. In this case, of course, the appellant inexplicably was not represented at the motion for decree by default. No explanation could therefore be tendered. In these circumstances, in my opinion, the interests of justice point towards a broader approach to the submissions now advanced in support of the appeal. Following, *Battenberg* v *Dunfallandy House* and my own decision in *General All Purpose Plastics Limited* v *Young* [2017] SAC (Civ) 30 in these particular circumstances the appellate court should exercise its own discretion having regard to all the material available to it in order to do justice between the parties. However, as that requires a broader approach to the exercise of discretion it is appropriate to consider not only the explanation now provided on behalf of the appellant but the broader interests of justice. The explanation advanced on behalf of the appellant does not persuade me that the persistent failures can be overlooked. The prejudice to the appellant is overstated. He has a remedy against his solicitors which would appear to be unanswerable. As in *Moran* the appellant's conduct has undermined the operation of the rules of court; the progress of this case and the purpose of the Chapter 36 Rules. The appellant has not overlooked the rules and the purpose of the rules but has ignored the rules. The court has interests of its own to protect which involves not only the just resolution of disputes but also the effective and efficient progress of personal injury actions by requiring that the rules of court are followed. As was observed in *Moran* there will be circumstances where the court must apply a sanction to mark any serious and sustained failure to comply with the rules. It is difficult to categorise the appellant's conduct as other than a serious and sustained failure to comply with the timetable and the rules of court. Looked at broadly and applying my own discretion anew to the full circumstances as presented to the court the appeal should be refused and I will adhere to the sheriff's interlocutor. The expenses of the appeal will be awarded to the respondents.

Appendix

Court Ref: PIC-PN928-20

IN THE SHERIFF APPEAL COURT

TIMELINE PREPARED BY FIRST RESPONDENT

in the cause

Fergus Murphy,

Pursuer and Appellant

against

(First) Ogilvie Construction,
and (Second) Nuwalls Limited,

Defenders and Respondents

1.	8/6/17	Date of Accident.
2.	11/5/20	Proceedings warranted.
3.	12/6/20	Timetable issued.
4.	18/9/20	in terms of which Pursuer's SOV due.
5.	10/9/20	Timetable varied. Adjustment period and Defender's SOV now due 27/11/20 (from 4/9/20).
6.	8/12/20	Timetable varied. Defender's SOV now due 8/1/21.
7.	19/11/20	Email from First Respondent to Digby Brown.
8.	30/11/20	Email from Respondent to Digby Brown.
9.	2/12/20	Email from First Respondent to Pursuer's Agent.
10.	8/1/21	Motion 7/7 intimated.
11.	14/1/21	Motion 7/7 enrolled.
12.	18/1/21	Email from Sheriff Clerk with Note of Hearing date.
13.	25/1/21	Hearing on Motion.