SHERIFF APPEAL COURT

[2025] SAC (Civ) 1
INV-B101-23

Sheriff Principal D C W Pyle
Appeal Sheriff B A Mohan
Appeal Sheriff P A Hughes

OPINION OF THE COURT

delivered by APPEAL SHERIFF PATRICK HUGHES

in the appeal in the cause

SIMPLY INVERNESS LIMITED

Pursuer and Appellant

against

THE HIGHLAND COUNCIL (COMHAIRLE NA GAIDHEALTACHD)

Defender and Respondent

Pursuer and Appellant: Byrne KC, Boffey; Mellicks
Defender and Respondent: D.D. Anderson; Legal Services, Highland Council

13 December 2024

Introduction

[1] The pursuer and appellant (henceforth "the appellant") is a company which operates care homes, one of which is in Inverness, where the relevant local authority is the defender and respondent (henceforth "the respondent"). Care homes of this kind are generally exempt from non-domestic rates; the appellant had previously obtained rebates from such rates for this home, but failed to timeously apply for the annual renewal of their rebate. As a result, the respondent issued the appellant with a bill for non-domestic rates in respect of

this care home, in the amount of £163,488. The appellant did not pay this bill and the respondent obtained decree from the sheriff for payment of the bill as well as a 10% surcharge, amounting to £16,348.80; thereafter, a charge was served for payment of the whole amount. The appellant then belatedly obtained a retrospective rebate from the respondent for the entire amount of its rates bill; however, the respondent insisted on payment of the surcharge, and a fresh charge for payment of £16,348.80 was served. The appellant again refused to pay and raised this action, seeking suspension of the latter charge and interdict against further diligence. Following proof, the sheriff refused to grant orders to this effect, and the question in this appeal is whether she erred in so doing.

[2] The appellant opened Castlehill Care Home in December 2019, at which point it was assessed as being liable for non-domestic rates in the amount of £163,488; however, by virtue of section 5 of the Rating (Disabled Persons) Act 1978, establishments which offer residential accommodation to disabled persons are entitled to a rebate in respect of chargeable non-domestic rates. It is a matter of agreement that Castlehill has at all relevant times fallen within this category of establishment. In June 2020 the appellant applied retrospectively for this rebate in respect of financial year 2019-2020. The respondent granted the application; section 5 of the 1978 Act allowed it no discretion to do otherwise, given that the premises fell within the exempt category.

[3] Once such a rebate is obtained, there is no need to make a fresh application in subsequent years. Instead, in each subsequent financial year the local authority will issue a review form to the establishment; and if the latter returns the completed form confirming that there has been no change of circumstances, it will receive relief for that financial year. If circumstances are unchanged, then again the local authority has no discretion to withhold

relief; but it cannot grant relief unless either an application or an annual review form is received.

[4] In February 2021 the appellant, having submitted a completed review form, received relief for financial year 2020-2021. It is unclear as to how liability for financial year 2021-2022 was addressed.

[5] On 26 July 2021 the appellant changed its registered office, but did not intimate this change of address to the respondent until October 2022. As a result, the respondent continued to send all postal correspondence to the appellant's former address until October 2022.

[6] On 9 February 2022 the respondent sent the annual review form for financial year 2022-2023 to the appellant's old address; and on 2 March 2022 the respondent sent a reminder letter to the same address. No response from the appellant was received to either item.

[7] On 6 April 2022 the respondent sent the appellant a bill for non-domestic rates which showed 100% relief from liability for the financial year 2022-2023; but this was erroneous, since relief could not be granted absent either an application or completed review form showing no change of circumstances, neither of which had been submitted by the appellant.

[8] On 19 May 2022 an officer of the respondent e-mailed a further copy of the annual review form to one of the appellant's directors, but again no response from the appellant was received.

[9] On 5 July 2022 the respondent issued an amended bill for non-domestic rates in financial year 2022-2023 for the full amount of £163,488. No payment was made by the appellant in response either to that bill or to the subsequent final notice sent on 19 August 2022.

[10] On 30 September 2022 the sheriff granted the respondent's application for summary warrant. The sum due in respect of this warrant was £179,939.17, comprising the principal rates bill of £163,488 and in addition a 10% surcharge of £16,348.80, plus expenses.

[11] On 10 October 2022 the appellant submitted an application for relief, which also gave notice of the change of registered office.

[12] On 19 October 2022 sheriff officers instructed by the respondent served a charge for payment of the sum of £179,939.17; this charge was later cancelled.

[13] On 1 November 2022 the respondent retrospectively granted the appellant 100% relief from non-domestic rates for financial year 2022-2023.

[14] On 30 March 2023 sheriff officers instructed by the respondent served a new charge for payment of the sum of £16,348.80 (the surcharge amount) plus expenses.

[15] On 24 May 2023 the sheriff at Inverness granted interim interdict preventing further diligence and ordered that that sum be lodged as caution. After sundry procedure, a proof took place, which resulted in the decision now appealed, ie the sheriff's refusal to grant the suspension and permanent interdict sought. The sheriff's reasoning was that the appellant was at fault in failing to intimate its change of address and failing to timeously seek relief. The respondent had had no power to grant relief until it was sought. As at 30 September 2022, relief had not been sought and consequently the full amount was due, together with the statutorily-mandated surcharge amount. Notwithstanding the subsequent granting of retrospective relief in respect of the principal sum - which the sheriff described as a "fair exercise" of the respondent's discretion - the summary warrant, including the 10% surcharge, was properly applied for and properly granted. The respondent was not acting oppressively or unfairly in effecting diligence on the unpaid sum (ie the surcharge).

Submissions for the appellant

[16] The appellant advanced four grounds of appeal. First, the sheriff had given insufficient weight to the notice of 100% relief issued on 6 April 2022, which had created a legitimate expectation on the part of the appellant that the relief previously granted would continue.

[17] Secondly, the sheriff had failed to consider that once the respondent had accepted that no rates were in fact due, it could not then seek diligence on the surcharge; "10 per cent of zero is zero". To do so was wrongful, unjust and oppressive.

[18] Thirdly, the sheriff had erred in failing to consider the *ex parte* nature of summary warrants and the enhanced obligation to ensure accuracy when seeking them. The procedure here had been irregular, with the respondent initially granting relief and then proceeding straight to summary warrant procedure against an establishment it knew to be a care home dealing with the Covid-19 pandemic.

[19] Finally, the sheriff had erred in concluding that the appellant had received all correspondence sent by the respondent.

[20] At the hearing before us, all grounds were insisted upon but senior counsel concentrated his submissions on the second ground. It was accepted that one sheriff could not review the merits of a decision made by another sheriff. However, the review sought here was not of the decree but rather the diligence which followed upon it; the facts had changed so materially since the grant of decree, that to execute diligence would be oppressive and unjust: *Wilson* v *Scott* (1890) 18 R. 233; Walker, *The Law of Civil Remedies in Scotland* (1974), chapters 10 and 11. Specifically the respondent, in granting relief, had disavowed entitlement to payment of the rates; no penalty could be sought for failure to

meet a disavowed liability. Without a charge there could be no surcharge; the latter was parasitic upon the former.

[21] The sheriff at first instance erred in characterising the grant of relief as an exercise of discretion by the sheriff. The respondent had had no discretion; relief was granted to the appellant as a matter of right. The rebate could be sought at any point during the financial year, and could take the form of either a payment of the amount of the rebate, or a reduction in the rates payable. The statutory provisions should be given a purposive interpretation, having regard to Parliament's clear intention that care homes ought not to be liable to pay non-domestic rates, because of the nature and importance of the service they provided.

[22] The two key provisions were section 8A of the Local Government (Scotland) Act 1975 and section 247(2) of the Local Government (Scotland) Act 1947. The former provision was clear that it applied to ratepayers who were "liable to pay the rates chargeable for a year". The latter provision was the basis on which arrears could be recovered using diligence authorised by a summary warrant granted under subsection (2); and it expressly referred back to section 8A of the 1975 Act. The entitlement to surcharge arose solely from section 247(2) of the 1947 Act. So, if the appellant as ratepayer were not liable to pay rates, it did not fall within the ambit of section 8A; and nor, consequently, did it fall within the ambit of section 247(2), which was the only basis for imposing a surcharge. Senior counsel stressed that the surcharge, in the amount of 10%, had a logic only under reference to the substantive charge; absent that, it was significantly in excess of administrative costs occasioned by any late application for rebate. If the charge and surcharge did not run together, then rating authorities would receive an arbitrary windfall of one tenth of an amount to which they had never in fact been entitled.

Submissions for the respondent

[23] Counsel for the respondent submitted that the sheriff had not erred and that her decision should be upheld by this court. Separately it was submitted that the proposed grounds for suspension and interdict were irrelevant and incompetent in sheriff court proceedings for suspension of diligence by way of summary application.

[24] Dealing with that latter issue first, the sheriff courts had authority to suspend diligence in terms of section 38 of the Courts Reform (Scotland) Act 2014 and articles 2 and 3 of the Act of Sederunt (Summary Suspension) 1993. However, the only proper object of such procedure was to preserve a *status quo* until parties' rights had been determined by a final judgment: Macphail, *Sheriff Court Practice,* 3rd Edition at paragraph 24.17. No such judgment could competently review the underlying decree, as opposed to the regularity of the diligence itself: Macphail, *Sheriff Court Practice*, 4th Edition at paragraph 26.258; Walker, *Civil Remedies*, pp. 201-203; Jamieson, *Summary Applications and Suspensions* at paragraphs 27-11 to 27-13, 29-07. The appellant had not sought to prove that the diligence was irregular, or that the sum charged for had been paid; rather it aimed at review of the summary warrant. The appellant's action was in conflict with the well-known principle that the sheriff court does not have jurisdiction to review its own decrees. *Wilson* was of no assistance to the appellant since it was an 1890 decision which pre-dated the sheriff's jurisdiction and concerned historic rules of private jurisdiction. A secondary issue concerned the raising of proceedings by way of ordinary action rather than summary application, but it was unnecessary to address that matter.

[25] The appellant's first ground of appeal was misconceived; no legitimate expectation of a rebate could have been created by the notice of 6 April 2022, since the respondent could not as a matter of law have granted a rebate without an application having been made. The

appellant knew or ought to have known that no such application had been made and that no rebate could be applied without an application having been made. The third ground of appeal was based on a proposition that was irrelevant and lacking in specification; it was not clear why these matters were relevant factors for the sheriff to have considered, why it was irrational for her to have left them out of consideration, nor why the respondent had failed to meet the purportedly enhanced obligation upon it. As to the fourth ground of appeal, the sheriff had explained why she had made her findings in fact, and these could not be said to be irrational or otherwise plainly wrong. Again, compliance with the procedural requirements of section 8A of the 1975 Act went to the merits of the summary warrant; if this point had any merit, it could only be ventilated in the Court of Session.

[26] With regard to the appellant's second ground of appeal, that the sheriff had failed to take account of the 10% surcharge being a "nullity", this was misconceived in a number of ways. The sheriff had considered the issue and correctly assessed it as having been properly applied for and still due for payment as a separate debt, notwithstanding the grant of the rebate; the latter did not operate with retrospective effect. Again, whether the surcharge was a nullity depended on the merits of the summary warrant, which the sheriff could not competently review. Any such review required to be conducted in the Court of Session. A nullity was something that had never existed, but absent any application for rebate, the liability had existed at the point at which decree was granted; and as the liability had not been met and therefore existed, so too did the surcharge. There was no ambiguity in the statutory provisions; their clear meaning was that if payment was not made timeously then a surcharge became due. The appellant could not have been given a rebate until it applied for it by submitting its review form, and until it did so it required to pay the rates, payments which could be recouped if rebate were granted.

Relevant Law

Local Government (Scotland) Act 1947

"247 — Recovery of rates.

(1) Subject to subsections (4) and (5) below, arrears of rates may be recovered by a rating authority by diligence—
  (a) authorised by a summary warrant granted under subsection (2) below; or
  (b) in pursuance of a decree granted in an action for payment.

(2) Subject to subsection (4) below, the sheriff, on an application by the rating authority accompanied by a certificate by the rating authority—
  (a) stating that none of the persons specified in the application has paid the rates due by him;
  (aa) in a case to which section 8A of the Local Government (Scotland) Act 1975 applies, stating that—
    (i) the authority has served a notice on each such person under section 8A(2) of that Act in respect of the rates,
    (ii) the unpaid amount of the rates due for the year (or part of the year) to which the notice relates has become payable under section 8A(4)(b) or (5)(c) of that Act, and
    (iii) a period of 14 days beginning with the day on which that amount became payable has expired;
  (b) in any other case, stating that the authority has given written notice to each such person requiring him to make payment of the amount due by him within a period of 14 days after the date of the giving of the notice;
  (c) stating that the period of 14 days mentioned in paragraph (aa)(iii) or (as the case may be) (b) has expired without payment of the amount mentioned in that paragraph; and
  (d) specifying the amount due and unpaid by each such person.

shall grant a summary warrant in a form prescribed by Act of Sederunt authorising the recovery by any of the diligences mentioned in subsection (3) below of the amount remaining due and unpaid along with a surcharge of 10 per cent (or such percentage as may be prescribed) of that amount."

Local Government Scotland Act 1975

"8A – Failure to pay instalments

(1) This section applies where—
  (a) a person (the 'ratepayer') is liable to pay the rates chargeable for a year, or part of a year, in respect of lands and heritages,

(b) the rates are payable by instalments under section 8(1), and
(c) the ratepayer fails to pay an instalment (the 'missed instalment') in accordance with that section.

(2) The rating authority must give the ratepayer a notice (a 'reminder notice') setting out—
(a) details of the missed instalment,
(b) the effect of subsections (3) and (4), and
(c) where the notice is the second reminder notice given to the ratepayer in respect of the rates due for the year, the effect of subsection (5).

(3) The ratepayer must, within the period of 7 days beginning with the day on which the reminder notice is given to the ratepayer by the rating authority, pay the missed instalment and any other instalment which is due to be paid within that period.

(4) If the ratepayer fails to comply with subsection (3)—
(a) the rates are no longer payable by instalments, and
(b) the unpaid amount of the total rates due for the year (or part of the year) becomes payable at the end of the period of 7 days beginning with the day on which the period mentioned in subsection (3) ends.

(5) Where the ratepayer has already been given two reminder notices in respect of the rates due for the year—
(a) subsections (2) to (4) do not apply,
(b) the rates are no longer payable by instalments, and
(c) the unpaid amount of the total rates due for the year (or part of the year) becomes payable on the day following the day on which the missed instalment was due to be paid."

Rating (Disabled Persons) Act 1978

"5 — Rebates for institutions in Scotland for the disabled.

(1) Subject to the provisions of this Act, the rating authority for any area in Scotland shall grant a rebate in respect of the rates chargeable on any lands and heritages situated in the area which are occupied by a local authority or other body and are if half or more of the floor area of so much of any building or, where there are more than one, those buildings as is comprehended in the lands and heritages is used exclusively for one or more of the purposes specified in subsection (2) below or purposes ancillary thereto, or is available so to be used.

(2) The said purposes are—
(a) the provision of residential accommodation for the care of persons suffering from illness or the after-care of persons who have been suffering from illness;
(b) the provision of facilities for training or keeping suitably occupied persons suffering from illness or persons who have been suffering from illness;
(c) the provision of such accommodation or facilities as are mentioned in paragraph (a) or (b) above for disabled persons not falling within that paragraph;
(d) the provision of welfare services for disabled persons;

…

(4) The person entitled to a rebate under this section is the occupier of the lands and heritages."

Decision

[27] One sheriff cannot review a decree granted by another sheriff. It is regrettable that this principle was lost sight of in the proceedings at first instance. Had it been focused by a plea-in-law for the respondent, the position could have been clarified at debate instead of proceeding to proof. In the present case we agree with counsel for the respondent's characterisation of the appellant's action as one which seeks to address the merits of the original decree granted. As Macphail, *Sheriff Court Practice* (4th Edition) states at paragraph 26.253:

> "The sheriff has no jurisdiction to suspend the decree on which the charge was served and any application which is in substance an application for suspension of the decree brought under these provisions is incompetent and may only be brought in the Court of Session."

[28] The orders which the appellant craved the court to grant amount, in substance, to an application for suspension of the decree granted on 30 September 2022. Since the sheriff at proof had no jurisdiction to grant these orders, her refusal to do so - for whatever reason - is not a decision with which this court can interfere. For that reason alone the appeal must be

refused. Given that there is no basis on which we could uphold the appellant's grounds of appeal it is unnecessary for us to consider them. However, since we have had the benefit of detailed and helpful submissions on the second ground of appeal, we consider it appropriate to express an opinion thereon.

[29] Had we jurisdiction to grant the orders of suspension and interdict craved by the appellant, we would be inclined to do so. We agree with the appellant's interpretation of the statutory scheme. In terms of that scheme, Parliament intended that establishments, such as the appellant's, should be relieved from liability for non-domestic rates. This is made clear by *inter alia* the long title of the 1978 Act – "An Act to amend the law relating to relief from rates in respect of premises used by disabled persons and invalids". The scheme provides that the relief takes the form of a rebate, which might suggest refund of sums already paid, but on the information available to us the scheme seems equally capable of operating by way of remission. Whilst establishments must proactively apply for relief, once they do so it is given to them as of right, regardless of any dilatoriness in applying for it.

[30] Consequently the application may be seen to be no more than an administrative formality. Failure to - timeously - comply with such a formality may perhaps require some sanction, but we cannot conclude that Parliament intended that that sanction should, through a Procrustean interpretation of the surcharge provisions, take the form of a fine of over £16,000.

[31] The logic of the surcharge is to penalise ratepayers who are delinquent in paying what they owe, and thereby to deter such delinquency. The respondent now accepts that the appellant did not owe rates for the period in question. There is therefore no delinquency to punish or deter. Parliament sought to penalise the non-payment of sums due; in our

view it cannot have intended that the same penalty should apply to failure to submit an administrative form, which did no more than confirm that no sum was due.

[32] The scheme enacted by Parliament envisaged that charge and surcharge would operate in tandem. Given that the latter could only be triggered by the existence of the former and was parasitic upon it, there is neither logic nor fairness in the surcharge remaining exigible once the charge is disavowed.

[33] Having reached this view of the proper interpretation of the scheme enacted by Parliament, we consider that whilst the grant of decree for the payment of the surcharge was - on its own merits at that moment in time - sound, any diligence upon it now that relief had been granted would be oppressive. We agree that an analogy may be drawn with the *dicta* of Lord President Glencorse in *Wilson* v *Scott* (*supra*) at pp. 235-236:

> "…there may be facts emerging subsequent to the date of the decree which will prevent the holder of the decree putting it in force. If the defender can shew that his debt has since been paid or otherwise discharged, that will be a good ground for preventing the decree being put in force…"

[34] In this case the debt constituted by the surcharge arose only due to - and calculated as a percentage of - a separate debt which is now accepted not to have been owed at all. Decree for payment of the surcharge was sought and granted on the basis of an erroneous understanding, ie that the appellant's establishment was not entitled to relief from that year's rates. That that misunderstanding arose through the appellant's own failure is in our view immaterial; a decree for payment of £16,348.80, granted on the basis that a sum ten times that was owed and unpaid, ought not to have diligence follow thereon when it is accepted that the true sum owed is zero. However, we agree with counsel for the respondent that, for the reasons set out above, neither the sheriff nor this court may competently review the original decree for payment of the surcharge nor any diligence

arising from it; the appellant's remedy lies in the Court of Session. Counsel for the appellant invited us, should we have reached such a conclusion, to grant interim suspension pending the outcome of proceedings that would then be raised in the Court of Session. However, we are not persuaded that such a course is open to us, nor that it is necessary; rather, we consider that it might introduce a degree of procedural uncertainty that would not be in the interests of either party.

Disposal

[35] The appeal is refused. Parties were agreed that expenses should follow success, and we therefore award the expenses of the appeal procedure, as taxed, against the appellant in favour of the respondent. We also grant the appellant's motion to sanction the cause as suitable for the employment of senior and junior counsel.