SHERIFF APPEAL COURT

[2025] SAC (Civ) 2
PAI-A240-21

Sheriff Principal Murphy KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL S F MURPHY KC

in appeal by

SMAIRA BILAL SALEEM

Defender and Appellant

in the cause

EURO CAR PARKS LIMITED

Pursuer and Respondent

against

SMAIRA BILAL SALEEM

Defender and Appellant: Hutcheson; Hutchesons Solicitors
Pursuer and Respondent: Cargill; Mellicks Solicitors

6 January 2025

[1] The pursuer and respondent operated a car park on a site within the campus of Robert Gordon University in Aberdeen. Some 49 fixed penalty charge tickets were issued in respect of a Vauxhall Corsa motor vehicle registered WU64 XHE which had been repeatedly left in the car park in contravention of its permit system; it had also commonly been left in a disabled parking bay without displaying the necessary badge. The defender and appellant was the registered keeper of the vehicle. The respondent raised an action against the appellant seeking £6,370 in unpaid parking charges.

[2] The sheriff at Paisley heard a diet of proof before answer over two days, 22 and 28 February 2023. On the first of those days, the defender testified that her son had been the driver of the vehicle on each of the days in question. On the second day her son, who was a student at Robert Gordon University at the time, confirmed that he had been driving the vehicle on each of the days when the parking charges had been incurred. In the light of that evidence the respondent no longer sought decree against the appellant, who was assoilzied. Subsequently the sheriff heard detailed submissions on the issue of expenses. Having considered matters he issued an interlocutor on 6 November 2023 in which he found the respondent entitled to expenses on account of the appellant's conduct of the case and that aspect of his decision is the subject of the present appeal.

Grounds of appeal

[3] The sheriff had erred in law by failing to award the expenses of the cause to the successful party. The appellant had been vindicated in her position that she was not the driver of the vehicle. The respondent had not had right or title to sue as agent for a disclosed principal. Any decipherable contractual claim was in fact for delictual acts of trespass. The respondent had raised proceedings improperly as it did not have evidence to support its principal averment that the appellant had been the driver of the vehicle at the relevant times.

[4] The sheriff had further misdirected himself by determining that the appellant had obstructed and obfuscated matters and had failed to demonstrate the degree of candour which the court was entitled to expect.

Submissions for the appellant

[5] A determination of expenses was a discretionary decision which could be recalled if a sheriff had misdirected himself in law or had made a decision which was plainly wrong, unreasonable or manifestly inequitable. Appeals on expenses were strongly discouraged and only entertained where there had been an obvious miscarriage of justice, the expenses had become a great deal more valuable than the merits or a question of principle was involved. Here the respondent's case had been so devoid of merit that it had moved for dismissal of its own action and had consented to decree of absolvitor. The sheriff's award of expenses against a successful litigant was highly unusual, and was the result of his misapplication of both substantive and procedural law. The expenses would substantially exceed the value of the claim and the appellant had no power to discontinue the proceedings. The sheriff had not had before him the materials upon which he could, in the exercise of his discretion, have declined to follow the usual rule that expenses should follow success.

Submissions for the respondent

[6] There was no proper basis for interfering with the sheriff's discretionary decision. During the period of adjustment the appellant had been called upon to state who was claimed to have been the driver of the vehicle on the relevant dates. The call was unanswered. This had a bearing on the issue of the appellant's conduct of the proof before answer. In September 2022 the appellant had unsuccessfully tried to oppose the respondent's motion for a specification of documents which sought to identify who was insured to drive the vehicle in question. There could have been no doubt over the

information which the respondent had been seeking and the appellant's response had been one of blatant obfuscation.

[7] An award of expenses was "a matter for the exercise in each case for judicial discretion, designed to achieve substantial justice, and very rarely disturbed on appeal" (*MacPhail, Sheriff Court Practice*, 4th edition, at 19.10). The principle was that the cost of litigation should fall on the party who had caused it. In this case that was the appellant and the respondent had incurred significant expense on account of the way in which the appellant had conducted the case. Appeals on expenses alone were strongly discouraged. The sheriff had sought clarification of the appellant's position in the light of her pleadings at the outset of proof. The identity of the driver was not disclosed at that point but only later in the day in the course of the appellant's evidence and then only during cross-examination. In the light of the appellant's conduct the sheriff's decision on expenses was justified and the appeal had to fail.

Decision

[8] The case before the sheriff turned on the identification of the driver who had parked the appellant's vehicle in the car park at the University. This appeal relates only to the sheriff's decision on expenses. The other issues raised in the parties' preliminary pleas were not debated fully before him because the respondent declined to continue with the action once it had been established that the appellant's son had in fact been the driver at the material time. In the course of the appeal the appellant sought to make much of his own preliminary pleas, but these were not debated fully before the sheriff. For present purposes they are relevant only insofar as they indicate that the appellant had reasons to defend the action on more than the single issue of fact which is relevant to the conduct of the litigation.

[9] In general an award of expenses follows success but it is always a matter of judicial discretion. *MacPhail*, at paragraph 19.10, sets out the general rule by quoting the Opinion of Lord President Cooper in *Howitt* v *Alexander & Sons* 1948 SC 154, at 157:

> "An award of expenses according to our law is a matter for the exercise in each case for judicial discretion, designed to achieve substantial justice, and very rarely disturbed on appeal. I gravely doubt whether all the conditions upon which that discretion should be exercised have ever been, or ever will be, successfully imprisoned within the framework of rigid and unalterable rules, and I do not think that it would be desirable that they should be."

This is followed by a passage from Lord President Robertson's Opinion in *Shepherd* v *Elliot* (1896) 23 R 695, at 696:

> "The principle upon which the court proceeds in awarding expenses is that the cost of litigation should fall on him who has caused it. The general rule for applying this principle is that costs following the event, the ratio being that the rights of parties are taken to have been all along such as the ultimate Decree declares them to be, and that whosoever has resisted the vindication of those rights whether by action or defence, is prima facie to blame. In some cases, however, the application of the general rule would not carry out the principle, and the Court has always, on cause shewn, considered whether the conduct of the successful party, either during litigation or in the matters giving rise to the litigation, has not either caused or contributed to bring about the law suit."

The authors of *MacPhail* indicate that this is the basis for the general rule that expenses follow success. However, detailed consideration is subsequently given to situations in which a successful party has been refused expenses or even found liable, as in the present case, and I shall return to a consideration those situations below.

[10] In relation to appeals in relation to expenses, *MacPhail* states, at paragraph 18.31:

> "A decision dealing only with expenses may be alone submitted to review, but in practice appeals on expenses only are strongly discouraged, and are not entertained unless there has either been an obvious miscarriage of justice, or the expenses have become a great deal more valuable than the merits or a question of principle is involved."

[11] The sheriff's decision in the present case falls to be considered according to these principles. The reasons for his decision are set out within paras [16] to [23] of the Note which the sheriff attached to the interlocutor of 6 November 2023. In summary, expenses were awarded against the appellant, who had been assoilzied at proof, on account of her conduct both before and during the course of litigation. His conclusion was "that a huge amount of procedure and expense has been occasioned by the defender's lack of candour".

[12] The respondent did not proceed with the proof once it was established that the driver of the vehicle at the material times had been the appellant's son. This information had been known to the appellant from the outset but not revealed until she was cross-examined on the first day of proof, some five years after the first notice of penalty had been issued. The pleadings prepared on her behalf denied that she had been the driver of the vehicle but did not indicate who had been. In the course of the appeal hearing the court was told that she had been advised before proof that she was bound to be asked who the driver had been and that she was required to answer honestly. Her son had obviously been cited as a witness on her behalf as he testified on the second day of proof. In these circumstances it must have been obvious to the defence that the identity of the driver would emerge in the course of the proof before answer. In the event that was the critical piece of information which determined that the proceedings would come to an end, a development which could readily have been foreseen. The appellant's primary defence on the facts of the matter was that she had not been the driver. The sheriff was certainly of the view that the case would not have gone to proof if that information had been provided at an earlier stage. The appellant had failed to respond in any way to any of the voluminous correspondence sent to her before litigation commenced which made it plain that action might be taken against her in respect of parking charges and that she had been contacted because she was

the registered keeper of the vehicle and therefore was assumed to have been the driver at the material time. It is difficult to consider that proceedings against the appellant would have followed if she had identified the actual driver at a much earlier stage, which was clearly the sheriff's position.

[13] A call was made upon the appellant by the respondent to identify the driver in the light of her denial that she was, to which no response was made. I accept that there is no obligation upon a party to respond to such a call; it is a tactical question in the course of litigation. However, I agree with the respondent's submission that the failure to respond in relation to something which was clearly within the appellant's knowledge is relevant to the question of the parties' conduct for the purposes of determining the issue of expenses.

[14] The sheriff was also concerned that the appellant had failed to provide any insurance documentation at a commission hearing which followed on a motion for specification of documents raised by the respondent in order to determine who had been insured to drive the vehicle at the material time. Her position was that she no longer had the relevant documentation by the time of the commission hearing. The transcript of the commission hearing indicates that she did not pursue the matter with her insurers with any real vigour. It must have been obvious why the specification had been raised but in my view little may have turned on that because in the course of the commission hearing the appellant's insurers at the time were identified and the respondent does not seem to have pursued the issue with them, as they might have done by way of a further motion for specification.

[15] Of greater concern was the apparent absence of candour when the sheriff sought clarification of the appellant's position at the outset of proof, as he describes within para [20] of his Note. For the reasons set out within para [12] above, by that time the appellant's agent must have been aware that her son was bound to be identified as the driver during the

proof but the sheriff was told only that she was not the driver and had no business going to the area where the contentious parking charges had been incurred. This aspect of the matter alone justifies the sheriff's conclusion that lack of candour was displayed on the part of the appellant.

[16] This case clearly turned on the question of the identity of the driver who had parked the appellant's vehicle in the car park at Robert Gordon University. I have therefore reached the conclusion that the sheriff was correct to consider that the actions - or inaction - of the appellant in failing to identify her son as the driver caused or contributed to the raising of the action and its progress to the stage of a proof before answer which took up two days of court time. The appellant therefore was responsible to a significant extent for the raising of the action and its progress to the stage of proof before answer. It is therefore relevant to the sheriff's discretionary decision in relation to the award of expenses answer (*MacPhail*; *Shepherd* v *Elliot).*

[17] I turn now to the questions of whether there has been an obvious miscarriage of justice, or the expenses have become a great deal more valuable than the merits or a question of principle is involved.

[18] So far as a miscarriage of justice is concerned, I am satisfied that the sheriff was correct to conclude that the appellant's conduct from the pre-litigation period to the events at proof occasioned unnecessary expense. Early identification of the driver would almost certainly have prevented the raising of legal action against the appellant. The sheriff concluded that the appellant had demonstrated obstruction, obfuscation and a complete lack of the degree of candour which a court is entitled to expect from a litigant. While nothing described in his report amounts to obstruction in my view, the appellant's behaviour in relation to the specification might be construed as obfuscation and there was a clear absence

of candour in the response to the sheriff's enquiry at the outset of the proof hearing. The appellant's earlier failure to respond to any of the notices posted to her was in practical terms behaviour which was obviously likely to lead to further action and she was repeatedly warned that further costs might be incurred if she simply buried her head in the sand. The appellant's position on appeal was that the notices were nothing to do with her and therefore there could be no need to respond was unrealistic in practical terms and gave rise to the litigation in which the respondents were entitled to seek to vindicate their position against the person reasonably perceived to be the driver - albeit they might have done so at an earlier stage before such a large amount of unpaid charges had accumulated.

[19] The respondent's expenses were taxed at £1,246.00 which is not a great deal more valuable than the merits of the cause in which the sum of £6,370.00 was sought.

[20] The question of principle which arises in this case is the one already discussed; that is, whether the conduct of the appellant before and during the litigation caused or contributed to the costs of litigation to the extent that it would be unjust to award expenses to her. I have already answered that question at para [16] above.

[21] It follows that the sheriff was entitled to depart from the general rule that expenses should follow success in the exercise of his discretion. However, the next question to be considered is what the appropriate departure should be in all the circumstances. After considering the principles set out in paras [9] and [10] above, *MacPhail* goes on to consider what might follow:

> "**19.15**
> The sheriff may refuse a motion for expenses where the behaviour of a successful party prior to the raising of the action has been improper, careless or misleading; or where the procedure adopted has been erroneous, irregular or unnecessary, for example where a pursuer has unjustifiably raised an action without prior warning, or where several defenders have needlessly maintained separate defences, or where an unnecessary proof has been led, or to mark the court's disapproval of the conduct of

> the defender in relation to the pursuer's claim. In such circumstances, the successful party may be deprived of part or all of the expenses which would otherwise have been awarded, or of the expenses from or up to a specified stage of the proceedings. Thus, a successful party who had made misleading averments was refused expenses at first instance and held entitled to expenses only from the date of the interlocutor which the other party had unsuccessfully appealed. It is incorrect to refuse expenses on the ground that the case is a test case, unless the parties so agree.
>
> **Successful party found liable**
>
> **19.16**
> A party who unnecessarily or unreasonably causes litigation to take place or protracts it when it has been initiated may not only forfeit a claim for expenses, even if ultimately successful, but may also be found liable in expenses to the other party. For example, a successful party may be found liable in expenses where the precognition of witnesses has been obstructed, or there has been a failure duly to produce a material document, or has raised an action unnecessarily in view of the reasonable attitude of the defender, or has raised an action for payment without making a previous demand. A successful party may likewise be found liable in part of the other party's expenses, as, for example, in the expenses of unnecessary procedure, or in the expenses caused by a failure to put forward a successful defence which it was pars judicis to notice."

[22] The sheriff clearly considered that the appellant's behaviour had been improper, careless or misleading in terms of his comments at paras [18], [20] and [23] of his Note and for the reasons stated above I agree that it was at least careless and misleading. A defence of denial that the appellant was the driver was advanced but the detail of who the driver had been was not disclosed beforehand, although it had been known to the appellant throughout. However, I note that the respondent did not cease to pursue the matter until the appellant's son had confirmed the position so that I have reluctantly reached the conclusion that litigation may have been necessary for that position to have been properly established. I consider that the appellant was at fault and that her behaviour certainly caused unnecessary expense but the respondent might also have taken action before the debt had accumulated to the extent it did and might have made some further enquiries such as seeking to obtain information from the appellant's insurers with the sanction of the court.

I have therefore concluded that the circumstances of the present case fall within the categories set out in paragraph 19.15 of *MacPhail* rather than the following section so that the sheriff has erred by awarding expenses against the appellant.

[23] I shall therefore allow the appeal to the extent of modifying the sheriff's interlocutor of 6 November 2023 in which he made an award of expenses to the pursuers and respondent and making no award of expenses to either party.

Other matters

[24] Since the sheriff has expressed his views on some of the other points raised during the proof before answer and these have been questioned by the appellant it is appropriate that I should consider them.

[25] On the question of whether the respondent had the right to sue the appellant as the driver of the vehicle, I agree with the conclusion which the sheriff reached. There was no dispute that the appellant was the registered keeper of the vehicle and that she had taxed and insured it at the material time (Sheriff's Note, para [13]). No fewer than 49 charge tickets were affixed to her car between March 2018 and May 2019 while it was parked in the University car park, which clearly suggest more than very occasional use. An inference could be drawn that the registered keeper was the driver, as indicated in the correspondence sent to her, which stated that she was considered to be the driver because she was the registered keeper. That inference was not displaced by the appellant before litigation was commenced and in my view the respondent was entitled to raise the action against her on the basis of such an inference.

[26] The legal basis of the action was breach of contract, not delict. Whoever parked the vehicle in the car park which clearly displayed signage setting out the terms on which it was

operated, that is, where a permit required to be displayed or a penalty would be incurred, entered into a contract with the provider of the parking facility. Failing to display a permit, or parking in a disabled bay without displaying the appropriate badge, constituted a beach of that contract. These issues were clearly settled in *University of Edinburgh* v *Onfade* 2005 SLT (Sh Ct) 63, *ParkingEye Limited* v *Beavis* 2015 UKSC 67 and *Indigo Park Services UK Limited* v *Watson* 2017 WL5999951, Dundee Sheriff Court, 6 September 2017. The first and last of these three cases are not binding on this court but are highly persuasive in my view. *Carmichael* v *Black* 1992 SLT 897, which was referred to by the appellant, is of no assistance as it is a criminal case in which the central issue was whether depriving the owner of the use of his vehicle by clamping its wheel constituted either of the crimes of theft or extortion. At page 900F, Lord Justice General Hope expressly states that the case was not one in which there was a contract for use of the car park and the issue was not explored further.

[27] The sheriff considered that the cases of *University of Edinburgh* v *Onfade, ParkingEye Limited* v *Beavis* and *Indigo Park Services Limited* v *Watson* also supported the contention that the respondent had title to sue as an agent who was contracted to operate car park management services. In the present case the contract between Robert Gordon University and Euro Car Parks was lodged by the respondent but the matter was not debated in full because of the turn of events as narrated above. In terms of the agreement, which had been lodged as a production in advance of the proof before answer, the respondent was to provide car park management services to the University. At Article of Condescendence 2 the respondent averred that it was the manager of a car park situated at Robert Gordon University, Aberdeen on behalf of the owners and:

> "by dint thereof have right and title inter alia to (a) occupy same; (b) provide a parking control service there, and (c) collect all unpaid parking charges that might arise from time to time at the car park".

The respondents therefore averred that responsibility for operating the car park and for collecting unpaid parking charges was their responsibility by virtue of their contract with the University. The action was raised to collect such charges. I found the case of *University of Edinburgh* v *Onfade* to be of little assistance in relation to the question of title to sue, because it was the University itself which pursued the action, not an agent. The case was, however, helpful in relation to the issue of the contractual basis of the claim. *ParkingEye* v *Beavis* was of limited assistance because the question of title to sue did not arise before the Supreme Court. The most helpful discussion of the matter was found in *Indigo Park Services Limited* v *Watson.* While I accept that the learned sheriff's discussion of title to sue is *obiter* in view of her determination of the case on other matters, I found her consideration of the point to be helpful. While the facts of that case, in relation especially to the signage displayed, are not identical to the present one, there are a number of similarities. A fuller discussion of the issues took place before the sheriff there than in the present matter and the sheriff was clearly of the view that the terms of the contract between the landowner and the operator of the car park might be significant, although in that case the details were not available to her.

Expenses of the appeal

[28] In view of the nature of my decision I direct parties to lodge written submissions on the issue of the expenses of this appeal within 21 days of the date of this interlocutor.