



SHERIFF APPEAL COURT

**[2025] SAC (Civ) 3
SAC/2024/DBN-PD46-23**

Sheriff Principal Murphy KC

OPINION OF THE COURT

Delivered by SHERIFF PRINCIPAL S F MURPHY KC

In Appeal by

OZGUR PALAS

Pursuer/Appellant

against

EUI LIMITED

First Defender/First Respondent

and

LIVERPOOL VICTORIA INSURANCE LIMITED

Second Defender/Second Respondent

Appellant: Talat; Kudos Legal

First Respondent: Hovey, Advocate; DAC Beachcroft

Second Respondent: Smart; Horwich Farrelly

12 December 2024

[1] Following a motor vehicle collision said to have occurred on or about 13 May 2022 in Bearsden the pursuer and appellant raised an action seeking damages from the first and second defenders as the insurers of two drivers whom he alleged to have been responsible.

After sundry procedure the case called before the sheriff at Dumbarton on 5 March 2024.

Decree by default was granted on the defenders' unopposed motion. The sheriff assoilzied the defenders rather than granting decree of dismissal. Appeal has been taken against that decision.

Grounds of Appeal

[2] The appellant accepts that he failed to appear at the diet on 5 March 2024 under explanation that his agents had advised the sheriff clerk in Dumbarton that they would be unable to appear because they were engaged in Glasgow Sheriff Court on the same date. They had tried unsuccessfully to arrange cover for the appearance in Dumbarton. In these circumstances the sheriff ought to have continued the case to another date; *esto* he ought to have granted decree of dismissal rather than absolvitor. Although reference is made to the interlocutor of 2 April 2024, neither the grounds of appeal nor the appellant's written submissions address the sheriff's decision on expenses.

Submissions for the Appellant

[3] The test for an appeal against a discretionary decision by the sheriff is set out in *Douglas v Douglas (No. 2)* [2020] Fam L R 143. The sheriff gave no indication that he might grant decree of dismissal rather than absolvitor so that his decision was open to review: *Group 4 Total Security Ltd v Jaymarke Developments Ltd* 1996 (Sh Ct) 61. The appellant's agents had failed to lodge the record due to an administrative mistake after the agent who had originally dealt with the case had left the firm. The hearing on 5 March 2024 had been fixed on 26 February 2024. As the appellant's solicitor was aware that he would not be able to attend various unsuccessful attempts had been made to seek to arrange cover. On 1 March

2024 the agents contacted the sheriff clerk to ask that the hearing be re-arranged for another date, to be told that could not be done and that an arrangement would have to be made for a local solicitor to attend. No such arrangement could be made. During contact with the sheriff clerk at Dumbarton in the course of 5 March 2024 the position was explained but the court had refused a reasonable request to move the date in the circumstances. Such requests are not uncommon. The sheriff had not allowed the appellant to be heard, knowing that he wished to take part but that his agents were not available. The appellant's agents had made all reasonable attempts to secure representation at the hearing. The sheriff had failed to assess the prejudice to the appellant which was caused by granting decree of absolvitor against that caused to the respondents by continuing the hearing to a later date. As such his decision was wholly unreasonable and plainly wrong. The failures to lodge the record and to attend the hearing were the responsibility of the agents and not of the appellant himself but this factor had not been taken into account as it should have been: *MacPhail, Sheriff Court Practice*, 4th edition at 14.14. The respondents had also failed to adhere to the timetable previously. Failure to lodge the record in a chapter 36 action was less significant than was the case when the matter would have gone to an options hearing.

[4] This court was invited to uphold the appeal, to recall the sheriff's interlocutors of 5 March 2024 and 2 April 2024 and to remit the case to the sheriff to arrange a hearing to enable the appellant to address the court on his failures to meet the requirements of the timetable; *esto* the court should substitute decree of dismissal in lieu of absolvitor.

Submissions for the Respondents

[5] The respondents submitted that the appellant had repeatedly failed to observe the timetable by lodging the record timeously and had repeatedly failed to enrol a motion for

further procedure. The action was originally raised in the wrong jurisdiction. The first and second respondents lodged motions seeking decree by default on 20 February 2024. The appellant's agents failed to appear or to instruct representation at the hearing on 5 March 2024, although there were some local solicitors present in the court. The appellant was in default in terms of OCR 16.2 (1)(a), (b) and (c). Accordingly it was within the sheriff's discretion to grant decree of absolvitor in terms of OCR 16.2 (2)(b). The granting of decree by default is a mark of the court's disapproval of failure to comply with court rules: *Moran v Freyssinet* 2016 SC 188; *Murphy v Ogilvie Construction* 2021 Rep. L.R. 133. The present case was analogous with *John Carty v Churchill Insurance Company Limited* [2023] SC Edin 31, a case in which fault lay with the pursuer's agents rather than the pursuer himself, the conduct of the agents was a relevant factor when the court was asked to disapply QOCS and it was stated that an agent's obligations to the court and to his client were not diluted by the pressures of business. In the present case there had been repeated and persistent failures to comply with orders of court reflective of a casual approach to the rules and which amounted to a breach of professional duty. It was appropriate for the sheriff to impose a sanction having regard to the public interest and his decision had been proportionate on the circumstances. The appellant's remedy lay in taking action against his agents.

Decision

[6] The history of this case reflects badly upon the appellant's agents. It was originally raised in the wrong sheriff court (Glasgow) and was transferred to the sheriff at Dumbarton within whose territorial jurisdiction the accident was said to have occurred. The record was not lodged timeously in terms of the court's timetable in July 2023. When produced in August 2023 it was incomplete and no motion for further procedure was lodged. After

transfer to Dumbarton Sheriff Court the appellant's agents again failed to lodge the record or to move for further procedure. The first and second respondents lodged motions seeking decree by default. The appellant's agents lodged a motion for the record to be received late. When these motions called before the sheriff in Dumbarton on 5 March 2024 the appellant was neither present nor represented.

[7] OCR 16.2 (1) provides, *inter alia*, that where a party fails to lodge any part of process timeously or to appear or be represented at any diet they shall be in default. OCR 16.2 (2) provides *inter alia* that where a party is in default the sheriff may grant decree of absolvitor or dismiss the action with expenses. Accordingly it is a discretionary decision for the sheriff to grant decree in the event of default and it is a matter for his discretion whether to grant absolvitor or to dismiss the cause. Under reference to *Douglas v Douglas* the appellant identifies the basis on which an appellate court might interfere with such a decision:

"We repeat again that an appellate court will be slow to interfere with a discretionary decision unless it may be shown that the judge did not exercise his discretion at all, or that in exercising it he misdirected himself on the law or misunderstood or misused material facts before him, or took into account an irrelevant consideration or failed to take account of some relevant consideration, or if his conclusion is such that although no erroneous assumption of law of fact can be identified he must have exercised his discretion wrongly and reached a conclusion which is plainly wrong".

per the Opinion of the court at paragraph 30.

[8] In the present case the appellant's agents had failed to lodge the record timeously for the second time and had failed to appear at the hearing on 5 March 2024. It follows that the appellant was *prima facie* in default in terms of OCR 16.2(1). *MacPhail's Sheriff Court Practice* describes decree by default as:

"an effective and appropriate sanction to compel the parties' due compliance with the rules and orders of court and their due appearance or representation at those callings of the case at which their attendance is required"

(4th edition, paragraph 14-02); see also *Moran v Freyssinet* and *Murphy v Ogilvie Construction*.

In the present case it is said that the deadline for lodging the record was missed because the appellant's principal agent had left the firm. In the appellant's written submissions it is argued that an inadvertent failure to lodge documents timeously "is to be expected" and is something which the court is "aware" happens "regularly". This line of argument is unacceptable and completely fails to recognise the seriousness of the situation. The court is entitled to expect that all who plead before it will comply with the basic requirements imposed upon them by the rules of court which are designed to ensure that cases proceed efficiently in the interests of justice and of all parties.

[9] Repeated attempts to contact other agents or counsel to obtain representation on 5 March are set out in the appellant's submissions but none of these was successful. The respondents contend that there were local agents present in the courtroom in Dumbarton on the day in question who might have been able to assist even while the appellant's solicitors were speaking to the sheriff clerk to explain their predicament.

[10] The appellant was in default because the record had not been lodged timeously. The appellant was in default because he did not appear and was not represented at the hearing on 5 March 2024. The appellant's explanations for these failures are unsatisfactory. Care has to be taken when a solicitor leaves a firm to ensure that the business which was scheduled for his attention is dealt with by others remaining in the business. The courts have repeatedly made the point that a solicitor should not take on more work than he is able to deal with. I respectfully agree with Sheriff Campbell KC in *Carty v Churchill Insurance* that practitioners' obligations to their clients and to the court are not diluted by pressures of business and that the operation of court process depends each case upon the due observance of the procedural framework and its requirements. Every case has to be considered

according to its own particular circumstances. *Carty* was concerned primarily with the question of whether to disapply QOCS.

[11] The sheriff reports to this court that arrangements were made to call the case at the end of the roll in an effort to allow the appellant's agents to attend or to arrange for representation but neither of those things happened. He agreed to hear the matter only after being told by the clerk of court that attempts to contact the appellant's agents' office had been unsuccessful. He concluded that the rules of court had not only been overlooked but ignored. He noted that there had been repeated failures to comply with the court timetable. He correctly commented that failure to lodge the record timeously was not simply an administrative matter, as the appellant suggested, but an important procedural step in the progress of the case.

[12] In the circumstances of the present case it was within the sheriff's discretion to grant decree by default against the appellant and it cannot be said that he erred in law or that his decision was wholly unreasonable in the light of the nature of the failures made by the appellant's agents and their repeated nature.

[13] The question then becomes, did the sheriff err in granting decree of absolvitor, rather than dismissal? In *Group 4 Total Security v Jaymarke Developments Sheriff Principal Risk QC* considered a similar question. At page 64F he said:

"I agree with the pursuers' solicitor that to grant decree of absolvitor is calculated to lead to substantial injustice. The pursuers' case is not manifestly lacking in merit and the default was committed not by the pursuers but by their solicitors. To bar the pursuers from ever seeking their remedy would be a penalty out of all proportion to the default. The same cannot be said of dismissal."

In the present case the appellant's solicitor accepted, as he had to, that the error in failing to lodge the record timeously lay with him. While it is difficult to understand why he failed to arrange for someone to attend on his client's behalf on 5 March 2024, it seems that he did

make repeated efforts to do so. The sheriff was apparently not aware that he had contacted the sheriff clerk's office to seek to re-arrange the diet, albeit he ought to have enrolled a motion to that effect. While there were matters which were perhaps to be the subject of debate, it cannot be said that the appellant's case was manifestly lacking in merit. The default was caused by the decisions taken by the appellant's solicitor and not by the appellant himself. The sheriff has reported that the decisive factor in his decision to grant decree of absolvitor was the consideration that the appellant would have an unanswerable claim against his agents so that he was not without redress. However, the same consideration would also apply in relation to the expenses arising out of the procedure to date and any further procedure which might arise after dismissal and there is merit in my view in having the appellant's case fully considered.

[14] It follows that the sheriff erred in granting decree of absolvitor in the particular circumstances of this case.

[15] I have held that the sheriff was correct to grant decree by default and in my view no adequate justification has been advanced in this appeal for the sheriff's decision on the expenses of the procedure before him to be overturned.

[16] The appeal will be allowed but only to the extent of substituting decree of dismissal for decree of absolvitor.

[17] In the light of my decision, I invite parties to lodge written submissions in relation to the question of the expenses of this appeal within 21 days of receipt of the accompanying interlocutor.