
SCOTLAND / JUDGMENT

Dawson v. Shaw [2005]

ScotSC 9 (02 February 2005)

[2005] ScotSC 9

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Dawson v. Shaw [2005] ScotSC 9 (02 February 2005)
SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS AT STONEHAVEN
A128/04

JUDGEMENT

of SHERIFF PRINCIPAL SIR STEPHEN S T YOUNG Bt QC in the cause MRS LOUISE DAWSON Pursuer and Respondent against MR ANDREW SHAW Defender and Appellant Act: Mr Neil Smith, solicitor, CMS Cameron McKenna, Aberdeen Alt: Mr Thomas Mullen, solicitor, Stronachs, Aberdeen Stonehaven: 2 nd February 2005 The sheriff principal, having resumed consideration of the cause, sustains the appeal in part and recalls that part of the interlocutor of the sheriff dated 30 September 2004 which begins with the words "having heard parties' procurators on pursuer's motion, no. 7/2 of process" and ends with the words "..... Stonehaven as a diet of debate"; reserves meantime the question of the expenses of the appeal and appoints parties to be heard thereon at Aberdeen Sheriff Court on Monday 14 th February 2005 at 12.00 noon. Note [1] In this case the pursuer and respondent is the heritable proprietor of premises in Portlethen of which the defender and appellant is the tenant. In short, the pursuer craves the court (1) to find and declare that the lease of the premises is at an end, (2) to grant decree of ejection against the defender, (3) to grant decree for payment by the defender to the pursuer of outstanding rent in the sum of £2,971.15, and (4) to grant decree for payment by the defender to the pursuer of the sum of £4,650 in name of violent profits. In addition, the pursuer seeks the expenses of the action. [2] A notice of intention to defend having been lodged on behalf of the defender, on 16 June 2004 the sheriff clerk fixed 2 September 2004 at 10.15 am as the date and time for the options hearing in terms of rule 9.2(1) of the Ordinary Cause Rules. This date was duly intimated to the parties, as was the last date for adjustment of the pleadings, namely 19 August 2004 - see rule 9.8(1). [3] On 30 June 2004 a motion, no. 7/1 of process, was enrolled on behalf of the defender in terms of which he asked the court to sist the cause to allow him time to apply for legal aid. On 22 July 2004 the sheriff continued consideration of this motion until 12 August 2004. On 6 August 2004 a motion, no. 7/2 of process, was enrolled on behalf of the pursuer. This had two parts. In terms of part 1 she asked the court to grant summary decree against the defender in terms of craves 1, 2 and 3 with expenses in respect that no relevant defence to the cause had been stated. In terms of part 2 she asked the court to allow a minute of amendment on her behalf to be received and to allow time to the defender to lodge answers thereto, if so advised. [4] On 12 August 2004 the sheriff granted part 2 of the pursuer's motion to the extent of allowing her minute of amendment to be received and the initial writ to be amended in terms thereof. (It

appears that the defender did not wish to answer the minute of amendment). The sheriff continued consideration of part 1 of the pursuer's motion and also the defender's motion to 2 September 2004 which, it will be recalled, was the date which had been fixed for the options hearing. [5] On 2 September 2004 the sheriff began by granting leave to the defender's agents to resign from acting for him in the case. The defender was evidently present himself and, having heard him and the pursuer's solicitor, the sheriff *ex proprio motu* discharged the options hearing which had been assigned for that date and of new assigned 30 September 2004 at 10.15 am as the date and time for the options hearing. He continued consideration of the defender's motion and also part 1 of the pursuer's motion to the same date. [6] On 30 September 2004 the defender was again present and represented himself and the pursuer was represented once more by her solicitor. Having heard them, the sheriff refused the defender's motion to sist the cause so that he could apply for legal aid. Thereafter, having heard parties on part 1 of the pursuer's motion, he granted summary decree against the defender in terms of craves 1 and 2 of the initial writ. He then closed the record and assigned 15 December 2004 as a diet of debate on the parties' respective preliminary pleas. [7] It is this interlocutor dated 30 September 2004 which is the subject of the present appeal. But it became apparent at the hearing of the appeal that the defender no longer challenged that part of the interlocutor in terms of which the sheriff had refused the defender's motion to sist the cause. [8] In support of his interlocutor the sheriff prepared a careful note in which he explained fully what had happened on 30 September 2004. In view of the way matters turned out at the appeal (by which time the defender had secured representation by another solicitor), it is necessary to notice only certain parts of the sheriff's note. At page 4 he recorded that the pursuer's solicitor had addressed him with reference to the pleadings contained in the record which had been lodged on 23 August 2004 (no. 11 of process). At the foot of page 4 and the top of page 5 the sheriff recorded that the defender had prefaced his submissions by saying that he felt unqualified to address the sheriff on legal points. The sheriff continued: He (the defender) did, however, make a number of observations upon the terms of the defences which defences, he said, did not reflect his true position. In the course of doing this, he referred to a "line of defence" that was not mentioned in his pleadings. I indicated to him that the matter required to be dealt with on the basis of the pleadings before me and that I could not entertain this new point.

- [9] Further down page 5 of his note the sheriff referred to having invited the defender to direct himself principally to one particular issue, and he then continued: In response to this, the defender, rather than addressing what was a rather technical argument, again indicated that he wanted to introduce new lines of defence. These, he said, related to events at the outset of the lease and also to the conduct of his former solicitor earlier in this litigation. I indicated that he could not do this - that the matter before me would be decided on the pleadings as they stood. Had the defender been represented, then I accept that - at this point - his solicitor would have been inviting me to continue the options hearing so that further adjustment could take place. That frequently happens at the initial options hearing. I did, however, take the view that to allow the introduction of a new ground of defence at this stage - in the face of a motion for summary decree that had been before the court for several

weeks - would be to render ineffective the summary decree procedure. In taking this view, I had regard to the view which I had already formed with regard to the substance and authenticity of the written defences "under attack". [10] At page 7 of his note the sheriff added finally: The hearing before me proceeded on the basis of the options record, no. 11 of process, lodged at the end of the adjustment period. This, at the time, seemed correct. In the course of preparing this note, however, I have found within the process folder two sets of "Adjustments for the Defender" sent directly to the sheriff clerk. These have now been "listed" on the process folder and, together, given the process number "15". Both sets of adjustments are accompanied by covering letters from the defender's former agents. There is not, of course, any provision in the rules for the lodging of adjustments in this way and I have confirmed that, at the time of the hearing, these documents were simply at the "back" of the process folder. Only subsequent to the hearing, when the process folder was being "tidied up", were the adjustments placed in a pocket and given a process number. The first adjustments are, properly, included in the record on the basis of which the hearing proceeded. The second adjustments are not so included. At first sight, this appeared correct - as the options record before me was lodged - and correct - at the point that the original adjustment period ended. It now occurs to me, however, that - when I discharged and re-fixed the options hearing on 2 September (to accommodate the defender's wish to find a solicitor), I effectively re-opened the adjustment period. Once this was re-opened then, if the pursuer's agents had a copy of the "late" adjustments found within process folder 15, there is a view that they should have lodged an amended options record incorporating those adjustments. Had they done so, then it is self-evident that matters may have followed a different course. [11] For present purposes it is unnecessary to notice the terms of the original grounds of appeal which were evidently drafted by the defender himself. It appears that he first met his present solicitor early in January 2005, and on 13 January 2005 a motion, no. 7/3 of process, was enrolled on his behalf in terms of which in effect he asked to be allowed to introduce a new ground of appeal although late. This motion was not opposed by the pursuer and at the outset of the appeal hearing on 20 January 2005 I allowed the new ground of appeal to be added as follows: The learned sheriff was in error in granting summary decree against the defender without adequate consideration of the further note of adjustments lodged on behalf of the defender although late. The note of adjustments lodged under cover of Messrs Bryan Keenan & Co's letter of 30 August 2004 disclose a substantive defence to the action. Further, and in any event, the sheriff has conceded (in his note) may have reached a different result had he had sight of this particular note of adjustments. The sheriff is entitled to hear submissions from the parties in addition to those matters contained in record and more particularly so where there is a proposed ground of defence, when the notice is from summary decree (sic). [12] Opening the appeal, the defender's solicitor referred to the passages on pages 4, 5 and 7 of the sheriff's note which I have quoted in paragraphs [8] to [10] above. He submitted in the first place that the version of the record which had been before the sheriff on 30 September 2004 ought to have incorporated the second set of adjustments for the defender, a copy of which was now to be found in no. 15 of process. These adjustments had been intimated to the pursuer's solicitor on 20 August 2004

(and this the pursuer's solicitor accepted), with the result that they had been correctly excluded from the version of the record which had been before the sheriff at the original options hearing on 2 September 2004. But, the sheriff having discharged that options hearing and having of new assigned 30 September 2004 as the date for the options hearing, the second set of adjustments ought to have been incorporated by the pursuer's solicitor in a fresh version of the record which should have been lodged before the new options hearing. If this had been done, then, as had been observed by the sheriff at the end of his note, it was self-evident that matters might have followed a different course on 30 September 2004. And in any event it was submitted, under reference to Macphail's Sheriff Court Practice (2 nd Edn) at paragraph 14.74 and Whiteaway Laidlaw Bank Limited v Green 1994 SLT (Sh. Ct.) 18 that, in dealing with the pursuer's motion for summary decree, the sheriff had erred in having apparently considered that he was not entitled to entertain any line of defence beyond what was disclosed in the record which was then before the court. In the circumstances therefore the proper course would be for the matter to be remitted to the sheriff to consider of new the pursuer's motion for summary decree in light of an updated version of the record including the second set of adjustments for the defender. [13] In response, the pursuer's solicitor rightly reminded me that the defender's second set of adjustments, having been received by him on 20 August 2004, had properly been excluded from the version of the record which had been prepared for the original options hearing on 2 September 2004. At that hearing there had been no motion either by the defender's original solicitor (before he had been allowed to withdraw) or the defender himself to allow these adjustments to be permitted to be received late in terms of rule 9.8(4). Nor had these adjustments been re-intimated at any time after 2 September 2004. Since this had not been done, he (the pursuer's solicitor) had taken the view, which he submitted was correct, that there had been no need to prepare a fresh version of the record incorporating these new adjustments for the purposes of the new options hearing on 30 September 2004. As for the second submission for the defender, it was conceded that the sheriff had been wrong to have considered himself confined to the terms of the record which was then before the court. In point of fact he had in addition looked at certain affidavits which had been lodged on behalf of the pursuer. In determining whether or not to grant summary decree in terms of rule 17.2(4) the sheriff had been exercising a discretion and in the circumstances of the present case he had weighed up the necessary considerations before reaching his decision and his having refused to allow the defender to advance new arguments beyond those reflected in the record had been justified in light of the previous history of the case. In all the circumstances there had been no misdirection by the sheriff with the result that the appeal should be refused and the interlocutor of 30 September 2004 confirmed. [14] It seems to me to be a nice question whether the sheriff was in fact entitled in terms of the Ordinary Cause Rules to discharge the options hearing on 2 September 2004 after it had begun. Arguably, his powers thereafter were confined to those set out in rule 9.12. For present purposes, and in particular since I was not addressed on the point, I am content, without expressing a concluded opinion, to assume that it was competent for the sheriff to have discharged the options hearing and to have fixed a new one to take place on 30 September 2004. But I think

that it is plain that the result of his having done so was to extend the period of adjustment allowed to the parties in terms of rule 9.8(1). This provides that parties may adjust their pleadings until fourteen days before the date of the options hearing or any continuation of it. It follows in my opinion that in terms of rule 9.11(1) and (2) the pursuer's solicitor ought to have made up a fresh version of the record incorporating the defender's second set of adjustments and lodged a certified copy of this in process not later than two days before 30 September 2004. If this had been done, as the sheriff rightly observes, matters might have followed a different course before him when he came to consider the pursuer's application for summary decree on 30 September 2004. [15] As for the defender's solicitor's second submission, it does respectfully seem to me that the sheriff fell into error in having apparently thought himself confined to the terms of the defences in the version of the record which was before him on 30 September 2004. In *Whiteaway Laidlaw Bank Limited v Green* my predecessor, Sheriff Principal Risk QC, had to consider the terms of the old rule 59A, the material parts of which were to precisely the same effect as rule 17.2 in the current Ordinary Cause Rules. At pages 20/21 Sheriff Principal Risk made certain comments about the old rule 59A which in my opinion apply equally to the current rule 17.2. He stated: The purpose of that rule is to enable the sheriff to penetrate the form and examine the substance of the dispute between the parties. To that end he is entitled to take account not only of the pleadings but also of any productions which are placed before him and of information given to him in the course of the respective submissions. He will look at the pleadings to see broadly what the case is about but he should not examine them with the rigour which would be applied at debate. That comment applies to both parties. Summary decree will not pass against a defender who appears to have the basis of a stateable defence but who has expressed it badly; on the other hand summary decree will not be refused merely because there is a drafting error or a lack of detail in the pursuer's pleadings (my emphasis). [16] It was agreed that the question of the expenses of the appeal should be reserved. Once these have been dealt with I shall order the sheriff clerk in terms of rule 31.8 to fix a new date for an options hearing and thereafter remit the cause to the sheriff to proceed as accords and in particular to consider of new part 1 of the pursuer's motion, no. 7/2 of process. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotSC/2005/9.html>

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