

SCOTLAND / JUDGMENT

MILLEER v CHIVAS BROTHERS LTD

[2014] ScotCS CSIH_65 (11 July 2014)

[2014] ScotCS CSIH_65

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

[Home] [Databases] [World Law] [Multidatabase Search] [Help] [Feedback] [DONATE]

Scottish Court of Session Decisions You are here: BAILII >> Databases >> Scottish Court of Session Decisions >> MILLEER v CHIVAS BROTHERS LTD [2014] ScotCS CSIH_65 (11 July 2014)
URL: <https://www.bailii.org/scot/cases/ScotCS/2014/2014CSIH65.html> Cite as: 2014 GWD 24-452,

[2014] CSIH 65, 2015 SC 85,

[2014] ScotCS CSIH_65 [New search] [Help] EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2014] CSIH 65 Lady Dorrian Lord Drummond Young Lord Philip XA83/13 OPINION OF THE COURT delivered by LADY DORRIAN in the cause by ANNETTE MILLER Pursuer and Appellant; against CHIVAS BROTHERS LTD Defenders and Respondents:

Act: Brodie QC, Fitzpatrick; Digby Brown Alt: Cowan, Solicitor Advocate; Simpson & Marwick 10 July 2014

- [1] In this action of reparation, the appellant sought damages from her employers, the respondents, in respect of an injury sustained during the course of her employment at their bottling plant in Dumbarton. Damages were agreed in the sum of £5,500, but the case went to proof over four days on the issue of liability. In the circumstances hereafter narrated, after the sheriff had made avizandum, a further two days of evidence was heard. The sheriff believed the evidence of the appellant and granted decree in her favour. At a subsequent hearing on expenses, the sheriff found the respondents liable to the appellant in expenses for the period from the commencement of the action up to and including 16 November 2011, the date upon which he made avizandum. He also found the respondents liable to the pursuer in expenses for the period from 17 November 2011 to 7 February 2012, the date of allowance of the additional proof. For the period from and including 8 February 2012 he found no expenses due to or by either party.

- [2] The appellant averred that she had fallen and injured herself on a floor made slippery by an accumulation of cardboard dust. The respondents averred that they operated a cleaning schedule under which floors required to be cleaned regularly to eliminate the build-up of dust, that the appellant had reported to a fellow employee Karen Griffin that the accident had been her own fault, and did not mention that she slipped on dust. In her evidence the appellant stated that after her fall there was dust on her clothes and there were skid marks in the dust on the floor showing where she had slipped. She said that an employee whose name she thought was Karen Griffiths came to her aid, she denied that she stated that the accident was her own fault, and maintained that she had been called the next day to give a statement to another employee, also called Karen, in which she explained that she had fallen on cardboard dust. Despite a specification of documents seeking to recover any such statement, no statement was produced by the respondents prior to the sheriff making avizandum.
- [3] In cross examination it was put to the appellant that she had not previously mentioned slipping on dust, and that there had in fact been no accumulated dust in the vicinity at the time. The respondents led several witnesses, none of whom supported the appellant as to the presence of an accumulation of dust being present and constituting a hazard. Karen Griffin gave evidence of arriving on the scene within a minute of the accident, when the appellant was still on the floor, and being unable to see anything which might have caused her to slip. It was a generally dusty area but there had been nothing out of the ordinary. She completed an accident report that night in which she recorded "injured party walked forward to clear case jam, slipped on the floor and fell". She confirmed that a signed statement was taken from the appellant the day after the accident. She was not aware of its contents, specifically she was not aware that during this statement the appellant stated that she had slipped on dust. She did not have sight of the appellant's statement prior to completing the accident report.
- [4] On 16 November 2011 the sheriff made avizandum. On 17 November the respondents' agents sent a fax to the court enclosing a copy of the appellant's statement which they said had just been discovered in a file. The statement had been taken by an employee named Karen Dockery. On 22 November the sheriff, being aware that the respondents' agent was in the building, called her into chambers to ascertain whether a copy of the statement had been sent to the appellant's agents and to indicate that a hearing would require to take place. At a hearing on 13 December 2011 the respondents' agents offered to enter into a joint minute that the appellant had indeed made a statement, a copy of which was produced and which included a statement to the effect that she had sustained her injury as a result of slipping on dust which was on the floor. Thereafter a number of hearings took place at which the implications of the production of the statement were discussed, culminating in a decision by the sheriff, there being no objection from the respondents, to allow further evidence to be led in relation to that issue.

- [5] The issues to be addressed during the leading of additional evidence were set out by parties in a minute and answers which contained the following answer for the respondents: “In the circumstances the defenders consider that further proof is not necessary. The defenders’ agents have offered to either agree the report or alternatively to agree that the pursuer told Karen Dockery that when she slipped, all that was on the floor was dust. The pursuer’s agents have indicated that they are not willing to enter into any such Joint Minute. They have not proposed any alternative wording for a Joint Minute. However, whilst considering that further proof is unnecessary, the defenders do not oppose the pursuer’s motion therefor. That is under reservation of their position on expenses arising from any such proof.” The appellant’s agents considered that the statement, containing a clear reference to dust within 24 hours of the accident, had the potential to be of considerable evidential significance, not only regarding the credibility and reliability of the evidence of the appellant, but also in relation to the credibility and reliability of certain of the respondents’ witnesses. For this reason, they did not consider that the offer of a joint minute was adequate. The sheriff records at para 114 of his note the submission made to him to that effect.
- [6] Furthermore, the statement produced was only a copy. The principal has never been produced. The copy statement contained information which the pursuer said she did not know, relating to the names or identities of employees who had been on the premises at the time of the accident. It is clear that the appellant’s agents, concerned by the late production of what they saw as an important document, and by what they wrongly perceived to have been a “hearing” before the sheriff at which the appellant was not represented, were further concerned that the copy statement might not be the original of the statement taken from the appellant that night, or might subsequently have had additional information, such as the names of individuals, inserted into it. For this reason, too, they considered it appropriate to lead evidence surrounding the taking of the statement.
- [7] At the further diet of proof, the appellant again gave evidence. She confirmed her signature on the statement and that the statement now produced was in substance the statement she had given the night after the accident to the person called Karen, but said that various names mentioned were not provided by her and were not contained in the original statement when she signed it. In cross examination, it was put to her that the phrase in the statement “That is when I slipped and all that was on the floor was dust from the cardboard” was not the same as saying that she had in fact slipped on the dust. She was also cross examined on the fact that the statement contained no reference to skid marks on the floor or her clothing being covered in dust.
- [8] Karen Griffin gave evidence that she had arranged for another supervisor, Karen Dockery, to take a statement from the appellant on the night after the accident. She had subsequently been sent a copy of the statement. At some point she had read it, but she was unclear when this was. Asked when she last read it she said “probably the last time I came to court as regards the case”. She was asked if she had it available to her the last time she appeared in court and she replied “Yes, I think so”. Asked why she had said at the first proof that she was

not aware the appellant had said that she slipped on dust she replied “I probably couldn’t remember the contents of it”. Pressed on whether she saw the statement on the day she had been to court the previous time, she said “I refreshed myself on the events of the evening before I came because it had happened so long ago but I can’t remember everything that I read at that point just now”. In saying that she was not aware that the appellant had said in the statement that she had slipped on dust, she must have been saying what she thought at the time. She did not know whether she actually had the statement with her at that time. She then said that prior to coming to court she had looked at the report she herself had made, and as to whether she had at that time looked at the appellant’s statement “To be honest I can’t remember”.

- [9] Karen Dockery gave evidence for the first time during the leading of additional evidence. She had taken the statement from the appellant. She had made an error in recording the date of the accident as 27th rather than 26th of the month. In noting which other employees were present in the premises at the time of the accident she said “I can only go by the names I was given”. She herself had not known who was on shift at the time.
- [10] The sheriff concluded that the circumstances in which the copy statement contained names apparently unknown to either the pursuer or Karen Dockery were unexplained, but that there was nothing sinister in that, merely that the passage of time had caused any explanation to be forgotten. He concluded that the statement produced was a copy of the statement made by the appellant. He further concluded that the appellant was a credible and reliable witness and found in her favour on the merits.
- [11] In explaining his decision in respect of expenses, the sheriff tells us that for the period up to and including 16 November 2011 he had no difficulty in finding the pursuer, as the successful party, entitled to the expenses of the action, and that since the procedure which followed the production of the statement arose principally as a result of the failure of the respondents to produce it at the appropriate time, in response to the specification of documents, the appellant was also entitled to an award of expenses in relation to that further procedure.
- [12] However, he concluded that such an award should not be made in respect of the whole procedure that followed. He reached that conclusion on the basis of his understanding that the basis upon which the appellant had sought to lead further evidence was (a) to establish the making of a contemporaneous statement in which she mentioned the presence of dust on the floor, in a way which attributed her fall to slipping on that dust, in circumstances where the respondents’ position at proof was broadly to the effect that no such statement had been made; and (b) to attack the credibility of certain witnesses on the existence of that statement, principally that of Karen Griffin.

- [13] The sheriff took the view that in the end, the credibility of Karen Griffin was unaffected by the additional procedure and the fact that the statement was made, supportive of the appellant's credibility, was a matter which could have been addressed in a joint minute of admissions, as proposed by the respondents. He therefore concluded that the additional procedure had been unnecessary.
- [14] The sheriff considered that the appellant had been entitled to carry out certain investigations following production of the document, such as obtaining orders for disclosure of witness details and the obtaining of a commission to address whether other documents existed, and to receive the expenses of doing so, which he allowed up to 7 February 2012. The sheriff refers to this as the date upon which he allowed further evidence to be led, but in fact this is incorrect. 7 February 2012 was the date upon which the commission was allowed. The commission took place on 23 March and so would itself be excluded from the award. The date upon which a further diet of proof was assigned was 21 May.
- [15] As for the period from the date on which further evidence was allowed, the sheriff states: "I was of the view that had the pursuer agreed to enter into a Joint Minute at that time, as proposed by the defenders, the pursuer would be in the same position in which she is now (in fact, although the pursuer and her agents could not have known it, I would have found in her favour even without the copy statement – I believed her evidence as to her fall being due to dust on the floor and, as I said in my judgement, I found that parts of her evidence on this matter had the ring of truth about them)." He concluded that the appellant should not be entitled to an award in relation to further procedure after 7 February 2012, but that since the additional procedure as a whole arose principally as a result of the respondents' original failure to produce the statement, there should be no expenses awarded to either party for that period. Submissions for the appellant
- [16] Counsel for the appellant recognised that this court discouraged appeals on expenses only, but submitted that the sheriff had erred in exercising his discretion in relation to expenses in such a way as to have resulted in a miscarriage of justice. The sheriff failed to understand the evidential significance of the statement in question.
- [17] Had the statement been available during the prior evidence, it would have been explored with the appellant and would have been used in cross examination of certain of the respondents' witnesses. In particular it would have been used to undermine the evidence of Karen Griffin, James Martin, who referred to an investigation into the incident, which clearly could not have been complete in the absence of the statement, and James McIlroy, who attended the scene shortly after the incident and who said he was not aware of any dust. The existence of the statement might have caused him to reconsider, were he to be cross examined upon it.

- [18] At the conclusion of the original proof there was a very sharp issue between the parties, the appellant providing the only adminicle to support (i) presence of excessive dust and (ii) that it caused her accident, on both of which matters she was challenged in cross examination. The sheriff approached the matter with a degree of hindsight in referring to the fact that he would have found the appellant to be credible in any event.
- [19] At the conclusion of the original proof the appellant's evidence had been disputed and she had no idea what the sheriff might conclude regarding credibility. It was a reasonable course of action for the appellant and her advisers to consider that all evidence which may bear upon her credibility should be explored in evidence. Accident investigation reports may carry a great deal of weight with the court so the statement may have been used to undermine the evidence in relation to this.
- [20] Under section 3 of the Civil Evidence (Scotland) Act 1988 the statement was admissible in so far as it tended to reflect favourably or unfavourably on the appellant's credibility. Had the statement been available when the appellant gave evidence her agents would have been able to explore its terms, the circumstances in which it was made, the date it was made, and such similarities as there were with the appellant's testimony, in order to enhance her credibility. A simple agreement by joint minute would fail to fulfil that function. Submissions for the respondents
- [21] In submitting that the appeal should be refused, the solicitor advocate for the respondents submitted that the principle that appeals on expenses only were severely discouraged presented the appellant with a considerable hurdle to overcome. As long as there was material before the sheriff to justify departure from the basic rule that costs follow success, the appeal should fail. The judge at first instance was better placed to deal with the apportionment of expenses than any appeal court. Here, the same sheriff had dealt with the procedure throughout. The crux of his reasoning that the procedure after 7 February was not necessary was that the defenders had offered to enter into a joint minute. He took the view that the purpose of enhancing the appellant's credibility would have been achieved by the existence of the joint minute. The position adopted for the respondents was that had the joint minute been entered into in the limited, alternative basis suggested by them, it would have been difficult for them to do other than concede that the statement was in her favour when it came to assessing her credibility. The leading of evidence, as opposed to the reliance on a joint minute, did not advance matters for the appellant. Karen Griffin had not said that the appellant had not made a statement, merely that she herself was not aware of it. It was submitted that in any event the length of the additional proof was elongated unnecessarily by exploration of whether the copy was in fact the statement signed by the appellant, in which case a finding of no expenses due to or by either party would be a fair and just outcome. On the issue of the expenses of the expenses hearing, the sheriff had treated this as a case of mixed success and had made no award to or by either party. That remains the case, even if the appeal were to succeed, because the appellant's counsel had argued for a 75% uplift, whereas only 15% had been given, and had argued for agent and

client expenses, whereas the award was on a party and party basis. Discussion and decision

[22] The law which applies to appeals of this kind, limited only to the question of expenses, was not in dispute between the parties and was referred to under citation of the following cases: *S hepherd v Elliot*

(1896) 23 R 695 ; *Caldwell v Dyke*

(1906) 8F 839; *Mackenzie v Mackenzie* 1951 SC 163; *Charles Rogers & Sons v G&H Mullen* 1957 SLT 23; and *Ramm v Lothian & Borders Fire Board* 1994 SC 226.

[23] The general principle is that the cost of litigation should fall on him who has caused it. The court will exercise considerable reserve in departing from the general rule that costs follow success. Such a departure may be justified where the conduct of the successful party has caused or unduly extended the litigation, as for example taking time raising and exploring issues for which there is no proper basis, as in *Ramm* , in which case an appeal court will be reluctant to interfere with the assessment of the judge at first instance. In any event, appeals on the subject of expenses only are to be severely discouraged, and should not be entertained except where there has been an obvious miscarriage of justice, or where the expenses have come to be a great deal more valuable than the merits of the dispute.

[24] We recognise the force of these observations and we in no way seek to depart from the view that appeals on questions of expenses only require severely to be discouraged. However, we are clearly of the view that this is one of those rare cases in which a miscarriage of justice has occurred, and in which this court ought to interfere. The sheriff recognised, as he had to do, that the procedure which followed the production of the statement arose principally as a result of the failure of the respondents to produce it at the appropriate time. His principal reason for concluding that the appellant should not be allowed the expenses of the whole of that procedure was based on the view that the leading of evidence had not achieved anything which a joint minute would not have done, and that it was not therefore necessary for evidence to be led. With respect, we do not consider that this addressed the correct question.

[25] This was a highly unusual situation in which, at the time the sheriff made *avizandum*, the whole credibility and reliability of the appellant was in issue, both as to the presence of an accumulation of dust and as to that dust being the cause of her accident. Her evidence that she had given this as an explanation at the time had been challenged as untrue, and the respondents had led evidence relating to their strict cleaning schedule and from witnesses present at the time of the accident who had not seen an accumulation of dust. They had argued that the appellant should be found to be neither credible nor reliable. In addition, they had led a witness, Karen Griffin, who, apart from not knowing the contents of the appellant's statement, which might be neither here nor there, specifically claimed that the appellant had accepted that the accident was her own fault. Karen Griffin had submitted the accident report, and, asked what she thought the cause had been, said: "I think she has just simply fallen. She just says she turned and she fell and she said to me on the night that it was

her fault, that she fell, she just turned and fell.” The appellant’s agents had no way of knowing the effect this evidence had made on the sheriff, and it was in the context of that being the state of the evidence that the appellant’s agents required to consider the potential evidential significance of the statements now produced. The matter requires to be considered not with the hindsight of knowing that the sheriff believed the appellant anyway, and that the evidence had in fact made little, if any difference, but from the point of view of what it was reasonable for the appellant’s agents to conclude at the time of production of the statement. In our view both the sheriff and the solicitor advocate for the respondents took far too narrow a view of what the potential evidential significance of the statement was. The issue was not merely that it could now be proved that such a statement had been made; an important question was what weight might be attached to that statement. In light of an assertion from a witness, for aught yet seen one whom the sheriff might find to be entirely credible, that the appellant had at the very time of the accident accepted that it was her own fault, how could the agents for the appellant have any confidence that without evidence exploring further the details surrounding the timing and making of the statement, as well as its content, that the sheriff would attach real weight to it as supportive of and enhancing her credibility? Even after the evidence was led, the argument for the respondents was still that the appellant had failed to establish the cause of the accident. It must have been implicit in such a submission that little weight should be given to the statement. During her evidence about its content it was suggested to the appellant that the precise terms were not exactly the same as saying she had actually slipped on dust, and she was challenged on the fact that the statement made no reference to dust on her clothing or skid marks on the floor. These arguments would have been equally open to the respondents if only a joint minute had been entered into, especially one which simply agreed the terms of the statement, and the appellant would have given up the opportunity of giving any evidence or explanation about these matters. It was submitted to us that the sheriff had considered Karen Griffin to be a credible witness so the leading of evidence about the statement had failed to undermine her evidence. It is true that the sheriff says that he formed the impression that she was a truthful witness, but he must at least have concluded that she was not reliable in relation to her assertion that the appellant had accepted that the accident was her own fault.

- [26] This is not a case like Ramm where considerable time was taken examining points for the explanation of which there was no proper basis. On the contrary, there was a perfectly proper and reasonable basis to consider that exploring the issue in evidence was appropriate. In the circumstances which arose in this case we consider that it was entirely reasonable for the appellant to consider that witnesses required to be recalled and additional evidence led in order that evidence might be led capable of reflecting on the weight to be attached to the statement and the significance which it might have for the assessment of other evidence in the proof. Once that is accepted, it does not matter that some time was taken up exploring whether the copy statement was truly in the terms of the original, since this is not a matter discrete from the issue of the weight to be given to it.

[27] In our view, having recognised that the additional procedure came about because of the failure of the respondents to produce the statement in response to the original specification, there was no basis for the sheriff to conclude that the whole of the expenses should not be awarded to the appellant. We shall accordingly recall the interlocutor of 17 June 2013, substitute an award of expenses in favour of the appellant, with a 15% uplift, certification of Mr Peter Scott, and sanction for the employment of junior counsel. We do not accept the submission that the sheriff's findings in relation to the expenses of the expenses hearing requires to remain untouched: this is not a case of divided success. The appellant may have been seeking a higher uplift, but the respondents were arguing for none. The only issue upon which the appellant failed was on whether expenses should be on an agent and client or party and party basis. Neither of these were matters of any real significance to the substantive arguments which were advanced. Accordingly we shall also substitute a similar award of expenses in favour of the appellant in relation to the expenses hearing. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2014/2014CSIH65.html>

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/scot/cases/ScotCS/2014/>

CASE PAGE <https://chat.esheria.ai/case-law/scotland/milleer-v-chivas-brothers-ltd-2014-scotcs-csih-65-11-july-2014>

Prepared on 24 October 2026 · Esheria