

SCOTLAND / JUDGMENT

O'Callaghan v. Simpson [2004]

ScotSC 43 (02 July 2004)

[2004] ScotSC 43

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[2004] ScotSC 43 [New search] [Help] O'Callaghan v. Simpson [2004] ScotSC 43 (02 July 2004)
SHERIFFDOM OF LOTHIAN AND BORDERS A2119/03 JUDGMENT OF SHERIFF
PRINCIPAL IAIN MACPHAIL QC in the appeal in the cause MRS KATHLEEN DORIS
MOFFAT O'CALLAGHAN Pursuer and Appellant against JOHN Y SIMPSON Defender and
Respondent

Act: Mackay; Lindsays WS for T F Reid & Donaldson, Paisley Alt: Grant; Henderson Boyd Jackson
EDINBURGH, 2 July 2004 The Sheriff Principal, having resumed consideration of the cause,
refuses the appeal quoad the interlocutor of 8 January 2004 complained of; varies the said
interlocutor by substituting for the words 'dismisses the cause in respect that no record having
been lodged' the words 'dismisses the cause in respect that no accurate record was lodged two
days prior to the continued options hearing on 8 January 2004 as required by the interlocutor of
27 November 2003'; continues the appeal quoad the interlocutor of 15 January 2004 complained
of; reserves all questions of expenses and appoints parties to be heard thereon on 12 August 2004
at 10.30 a.m. within the Sheriff Principal's Appeal Court, Court No 9, Sheriff Court House,
Chambers Street, Edinburgh. NOTE

Introduction

[1] This is a pursuer's appeal against two interlocutors. The first is a decree of dismissal pronounced by default at a continued options hearing on 8 January 2004. The second is an interlocutor of 15 January 2004 finding the pursuer's solicitor personally liable to the defender in the expenses of the cause. This judgment deals only with the appeal against the earlier of these interlocutors. I shall hear parties on the appeal against the later interlocutor at the hearing appointed in the interlocutor above. The facts

- [2] The material facts are not in dispute. The following summary is derived from the Sheriff's note, the pursuer's amended grounds of appeal (no 13 of process), the file note of the continued options hearing compiled by the solicitor who then appeared for the defender (no 6/1/1 of process) and the parties' submissions at the hearing.
- [3] The pursuer sues the defender for payment of £4,980. The initial writ contained three articles of condescendence. The defender lodged defences (no 8 of process) which had the following features. Two lines of text which should have been printed as the last two lines of answer 2 were printed as answer 3. There followed an answer 4. There was of course no fourth article in the condescendence. Answer 4 was in these terms: '4. Denied.' Clearly that should have been answer 3. Finally, the defender stated a single plea-in-law in these terms: '1. The said sum not being due or resting bowing [sic], decree should be refused.' This shoddy piece of pleading was signed by a solicitor who obviously had not taken the trouble to read it.
- [4] During the period allowed for adjustment of the pleadings, the pursuer added at the end of each article of the condescendence the words 'The defender's averments in answer are denied.' The defender did not adjust at all. For the options hearing on 27 November 2003 the pursuer lodged a record (no 9 of process) which accurately reflected the pleadings as adjusted. The last two lines of answer 2 continued to appear as answer 3, and answer 3 appeared as answer 4. At the options hearing the Sheriff then presiding allowed a continuation of the options hearing to 8 January 2004, allowed the parties to adjust further and appointed the pursuer to lodge a fresh record two days prior to the continued options hearing.
- [5] On 18 November 2003, after the last date for adjustment before the options hearing but before the hearing itself, the pursuer's solicitors had written a letter (no 5/1/5 of process) to the defender's solicitors pointing out that the defences did not make sense. On 9 December 2004 the defender's solicitors adjusted the defences by adding a clause to the second sentence of answer 2, deleting the figure '3' before answer 3, and renumbering answer 4 as answer 3. They also corrected the mistaken spelling of 'owing' in the plea-in-law. These adjustments were not contained in a note of adjustments but were added, apparently on a word processor, to the original defences which were then reprinted as so adjusted (no 5/1/7 of process). Thus it was not immediately obvious to an inattentive reader that the former answer 3 should run on as the end of answer 2. That would have been clear, however, to anyone who read the document with ordinary care and attention.
- [6] The person who compiled the record for the continued options hearing (no 10 of process) was an inattentive reader. He or she inserted the new clause in the second sentence of answer 2, but otherwise printed the record as before: the old answers 3 and 4 in the previous record reappeared, as did 'bowing' in the plea-in-law. Extraordinarily, this document was certified as a true record by the pursuer's solicitor on 5 January 2004. Here again, the signatory had clearly failed to check the accuracy of the document he signed. The document (no 10 of process) was lodged late, on 6 January 2004, less than two clear days before the

continued options hearing on 8 January 2004.

- [7] On 7 January 2004, the day before the continued options hearing, the defective state of the record no 10 of process came to the attention of the pursuer's Paisley solicitors. They arranged for a correct version of the record to be faxed to the office of their then Edinburgh agents on the morning of 8 January 2004. On that morning the solicitor who was to appear for the pursuer at the continued options hearing left the office for court before the fax arrived.
- [8] The continued options hearing took the following course. The case was called before Sheriff Lothian at 10.51 a.m. The Sheriff noted that the record did not make sense. The defender's solicitor said that she had in her possession a faxed copy of the accurate version of the record. The Sheriff was clearly prepared to overlook the fact that the record had been lodged late. He suggested that the defender's faxed copy might be photocopied and the photocopy certified as accurate and lodged at the end of the roll. There then ensued a flurry of ineffectual activity by the pursuer's solicitor. He would have been well advised to adopt the Sheriff's suggestion. Instead he telephoned the Paisley solicitors, but the person dealing with the case there was unavailable. When the case was recalled at 11.56 a.m. the pursuer's solicitor offered to lodge the faxed version of the record which had arrived in his office but was not yet in court. The Sheriff, not surprisingly, indicated that that would not be acceptable. The pursuer's solicitor decided to amend the record at the Bar. However, he unaccountably thought that the only alteration that had to be made to the record was to renumber answer 4 as answer 3. He made a manuscript amendment on a copy of the record, but in doing so he blundered by removing answer 3 altogether instead of placing its contents at the end of answer 2. Thus the Sheriff remained in the position of having to deal at the continued options hearing with a case in which there was no accurate and intelligible record. He writes in his note: The pursuer's agent was unable to suggest any other procedural course which I could take and with the greatest reluctance I felt obliged to dismiss the cause.

Submissions

- [9] At the hearing of the appeal the pursuer's solicitor (who had not appeared before the Sheriff) conceded that the record had not been in proper form and had been lodged late. He submitted, however, that that had been excusable. No excuse was offered, as I have noted the submissions, for the late lodging of the record. Of greater importance, however, was the state of the record. The pursuer's solicitor founded on what he described as three mitigating factors. First, the state of the record stemmed to some extent from the original state of the defences. Secondly, the adjusted defences (no 5/1/7 of process) had not been easy to follow. Thirdly, the defender had admitted in the defences that something was due by him to the pursuer. The Sheriff should have exercised the dispensing power contained in rule 2.1 of the Ordinary Cause Rules 1993 and should have prorogated the time for lodging an accurate, certified record in terms of rule 16.3. The purpose of the Rules was to see that cases

proceeded economically and with due diligence. The action was a straightforward one for the repayment of a loan, payment of which was admitted in part. There were no preliminary pleas, and the action could only have proceeded to proof. Before the case called at the continued options hearing the agents had agreed that there should be a proof on a date to be afterwards fixed, since each side was trying to obtain further information. The pursuer's solicitor's final motion was that I should allow the appeal, allow an accurate, certified copy of the record to be received, close the record, allow parties a proof of their averments on record on a date to be afterwards fixed, and remit the cause to the Sheriff after dealing with questions of expenses.

- [10] The defender's solicitor (who also had not appeared before the Sheriff) submitted that the appeal should be refused. She admitted that the original defences had been incorrect and that the adjusted defences had been slightly unclear. That, however, was not a sufficient excuse for the state of the record which had been certified and lodged for the continued options hearing. The pursuer's agents had been told before the hearing that the record was incorrect. At the hearing the Sheriff had given the pursuer's solicitor ample time to lodge a correct record. He had granted an adjournment, but even after that adjournment the pursuer's solicitor had failed to amend the record properly. The important point was that the pursuer's solicitor had been unable to confirm to the Sheriff what the contents of the record should have been, so that the Sheriff had had no means of ascertaining what the correct pleadings were. There were only a limited number of courses open to the Sheriff at a continued options hearing. He had not been moved to exercise the dispensing power. He had been concerned as to whether the case should proceed to proof. The pursuer would have required to amend. The pursuer would not be prejudiced by the dismissal of the action other than by the expense and delay involved in raising another action: there was no issue of time-bar. The approach of an appellate court to a discretionary decision had been authoritatively stated in *G v G (Minors: Custody Appeal)*

- [1985] 1 WLR 647 . The lodging of an accurate record had been crucial to the Sheriff's performance of his functions at the continued options hearing: *DTZ Debenham Thorpe v Henderson Transport Services* 1995 SC 282 at 287A-B. The Sheriff had been entitled to exercise his discretion by dismissing the action and the appeal should be refused.
- Discussion

- [11] The decree of dismissal against which this appeal is taken is a decree by default. Rule 16.2(1) of the Ordinary Cause Rules provides that a party is in default where he fails, among other things, to lodge any part of process within the period required by an order of the sheriff. Rule 16.2(2) confers on the sheriff a discretion, where a party is in default, to pronounce various decrees including decree of dismissal. Here, the Sheriff who presided at the options hearing ordered the pursuer to lodge a fresh record two days prior to the continued options hearing. It was not disputed at the hearing of the appeal that 'two days' meant 'two clear days' and that the record (no 10 of process) had not been timeously lodged. It was also not disputed that the record to be lodged had to be a record which accurately reproduced the

state of the parties' pleadings and that the record no 10 of process failed to do so. Thus, it was conceded, the pursuer was in default.

- [12] Since it was a matter for the Sheriff's discretion whether or not to grant decree of dismissal by default, the question for this court is whether it has been shown that he misdirected himself in law, failed to take into account a relevant and material factor, left some relevant and material factor out of account or reached a decision which was wholly unreasonable (DTZ Debenham Thorpe at 285D-E). The Sheriff had before him a record which he accurately describes in his note as 'a patently defective document'. It is said in the pursuer's amended grounds of appeal that the defects in the record 'were typographical errors which could have been corrected fairly easily for example by giving the pursuer's agent the opportunity to lodge a corrected record within a short period of time.' But that is just what the Sheriff did: he suggested that the accurate version of the record in the possession of the defender's solicitor should be photocopied and the photocopy certified as accurate and lodged at the end of the roll. The pursuer's solicitor did not take this course but demonstrated by his efforts to amend the record that he did not understand what the corrected version of the record should be. The amended grounds of appeal go on to say that the Sheriff wrongly failed to take into account the fact that the faxed version of the record had arrived in the office of the pursuer's solicitor after he had left for court. But that was nothing to the purpose, given the presence of an accurate faxed version in the courtroom and the Sheriff's sensible suggestion, which the pursuer's solicitor chose to reject. The same comment may be made about the further criticism in the grounds of appeal that the Sheriff 'wrongly failed to give sufficient allowance for the urgent efforts made by the pursuer's solicitor to resolve the problem' during the adjournment. The fact is that those efforts were misdirected and inept. The further criticism that the Sheriff had erred in his discretion by failing to exercise the dispensing power founders on the fact that he was not asked to do so, any more than he was asked to prorogate the time for lodging an accurate record. In addition, as I shall explain later, the necessary conditions for the exercise of the dispensing power did not exist.
- [13] I now consider the three 'mitigating factors' relied on by the pursuer at the hearing of the appeal. The first is that the state of the record stemmed to some extent from the original state of the defences. It is true that the defender's solicitors had lodged carelessly drafted defences and had not adjusted them during the period of adjustment prior to the original options hearing. They did, however, adjust them on 9 December 2003; and the second factor is that the adjusted defences 'had not been easy to follow'. As I have already observed, however, the effect of the adjustments should have been clear to anyone who read the document with ordinary care and attention.
- [14] The third factor is that the defender had admitted in the defences that something was due by him to the pursuer. Be that as it may, a primary question for the Sheriff was whether the cause was fit to be sent to proof. It was therefore essential that he should be able to understand the pleadings. In DTZ Debenham Thorpe the Court said at 287A-B: It is crucial to

the performance by the sheriff of his functions at the options hearing that he should have the record in his hands when he has time to prepare for the hearing by reading it. Unless he can prepare for the hearing beforehand he cannot be expected to identify the matters on which he requires to be informed if he is to secure the expeditious progress of the cause. An options hearing which cannot achieve this result is a waste of time and money. In that case the record had not been timeously lodged. These observations apply with equal force where a record is lodged which cannot be understood. They apply a fortiori to a continued options hearing at which a further continuation of the hearing is not permitted. If the Sheriff has in his hands only 'a patently defective document' he cannot perform the functions required of him by rule 9.12. In the exercise of these functions it is clearly necessary for the Sheriff to examine the intelligibility of the pleadings notwithstanding the absence of any preliminary pleas. A party cannot reasonably expect a Sheriff to appoint a cause to proof in terms of rule 9.12(3)(a) if his pleadings are to any material extent unintelligible.

- [15] In this case the defender's file note records that the Sheriff criticised the pursuer's pleadings. Article 2 of the condescendence states in part:
2. The said Michael George O'Callaghan (otherwise Callaghan) agreed to loan the sum of £20,495.00 to the defender on 14 December 2001 with interest at the rate of 12.9% per annum for a term of six years. The defender agreed to draw down the sum of £4,980 which was paid on 14 December 2001. The first payment was due to be paid by the defender on 14 January 2002. To date no payments have been received by the defender. At the hearing of the appeal I invited the pursuer's solicitor to explain, among other things, what it was that the defender had been due to pay on 14 January 2002. I also invited him to explain why it was said that to date no payments had been received by the defender. He was unable to do so. Thus, not only at the continued options hearing but even at the hearing of the appeal the Court was unable to obtain from the pursuer's advisers a coherent statement of her case. The pursuer's solicitor said that if the Sheriff had allowed a proof the pursuer could have amended her pleadings before the proof. But such an observation is in my opinion wholly misconceived. Not only does it assume that amendment would be allowed: it also assumes that the incoherence of a party's pleadings at a continued options hearing is a matter of secondary importance. The true position is that a Sheriff would be failing in his duty if he sent a case to proof on a record that was incomprehensible. It is nothing to the purpose to say that the defender admits that something is due: that does not relieve the pursuer of his duty to state coherently in his condescendence the material facts on which he relies in support of his claim.
- [16] I am accordingly unable to find that the Sheriff has fallen into error in any of the ways listed in DTZ Debenham Thorpe at 285D-E. I consider that he was well entitled to exercise his discretion in terms of rule 16.2(2) by dismissing the action.
- [17] It would not have been appropriate for the Sheriff to grant the pursuer relief by exercising the dispensing power contained in rule 2.1. Nor would it be appropriate for this Court to exercise it now. That course is appropriate where the failure has been due to something for

which the pursuer or his solicitor could not reasonably be held responsible, or a serious injustice would result from dismissing the action (DTZ Debenham Thorpe at 287E). Here the failure has been due to the errors of the pursuer's solicitors in compiling a manifestly defective record, lodging it out of time and then failing to lodge a correct version when given a reasonable opportunity to do so. No serious injustice will result from the dismissal of the action: a further action will involve the pursuer in delay and expense but it will not be time-barred. There is accordingly no room for the exercise of the dispensing power. Result

[18] I have therefore refused the appeal against the Sheriff's interlocutor of 8 January 2004. I have varied the interlocutor by stating more precisely the nature of the default. It remains to dispose of the appeal against the Sheriff's further interlocutor of 15 January 2004 whereby he found the pursuer's solicitor personally liable to the defender in the expenses of the cause. I shall hear parties on that matter at the hearing on expenses appointed in my interlocutor above. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII
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