
**[2016] SAC (Civ) 7**
**XO11/16**

Sheriff Principal C A L Scott QC
Sheriff Principal I R Abercrombie QC
Sheriff Principal M Lewis

OPINION OF THE COURT

delivered by the Vice President, SHERIFF PRINCIPAL C.A.L. SCOTT QC

in the appeal by

OUTLOOK FINANCE LIMITED

Pursuers

Against

WILLIAM LINDSAY

Defender

**Appellant: Stalker, Advocate.**
**Respondent: Kinnear, Advocate.**

7 July 2016

[1] In this case, after a debate, the sheriff sustained the fourth plea-in-law for the pursuers as tabled in the principal action, and that being so, the defender's counterclaim was found to be irrelevant and fell to be dismissed. It was a matter of agreement between the parties that should the counterclaim be dismissed, decree *de plano* in the principal action would follow. By way of his counterclaim, the defender seeks to have an indemnity in

favour of the pursuers and signed by the defender reduced on the basis that he signed it in error and on the basis that the pursuers in securing the defender's signature had not acted in good faith. In terms of that indemnity the pursuers seek payment in the sum of almost £266,000 from the defender.

[2] The sheriff's note runs to approximately 55 pages containing 110 paragraphs. The length of the note is largely due to the sheriff's habit of quoting substantial passages, sometimes several pages at a time, from the authorities cited by counsel during the debate. Aside from all else, that sort of approach is, to our mind, unhelpful in the sense that it results in an entirely unfocused summary of the submissions advanced for each party. In reading the sheriff's note we were repeatedly faced with great difficulty in identifying which particular passage within an authority had been relied upon and in recognising any discrete legal proposition being put forward. Moreover, at page 15 in the sheriff's note (page 55 of the appeal print) the sheriff recites the text from Lord Sands' opinion in the case of *Fletcher* v *Lord Advocate* 1923 SC 27 and yet the very same passage is then repeated *ad longum* at pages 39 to 40 in the note (pages 79 and 80 in the print). This sort of approach to the formulation of

a judgment, in our view, is not to be commended and, in any event, must be viewed as an unjustified drain on valuable time and resources.

[3] Even more significantly, the sheriff's approach to the writing of his judgment has obscured any proper articulation as to his actual view on the applicable law and the rationale upon which his decision is based. The discussion section of his note stops short of covering a page and a half of A4. In reality, the purported articulation of his decision, at best, is to be found within three paragraphs, that is to say paragraphs 106, 107 and 108. In the midst of paragraph 106, the sheriff asserts that "I do not regard the failure to mention an indemnity prior to that date as a misrepresentation on their (sic) party".

[4] By "that date", we take him to mean the date of the indemnity but that in itself is not clear. At all odds, in the face of apparently detailed submissions from counsel on both sides of the bar but, for present purposes, from counsel for the defender and appellant, largely centred around the proposition that the pursuers' admitted failure to mention the requirement for an indemnity to the defender at any stage prior to the presentation of the document for signing equated to the concealment of facts which in turn might amount to

misrepresentation, the foregoing unexplained assertion by the sheriff is completely inadequate.

[5] Further, with reference to paragraph 106, whatever may or may not have been clear from the terms of the email sent by the pursuers, those terms do not explain or support the sheriff's rejection of the concept of misrepresentation. In any event, the email was not even sent to the defender.

[6] The kernel of the sheriff's decision appears to be found at paragraph 107 in the following terms:

> "Quite simply the defender did not read the document which he signed and which he is bound by. It is clear in its terms and he is bound by it".

There is no doubt that the terms of the document signed by the defender were clear nor is there any doubt about the fact that the defender did not read the document before signing. All that is nothing to the point, however, when it comes to the arguments presented by counsel for the defender regarding misrepresentation and, indeed, a lack of good faith. Paragraph 108 adds nothing to the decision-making process.

[7] In these unhappy circumstances and where there is no meaningful reconciliation as between counsel's submissions and the court's application of the law as it applies to the facts

which the defender offers to prove in the counterclaim, we are bound to conclude that the sheriff's decision cannot be supported. Therefore, the issues concerning the relevance of the defender's counterclaim are live for determination by this court.

[8] The test when it comes to the relevance of a party's averments was not alluded to by the sheriff in the course of his note. That test is whether even if all of the party's averments were to be proved the party would still fail to achieve the remedy which he seeks. Put shortly, before us the focus primarily on the part of counsel for the respondents, lay with the proposition to the effect that the averments in the appellant's pleadings were not sufficient to set up a case which in turn would support the appellant's second and third pleas-in-law on record and counsel for the respondents sought to explain why that should be under reference to the various statements of fact.

[9] He sought to advance the proposition as we understood it that the crux of the matter was what appeared in statement of fact 3. We cannot agree with that singular proposition. It does appear to us that there is considerably greater material to be considered in the following statements of facts and particularly in statement of fact 6 which, among other things, avers that the defender had no reason to anticipate that the documents he was

signing would include an indemnity. At all odds, we do not agree with counsel for the respondents' submission to the effect that the averments advanced by the appellant, even if proved, would mean that the appellant would be bound to fail. We consider that the appellant has pleaded what amounts to a relevant case and that, in all the circumstances, he is entitled to have the matter determined by way of a proof before answer.

[10] When it comes to the second plea-in-law for the appellant in the counterclaim, we are of the view that there is just sufficient by way of averment to allow an inquiry but as regards the third plea-in-law we are more than satisfied that there is a sufficiency of material pleaded to entitle the appellant's case to go to such an inquiry.

[11] Therefore, all that being so we shall allow the appeal. We shall recall the sheriff's interlocutor repelling those pleas and granting decree *de plano* in the principal action and instead we shall allow a proof before answer with all pleas left standing. The matter will of course be remitted back to the sheriff to proceed as accords with a particular direction to the sheriff and indeed the administration that matters should initially proceed by way of a pre-proof hearing to enable the proof before answer and, indeed, the case as a whole, to be properly managed before it actually reaches the stage of a proof hearing.

[12] We shall award the expenses occasioned by the appeal in favour of the defender and appellant. In recalling the interlocutor we shall also, in effect, reverse the position regarding expenses and, therefore, find the respondents liable to the appellant in the expenses of the debate before the sheriff.