SHERIFF APPEAL COURT

[2017] SAC (Civ) 23

[XO15/16]

Sheriff Principal M Stephen QC
Sheriff Principal C A L Scott QC
Sheriff Principal Lewis

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M STEPHEN QC

in appeal by

MICHAEL CAMPBELL

Appellant;

in the cause

LINDSAYS Solicitors

Pursuers and Respondents:

against

MICHAEL CAMPBELL

1 August 2016

[1] In this appeal the defender, Michael Campbell, seeks to challenge the decision of the sheriff at Inverness to grant decree in favour of the respondents, Lindsays. Decree was granted on 27 January 2016 following proof which took place on 9 November 2015.

Background

[2] The pursuers are a firm of solicitors. In this action they seek to recover the sum of £7,680 being the balance of their professional fees in respect of work they undertook on behalf of the appellant. The sums outstanding relate to two unpaid fee notes dated 29 January 2013 and 31 March 2013. The sum in crave 2 represents the interest due on the unpaid fees in accordance with their terms of business. The work undertaken by Lindsays on behalf of the appellant relates to the proposed acquisition of subjects at North Couston, near Bathgate. The transaction did not complete.

[3] The pursuers rely on an exchange of letters in October 2012 being their letter of engagement incorporating their terms of business together with the appellant's acceptance. At proof the appellant did not dispute that there was a contract between him and the pursuers who had indeed provided him with legal services in terms of that contract. Nevertheless, the appellant did not accept that he was liable to meet the outstanding fees as the transaction did not proceed and the pursuers did not "*do enough to resolve the impasse*" which developed with the seller. The appellant is aware of and accepts the terms of clause 13 of the pursuers' terms of business but nonetheless does not accept that he should be liable to meet the fees in circumstances where the transaction did not proceed. Clause 13 is in the following terms:

> "Where a transaction does not complete for whatever reason you will be liable for the costs of our chargeable time expended up to the date the transaction is aborted."

The relevant terms of business are incorporated in finding in fact 5 in the sheriff's judgment. In finding in fact 8 the sheriff records:

> "8. The signing of the terms of business by the defender created a written contract between the pursuers and the defender whereby the pursuers would provide professional legal services to the defender in relation to the defenders'

> proposed purchase of the land near Bathgate (hereinafter referred to as "the contract")".

The contract terms are set out in the terms of business.

[4] The sheriff concludes that the relevant invoices remain unpaid and were issued properly in respect of the pursuers' chargeable time expended on the transaction up to the date the transaction was aborted. Accordingly, the pursuers are entitled to payment of the amounts due on both invoices namely £7,680. The sheriff's judgment is dated 2 December 2015. The sheriff also fixed a procedural hearing for Wednesday, 27 January 2016 to be addressed on the rate of interest which would apply to the unpaid invoices and also expenses. By interlocutor of 27 January 2016 the sheriff granted decree for the sum first craved together with interest at the rate of 4% per annum from 11 September 2014.

The appeal hearing

[5] The appeal was due to call for a hearing on Wednesday 20 July 2016. The morning prior the appellant, who is not legally represented, notified the clerk that he was not fit to attend court in Edinburgh to present his appeal as he was in considerable pain due to a fall which had occurred at the weekend. He indicated that he sought to have the appeal hearing adjourned until he was fit. The respondents on being informed of this indicated that they would be opposed to any adjournment. The appellant was advised of that and to obtain a Soul and Conscience certificate from his GP to vouch that he was unfit to attend court. It was also proposed that the appeal could be determined on the basis of the written case as both parties had lodged Notes of Argument as required.

[6] Both parties submitted supplementary notes or comments .The appellant indicated his concern that the hearing might proceed without him and without a missing interlocutor

from Dingwall Sheriff Court where this action commenced. Of course the sheriff court at Dingwall has now closed and its business has transferred to Inverness.

[7] When the hearing in the appeal called today the appellant did not appear and we were given a certificate from the appellant's GP Dr McKenna dated 19 July 2016. It narrates the appellant's history of how he came to be injured and records the doctor's examination noting a large bruise on his left flank. The appellant felt he was not fit to travel however the GP considered he could travel accepting it may be more uncomfortable for him. He may have difficulty with concentration but the effect of the discomfort would be difficult to quantify.

[8] There is, accordingly, no evidence before the court to the effect that the appellant is unfit to attend. In any event it is for the court to decide from any certificate and other relevant circumstances "whether it is persuaded that the person concerned is unfit to attend and, if so, what the consequences of that should be "(Scottish Ministers v Smith [2010] CSIH 44). We considered whether to refuse the appeal for want of insistence. We decided not to follow that course particularly as both parties had lodged written notes of argument as the rules of this court require .The appellant represents himself in these proceedings and this is a factor. The decisive factor is whether the court can determine the appeal properly on the basis of the written case. In this instance we considered that was the proper course. That may not be the outcome in other appeals.

The grounds of appeal

[9] The note of appeal advances four propositions:

1. No warrant exists for this action.

2. The sheriff erred by applying the wrong authority.

3. The sheriff had regard to authorities advanced on behalf of the respondent which were irrelevant.

4. The fee notes had not been taxed.

Grounds 2 and 3 are essentially identical in the sense that the appellant argues that the sheriff erred by considering authorities relating to a defence which amounts to professional negligence.

[10] The first ground of appeal challenges the warrant to cite. It appears to suggest that service of the writ was defective by virtue of errors in his designation and address. The appellant speculates why a warrant for re-service of the initial writ was granted by the sheriff. He suggests that an interlocutor is missing and "for all we know the presiding sheriff may have granted absolvitor of decree thus ending the case there and then "The appellant has made a complaint about the actings of the sheriff officers to the Sheriff Principal of Grampian Highlands and Islands and refers to the issue of competency raised before the sheriff at the outset of the proof.

[11] The sheriff's interlocutor of 9 November 2015 following proof which makes *avizandum* repels the challenge to the competency of the proceedings. In our view he was correct to do so. OCR 5.10 is in the following terms:

> "(1) A person who appears in a cause shall not be entitled to state any objection to the regularity of the execution of citation, service or intimation on him; and his appearance shall remedy any defect in such citation, service or intimation."

That rule and the purpose and rationale for the rule is analysed in *Macphail, Sheriff Court Practice* at 6.04 where it is stated that:

> "The rationale of the latter rule is that the purpose of citation is to convene a defender before the court, and once he has in fact been convened and is before the court, it matters not how his appearance was secured. The rule accordingly applies even where the citation is seriously defective."

Although we reject this ground of appeal as being without merit we nevertheless acknowledge the criticism advanced by the appellant that the sheriff clerk at Inverness incorrectly issued the extract of the decree in accordance with the old rules namely after 14 days. In terms of the Sheriff Appeal Court rules (AS (Sheriff Appeal Court Rules) 2015) which came into force on 1 January this year, an appeal may be made within 28 days of the decision or interlocutor appealed against (rule 6.3) . It follows that an extract decree may not competently be issued prior to the expiry of 28 days unless specifically authorised by the court by way of specifically allowing early extract. The appellant's speculation as to what he considers to be a missing interlocutor is misconceived. There is no basis advanced to support the idea that he may have a decree of absolvitor or that the sheriff was not entitled to proceed with the proof and adjudicate on the issues raised by parties.

[12] Grounds of appeal 2 and 3 are essentially the same. The appellant in his submissions argues that the sheriff erred in his understanding of and his approach to the defence advanced by the appellant. He did not accuse the respondents of professional negligence but rather professional incompetence. The specific criticism of the pursuers is that the principal solicitor dealing with the transaction did not verify that the sellers had title to sell the land. It transpired that Mr Gardener Young had no intention of concluding the transaction and any equity in the selling company Ridge Hire Ltd was in the name of his wife. Had the pursuers satisfied themselves on his behalf whether the sellers (and in particular Mr Gardener Young) had title to sell in the first instance unnecessary work could have been avoided and the fees would thereby be reduced.

[13] We observe from the pleadings that the appellant's position in his answers is supported by a vague and unspecific plea-in-law 1 in the following terms:

> "The sums not due to the pursuers as work not successful and cause the defender considerable loss."

This undoubtedly causes a difficulty for the appellant. In such terms there is no defence to the action as that plea is met by the terms of clause 13 of the pursuers' terms of business *(supra*). It is correct that there is no plea-in-law which puts forward the defence based on professional negligence and likewise no plea-in-law based on professional incompetence.

[14] In our view, any distinction between professional incompetence and professional negligence is a fine but unnecessary one in the circumstances of this case. Incompetence means either a complete lack of qualification to do the task or inadequate ability. This equates with negligence where a professional fails to perform his responsibilities to the required standard. That required standard is of course set out in the classic exposition of the test of negligence in *Hunter* v *Hanley* 1955 SC 200 where Lord President Clyde states the test for professional negligence. That test requires it to be established that the course adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care .Whether the failing or inadequacy be described as incompetence or professional negligence in our view makes no difference. In order to establish a defence based upon professional incompetence or negligence the party claiming negligence requires to discharge the onus of establishing whether the professional has deviated from that which a professional of ordinary skill acting with ordinary care would have done. The authorities referred to by the sheriff re-affirm the approach to be taken by the court when allegations of professional negligence are put forward as a defence. Such allegations require to have a proper foundation. Allegations must always be buttressed by a report from an appropriate witness which states that the course taken was one that no solicitor exercising ordinary skill or care would have taken (Lord Woolman in *Tods Murray WS* v *Arakin Ltd* [2010] CSOH 90).

[15] The sheriff considers this issue in paragraph [27] of his judgment. His conclusions are undoubtedly correct on the question of negligence and reflect the submission made by the defender "that the pursuers had been grossly negligent and failed to follow best practice" (paragraph [24] of the sheriff's note). As we have said the distinction between negligence and incompetence in the context of the appellant's complaint about the pursuers' professional conduct is illusory and comes to the same thing. We therefore detect no error in the sheriff's approach. We propose to refuse the appeal on the grounds advanced in paragraphs 2 and 3 of the note of appeal.

[16] The final ground of appeal relates to taxation. The appellant's submission proceeded on his understanding that the account should be taxed before decree could be allowed. This argument was not advanced before the sheriff and there is no defence on *quantum* in the written pleadings before the court. The basis of charge is contained in the pursuers' terms of business. Absent a dispute on *quantum* the pursuers come under no obligation to submit their account of fees for taxation. This ground of appeal must also fail.

[17] We propose to refuse the appeal and adhere to the sheriff's interlocutors of 9 November 2015 and 27 January 2016. The normal rule that expenses follow success will apply .The appellant will be liable to the respondents in the expenses of the appeal procedure as taxed by the Auditor of this court.