



SHERIFF APPEAL COURT

**2018 SAC (Civ) 26
SEL-A4-17**

Sheriff Principal M M Stephen QC
Sheriff Principal M W Lewis
Appeal Sheriff N McFadyen

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M STEPHEN QC

in appeal by

ANNE MORRIS

Defender and Appellant

in the cause

RICHARD MAWSON

Pursuer and Respondent

against

ANNE MORRIS

Defender and Appellant

**Appellant: Ms Crawford, solicitor; Morton Fraser
Respondent: Ms Watson, solicitor; HBJ Claims Solutions**

5 October 2018

[1] This case is about a Connemara pony "Shy Strikes Again" known by the acronym "SSA". The appellant advertised SSA for sale on Facebook in the early part of 2016. He was described as a "128 JA 15 yr old Gelding". Photographs were also posted on Facebook

showing him in action. Apparently, SSA had achieved some success in the 128 Class. The letters JA appear to describe the grade and 128 his height in centimetres. 128 is also a classification for show jumping purposes.

[2] The parties have had previous dealings. The pursuer bought another pony "Mimi" from the defender in June 2015. Mimi was bought for the pursuer's daughter as her first show jumping pony. By the following year she wished to progress to the under 12-128 category. To allow her to do so the pursuer was looking to buy a suitable pony on which she could compete in that category.

[3] The parties met in February 2016 to allow the pursuer's daughter to trial SSA. This was successful and on or around 1 March 2016 the contract of sale was concluded and SSA delivered to the pursuer.

[4] At the time of the sale the appellant was in possession of a height certificate in respect of SSA dated 11 June 2015. That certificate records the height of SSA as 128.0 cms. The certificate was provided by Andrew Miller who is a veterinary surgeon based in Lockerbie. He measured SSA at his premises in accordance with the Guidelines provided by the Joint Measurement Board ("J.M.B.") of the British Show Jumping Association ("B.S.J.A.") using a measuring stick calibrated by local authority weights and measures officials. The appellant provided that certificate to the pursuer at or after the date of sale. The certificate was valid only until the end of 2015.

[5] Subsequently, the pursuer's daughter competed in several events with SSA. At the end of May 2016 the pursuer was required to provide a J.M.B. height certificate for SSA and the pony's registration with the B.S.J.A. was suspended pending that being done.

[6] The pursuer arranged for SSA to be measured by Mr May, a veterinary surgeon in Penrith on 14 September 2016. As the pursuer requested a "Gold Certificate" Mr May was

accompanied by a colleague and the measuring took place in the presence of an official from the J.M.B. Measurements were taken by both Mr May and his colleague following the Joint Measurement Board Guidelines and under the superintendence of the official. After the measurements had been taken the Gold Certificate was issued in which SSA's height was given as 130.7 cms. A Gold Certificate provides in its terms immunity against challenge so far as qualification for the purpose of show jumping events in the UK. It means that the pony does not require to be re-measured except by order of J.M.B. stewards. The sheriff found that the Gold Certificate carried with it higher authority for those involved in show jumping competition for ponies such as SSA as the measurement was carried out under the supervision of a J.M.B. steward.

[7] SSA was an adult pony 15 years old at the time of the sale and would not naturally grow in height after the age of eight. He would not have grown in height between 11 June 2015 and 14 September 2016.

[8] There is therefore a difference in height of 2.7 cms between the two measurements. This is unusual but not impossible for a pony such as SSA. There is no single absolute height for a pony and the sheriff found that 128 cms is the nearest to its lowest possible absolute height. The condition and state of the pony and the measuring environment can have an effect on the measurement. Ideally, a pony should be relaxed when measured as if tense it will measure at a taller height. Unfortunately, SSA died from natural causes in 2017.

[9] These constitute the material background facts as found by the sheriff. The issue between the parties is whether SSA conformed to the description when offered for sale the material factor being that the pony was offered for sale at a height of 128 cms and suitable for the class JA. For the purpose of proof and also appeal the critical matter is whether SSA matched the description in respect of height at the date of sale.

The legal basis for the pursuer's action

[10] Articles of Condescence 6 and 7 set out the relevant averments relating to the contract. The pursuer avers that the defender is in breach of the contract as it is an implied term under section 13(1) of the Sale of Goods Act 1979 that the goods will correspond with the description. SSA is not 128 cms as described by the defender and therefore the defender is in breach of contract. The pursuer separately pleads a case based on misrepresentation namely that he was induced to enter into the contract by representations made by the appellant in respect of the height of SSA which were incorrect. There appears to be no dispute that the pursuer and defender were aware of and accept that a material condition of the contract was that SSA be of a height to be eligible to compete in the under 12 category which only admits ponies measuring 128 cms or less. The issue is whether the pursuer has proved a breach of contract on the part of the appellant or *separatim* a misrepresentation which induced him to enter into the contract in the first place.

[11] The appellant's position is that SSA was properly and accurately measured at 128 cms at the point of sale and the appellant had a certificate to that effect. Accordingly, there has been no breach of contract or misrepresentation as SSA conformed to the description as advertised for sale.

Submissions for appellant

[12] The solicitor for the appellant relied on written submissions which amplified the appellant's note of argument. She invited the court to recall the interlocutors of 8 January 2018 and 7 February 2018 and to grant decree of absolvitor with a finding of expenses in favour of the appellant.

[13] Noting that the height of the pony is the crucial issue for the sheriff to determine the sheriff clearly accepted that there had been two differing measurements of SSA carried out prior to the sale on which the appellant relies and subsequent to the sale on which the pursuer relies. In a nutshell the appellant's submission is that the sheriff erred when he felt compelled to choose between the two measurements or "*to pick a winner*" as it was put to us. The crucial question ought to have been "*what was the height of the pony at the date of sale?*". In other words, did the pony conform to the sale description? There was no evidence before the sheriff about the height of the pony at the date of the sale and accordingly the pursuer, on whom the burden of proof falls, must have failed to prove that the pony was not 128 cms as at the date of sale. The sheriff erred in his reliance *In Re B* [2008] UKHL 35, [2009] 1 AC 11, a case involving the making of a care order in England with a view to a child's adoption. The sheriff erred in considering that he simply had to pick a winner out of the two measurements, neither of which could be criticised on the evidence led. The sheriff himself in his findings did not criticise either measurement whether in its methodology or accuracy. Essentially there was no evidence before the sheriff to allow him to hold that the pursuer had proved that the pony was not 128 cms at the date of sale and having failed to discharge that onus the pursuer's case must fail.

[14] The appellant's solicitor referred us to the decisions of the Supreme Court in *McGraddie v McGraddie & Another* [2013] UKSC 58, 2014 SC (UKSC) 12 and *Henderson v Foxworth Investments Limited* [2014] UKSC 41, 2014 SC (UKSC) 203, with reference to the powers of the appellate court. In *Anderson v Imrie & Imrie* [2018] SLT 717, the Inner House reviewed the role of an appellate court when considering decisions at first instance across different categories of appeal. It was submitted that this case fell into the category of a case where the point in dispute is the proper legal inference to be drawn from proven facts. In

that situation *Anderson* confirms that an appellate court is generally in as good a position to evaluate the conclusions to be drawn from the evidence as the trial judge and indeed ought to do so. As the question at issue is the legal inference which can be drawn from the facts which the sheriff finds established, the advantages enjoyed by the sheriff are less important and it is open to us to intervene.

[15] The present case is noteworthy as there were no real issues as to the credibility and reliability of witnesses nor was there controversial evidence. Indeed, the evidence of the veterinary surgeons who conducted the measurements largely coincide and neither criticised the other's measurement. In this case the legal conclusions reached by the sheriff were neither justified by the evidence as a whole nor by the sheriff's own findings.

[16] The sheriff holds as a matter of fact the existence of the two measurements. There is no finding that one or other is wrong and in particular the sheriff does not find that the first measurement was in some respect flawed. There was no evidence to warrant such a finding. Instead the evidence with regard to the measurements was to the effect that both are likely to be correct when carried out and the sheriff himself had no reason to doubt that. In the whole circumstances the sheriff ought to have asked the question "on the balance of probabilities, did the pony measure 128 cms at the date of sale?" The most likely relevant date of sale is the date of delivery on 1 March 2016. The sheriff makes various findings to the effect that an adult pony would not grow after the age of eight and SSA would not have grown between the two measurement dates. A pony will measure at a taller height if tense. There is no single absolute height for a pony such as SSA. 128 cm is the nearest to its lowest possible absolute height. The difference in height of 2.7 cms in two different measurement dates is unlikely but not impossible for a pony such as SSA. Finding 23 is at odds with the sheriff's findings in fact. Finding in fact 23 is as follows:

"23 The pony SSA after purchase by the Pursuer measured 130.7 cms and did not conform to the description '128 JA'. The Defender has breached the contract of sale."

[17] Essentially the sheriff's findings are to the effect that there is no absolute height for the pony and attempting to prove the measurement of the pony after it was sold was a quite irrelevant exercise. The first part of finding 23 is a quite irrelevant finding. The only evidence of the height of the pony came from the two vets who are not prepared to criticise each other. As there was no evidence of the height of the pony at the time of sale and absent a finding which indicated that the first measurement carried out in June 2015 was wrong the pursuer's case must fail. The pursuer's measurement is no more conclusive than the defender's measurement. The sheriff erred in considering that he had to choose between two entirely acceptable measurements. Ultimately, the appellant's submission is a measurement after the sale is no more determinative of height than the measurement before the sale and where the only evidence is two measurements which are accepted as accurate the pursuer is unable to discharge the onus and prove the height of the pony at the date of sale. It was open to the pursuer to have obtained or insisted that the seller obtain an up to date measurement as at the date of sale but this did not happen.

Submissions for respondent

[18] The solicitor for the respondent argued that there was no error on the part of the sheriff. This was a straightforward question of whether the sheriff reached a decision that no reasonable sheriff would have reached. The sheriff was entitled to prefer the evidence of the second measurement of SSA conducted in September 2016 by Mr May. It was the gold measurement conducted with the assistance of another vet and overseen by an official of the

J.M.B. It had, therefore, more authority. The critical finding in fact 23 relies on the evidence relating to the second measurement.

[19] Accordingly, the sheriff was correct in the decision he reached. The sheriff had regard to the whole of the evidence. He gave particular weight to the evidence of the second measurement as he is entitled to do. The sheriff's decision was not one that no reasonable judge could have reached (*Henderson v Foxworth Investments Limited (supra)*). An appellate court can only interfere with the findings of fact made by the sheriff at first instance if satisfied that his decision cannot reasonably be explained or justified (*Henderson supra*). The sheriff's decision is fully justified and explained in his judgment.

[20] The sheriff, having preferred the evidence relating to the second measurement, was entitled therefore to find that the defender and appellant had breached the contract, the height of the pony being an important and material condition. He was also entitled to hold that the appellant had misrepresented the height of the pony to the purchaser.

[21] The appellant's reliance on the height of the pony at the date of sale is misconceived. The evidence of the height of the pony subsequent to sale was relevant. The sheriff has made a finding in fact (29) to the effect that "a fit pony such as SSA would not have grown between 11 June 2015 and 14 September 2016". Taken as a whole the findings in fact entitled the sheriff to make the crucial finding in fact 23 and to determine, as he did, that he was satisfied on the balance of probabilities that SSA did as at the date of the contract in about February 2016 and thereafter measure more than 128 cms (paragraph 5 of section vi) (Conclusions) on page 31 of the appeal print).

[22] Accordingly, there is no basis upon which this court should interfere with the sheriff's findings on the evidence and the respondent's motion was to dismiss the appeal and to adhere to the sheriff's interlocutor with a finding of expenses in favour of the respondent.

Discussion and Decision

[23] This is a case where there is no question as to the credibility or reliability of any witness who speaks to the central issue namely the height of the pony. The appellant does not seek to challenge the sheriff's findings in fact (save finding in fact 23 which properly analysed is a finding in fact and law). The question in this appeal is whether the sheriff has reached the correct conclusion or has drawn the proper legal inferences from the facts as he found them and the evidence. This case, therefore, does not fall into the category of appeal discussed by Lord Reed in *Henderson (supra)*. The advantages enjoyed by the sheriff in assessing the credibility and reliability of the witnesses he heard is respected; however, it appears to us that there were no real questions for the sheriff to address on credibility. This case is concerned with the sheriff's application of the law to the primary facts established by him on the evidence he heard. As such this appeal involves a question of mixed fact and law. In these circumstances "an appeal court is generally in as good a position to evaluate the evidence as the trial judge" (Lord Reid in *Benmax v Austin Motor Company Limited* [1955] AC 370 at 376 quoted with approval in *Anderson v Imrie (supra)*). We agree with the appellant's submission that this is a case where the appeal court may evaluate the facts with a view to considering whether the legal conclusions reached by the sheriff from these facts was correct.

[24] The action is for damages for breach of contract. The pursuer bought the pony from the defender in or around 1 March 2016. SSA is described as an adult pony with a height of 128 cms in the sale advert. The pursuer was only interested in ponies up to 128 cms. The pony was to be ridden by his daughter in a show jumping category for ponies up to that height. The pursuer maintains he would not have entered into the contract with the

defender but for the clear representation as to the pony's height. The pursuer avers that SSA is not 128 cms as described by the defender who is accordingly in breach of her contract with the pursuer. The pursuer also relies on the defender's representation in the course of discussions as to the pony's height being 128 cms. But for these representations he would not have brought SSA. The defender counters with the averment in Answer 7 "SSA was 128 cms at the point of sale and accordingly there has been no breach of contract or misrepresentation."

[25] It appears that there was a high level of harmony in the testimony of the principal witnesses before the sheriff. These witnesses, who were key to the central question as to the height of the pony, are two veterinary surgeons Mr May and Mr Miller. Leaving aside one area of contention which is not relevant to the issue on appeal and also the status and weight to be accorded the evidence of Miss Jennifer Ham, the sheriff records that all of those who gave evidence were credible. Ultimately the sheriff took the view that Miss Ham could not be accepted as an expert as she did not have the necessary knowledge and experience of actual measurement of animals such as SSA. For that reason the evidence of Ms Ham can be put to one side. The evidence centred on the testimony of the two veterinary surgeons. The sheriff was satisfied that both were independent with relevant background skills and knowledge. They are sufficiently experienced to qualify both of them as experts in the measurement of ponies. Both also gave evidence as to fact. Mr Miller had measured SSA in June 2015 and provided a certificate recording the pony's height at 128 cms. Mr May measured SSA along with a colleague in September 2016 and that measurement disclosed a height of 130.7 cms (his certificate is production 5/1/4). The findings in fact relative to the earlier measurement may be found in findings 11 to 14. The findings relative to the second measurement are findings 17 to 21. The sheriff discusses and evaluates the evidence of the

two veterinary surgeons. In particular at paragraph 11 of section iii) (Credibility and Reliability) on page 25 of the appeal print he records:

"There was no suggestion in the evidence and no cross-examination to the effect that either of these highly experienced veterinary surgeons would have acted in a way that was unprofessional to produce a result which might suit the client instructing them. In particular, therefore, there is no suggestion that Mr Miller had on (sic) some way provided a certificate that was not accurate and valid or that it has been prepared without the use of due skill and care. It was not suggested that Mr May could have in some way failed to measure in accordance with the standards of reasonable skill and care. Both knew of the other. Both were at pains to accept the skill of the other, and neither criticised or challenged the measurement done by the other."

At section iv) (Discussion of Factual Evidence) the sheriff discusses in some detail the evidence given by each of the veterinary surgeons relating to the respective measurements, concluding at paragraph 11, on page 28 of the appeal print:

"There is no measurement of the pony on or about the day of the contract. There are two conflicting measurements both of which can be respected and accepted as a matter of their general credibility and reliability. It is not suggested that either was in some way improper nor that either of the veterinary surgeons primarily involved was in some way negligent in the measurement procedures which they followed or the recording of results. There is one important variable – the pony is a living creature with features which can influence its dimensions on any given day."

Having regard to the sheriff's discussion of the evidence of the two veterinary surgeons it is not difficult to understand the consequential findings in fact 29 to 34 which for convenience we set out below:

- "29. Ponies' growth stops at approximately 7 years old and certainly after 8 years old no further growth in height would be likely. A fit pony such as SSA would not have grown between 11 June 2015 and 14 September 2016.
30. If a pony is tense then it will measure at a taller height. For each measurement a pony should be relaxed.
31. SSA is a "Connemara" pony and is normally calm in disposition. It was used to travelling.

32. To prepare a pony for measurement, sometimes it will be deprived of water to dehydrate it and relax it more. Prior to and as part of the Gold test, water would be offered.
33. The difference in height of 2.7 cms on two different measurement dates is unlikely but not impossible for a pony such as SSA.
34. There is no single absolute height for a pony such as SSA. 128 cms is the nearest to its lowest possible absolute height."

[26] Finding 34 is a critical finding in which the sheriff accepts the evidence given by Mr May to the effect that there is no single absolute height, but that each certificate using careful measurement technique represented the situation on the day when the measurement was made. In other words with an animal such as SSA the measurement represented a snapshot of the pony's height measured on a particular date. Not only was 128 cms the nearest measurement to the absolute minimum it also happened to be the upper measurement for the class which the pursuer was interested in for his daughter. There was no evidence as to the height of the pony at the date on which the contract was concluded. The pursuer did not seek re-measurement for the purpose of the contract, as may have been prudent given that SSA was advertised for sale at a height which was the absolute maximum for the class in which the pony was to compete. We have already noted that the sheriff, having accepted the veterinary evidence to the effect that there is no absolute recognised height, also accepted that "there are two conflicting measurements both of which can be respected and accepted as a matter of their general credibility and reliability" (paragraph 11 of his Discussion of Factual Evidence, on page 28 of the appeal print).

[27] The sheriff posed for himself the question "on a balance of probabilities at and after the sale, did SSA correspond to the description '128 JA 15 year old gelding' and in particular was it '128'?" (section vi) (Conclusions), at page 30 of the appeal print). Having recognised that there was no measurement of the pony on or about the day of the contract the sheriff

then embarked on an exercise of evaluating the methodology adopted by each of the veterinary surgeons with a view to deciding which measurement he preferred to assist him answer the question he had posed. He then determined that the assessment carried out by Mr May ("based upon the careful measurement exercise which was done by Mr May and his colleague – 4 separate measurements by 2 different qualified veterinary surgeons and subject to the scrutiny of an official of the Joint Measurement Board, with an average of the 4 results being the declared height of 130.7 cms") was the more reliable in respect of height leading to the conclusion that on the balance of probabilities that SSA as at the date of the contract and thereafter measured more than the 128 cms leading to the following finding in fact:

"23. The pony SSA after purchase by the Pursuer measured 130.7 cms and did not conform to the description "128 JA". The Defender has breached the contract of sale."

[28] An analysis of the evidence leads us to question whether the sheriff could properly make that finding in fact, especially the legal conclusion. It is accepted that there was no evidence as to the measurement of the pony at the date of the contract. Instead there are two conflicting but perfectly valid measurements by reputable and experienced veterinary surgeons, neither of whom would criticise the other's methodology or the result. The key to unlocking the conflict is, of course, the evidence given by these veterinary surgeons to the effect that the animal's condition and temperament on the day of measurement may affect its height, leading to finding in fact 34 that there is no single absolute height for a pony such as SSA with 128 cms being the closest to the lowest height for the animal. If we consider what has been proved by the evidence it is clear that the sheriff accepted two measurements of the pony on particular days with certificates properly issued for heights of 128 cms and 130.7 cms respectively. These are snapshots of the pony's height on the particular day they

were measured. It does, however, mean that the certificate in the possession of the defender and appellant when SSA was advertised for sale corresponded with the height at which the pony was advertised. The pursuer, on the other hand, has proved that on a particular date in September 2016 the pony was measured at a different height of 130.7 cms. If the height of a pony can vary according to its condition and surroundings it is difficult to understand why two or even four vets measuring an animal on the same day would enhance the standing of the measurement. The evidence indicates that the height will vary according to its condition at the time of measuring.

[29] It appears to us that had the sheriff addressed the correct question - "on the balance of probabilities did the pony conform to a height measurement of 128 cms as at the date of the contract of sale?" - he would have been bound to answer that question with an acknowledgement that there was no evidence of the pony's height at the date of sale and that he could not find that the pony when advertised for sale and at the point of sale was not 128 cms as described by the defender and appellant. If the sheriff preferred the methodology of Mr May and his evidence on this matter it is important to observe that Mr May in his evidence conceded that 128 cms might be the lowest measurement. Mr May, accordingly, does not say the pony would not have measured at 128 cms. There is no evidence and no finding to the effect that the measurement made by Mr Miller in June 2015 was not correct and, of course, it was Mr Miller's certificate on which the defender relied in good faith when advertising the pony for sale. The ancillary point that the earlier certificate by Mr Miller was out of date has nothing to do with the point in issue. The annual requirement for a certificate is purely for the purpose of the British Show Jumping Association's requirements. The pursuer could easily have made it a condition of sale that an up to date height certificate was produced. That did not happen. With the benefit of

hindsight that may have been a sensible requirement if only because the pony was advertised for sale at the absolute maximum height for the category in which the pursuer's daughter was to compete.

[30] For the reasons we give we consider that the sheriff addressed himself to the wrong question and therefore the answer he reaches in the second sentence of finding in fact 23 and in his finding in fact and law is not one he is entitled to reach on the evidence before him. Of course, it was open to the sheriff to make the finding he does in the first part of finding 23 with reference to the measurement on 14 September 2016. However, that has little relevance to the issue before him. We have come to the conclusion that on his findings in fact and the helpful analysis provided by the sheriff of the evidence led before him, he was not entitled to come to the conclusion that the pursuer had proved on balance of probabilities that the pony was not 128 cms as described by the defender when offering the pony for sale and at the point of sale. The sheriff ought not to have concluded that the defender was in breach of contract nor that the defender misrepresented SSA's height by advertising him as a 128 cms pony.

[31] We accordingly propose to allow the appeal, recall the sheriff's interlocutors of 8 January and 7 February 2018 and grant decree of absolvitor together with a finding of expenses in favour of the defender and appellant.