SHERIFF APPEAL COURT

[2019] SAC (Civ) 39
WCK-A20-15
WCK-A22-15

Sheriff Principal D L Murray
Sheriff Principal C D Turnbull
Appeal Sheriff P J Braid

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D L MURRAY

in the appeals in the causes

ELIZABETH DOBBIE

Pursuer and Appellant

against

MICHAEL PATTON

Defender and Respondent

and

HELEN PATTON

Pursuer and Appellant

against

MICHAEL PATTON

Defender and Respondent

Pursuers and Appellants: Thompson, solicitor; Thompson Family Law Solicitors
Defender and Respondent: Laughland, solicitor; Civil Legal Assistance Office

14 November 2019

[1] The appellants, who are sisters, were the pursuers in actions which each of them raised against the respondent, their brother, for count, reckoning and payment arising from his acting in winding up the estate of their late mother, who died on 2 January 2013. Various actions have been raised in connection with this matter but these appeals only concern the actions for count reckoning and payment A20/15 *Dobbie* v *Patton* and A22/15 *Patton* v *Patton*, which were each settled by tender and minute of acceptance. The appeals proceeded on what were essentially the same grounds against the decision of the sheriff in Wick on 21 December 2018 to modify the liability of the respondent in expenses to nil in terms of section 18(2) of the Legal Aid (Scotland) Act 1986 ("the 1986 Act").

Submissions for appellants

[2] The appellants insisted only on grounds (a) and (f) of their appeals. Their principal position was to invite the court to recall the sheriff's interlocutors of 21 December 2018 and refuse the motions for modification of the respondent's expenses to nil.

[3] It was submitted that it was incompetent for the sheriff to modify the expenses of the respondent in circumstances where the respondent failed to comply with the requirements of the 1986 Act and the Act of Sederunt (Civil Legal Aid Rules) 1987 ("the Rules"). The respondent had failed to comply with (a) rule 3(1) of the Rules which requires that the words "Assisted Person" shall follow the name of the assisted person on every step of process in the proceedings to which he is a party and (b) the requirement in terms of regulation 3(4) that the respondent, having become during the dependence of the cause an assisted person, "shall forthwith lodge in process the legal aid certificate issued to him and

intimate the lodging of it to all other parties to that cause." While it was accepted that the appellants were aware that the respondent was in receipt of legal aid, it was said that the respondent's failure to comply with the terms of the rules precluded the sheriff from modifying the respondent's expenses in terms of section 18(2) of the 1986 Act. The terms of a legal aid certificate provide:

> "This is to certify that subject to the provisions of the Legal Aid (Scotland) Act, 1986 and any regulations made thereunder, legal aid has been made available to the person designed below as the assisted person effective from the date shown hereon and for any urgent or specially urgent work undertaken before that date under Regulation 18 of the Civil Legal Aid (Scotland) Regulations 2002, provided that all the necessary conditions imposed by or under that regulation have been complied with."

By failing to lodge the certificate forthwith, the respondent had not complied with all the necessary conditions under the Rules.

[4] In the *Elizabeth Dobbie* case, the legal aid certificate had not been lodged until 3 June 2016, one month after the grant of legal aid on 4 May 2016. In the *Helen Patton* case, the legal aid certificate was not lodged until one year after the tender was accepted. In neither case had the process been marked up to design the respondent as an assisted person. The regulations are not discretionary and non-compliance meant that the respondent was not a "legally assisted" person and was not entitled to legal aid as he had failed to comply with the Rules. This meant that an award of expenses against the respondent could not be modified in terms of section 18(2) of the 1986 Act.

[5] As observed in *Bennion on Statutory Interpretation (6th ed.)* at section 312, there is a presumption against a construction which results in an absurd result. If modification could occur where the prescriptive "shall" in regulations was ignored, that would lead to the absurd result that the Rules may as well not exist.

[6] Reference was made to two conflicting decisions, *NB* v *EL* [2017] SC Dun 62 and *Aberdeen City Council* v *Muhamed Shauri*, Aberdeen Sheriff Court, [2006] 5 WLUK 733. The sheriff's decision on competency of applying section 18(2) of the 1986 Act where a legal aid certificate had not been lodged as required by the Rules was not considered by the Sheriff Principal in *Aberdeen City Council*, the appeal being decided on other matters, however, his decision records without adverse (or indeed any) comment that:

> "The sheriff concluded that he had no discretion where the legal aid certificate had not been lodged in process at the time it was issued, and refused modification of the expenses and granted decree for expenses as assessed".

The sheriff in *NB* v *EL* took a different view. His analysis and conclusion is to be found at paragraphs [41] - [46] of his judgment. He found that, in the absence of any identifiable prejudice arising from the breach of regulation 3, a failure to lodge the legal aid certificate did not preclude modification of expenses in terms of section 18(2). However, the appellant submitted that *NB* was wrongly decided and that the conclusion of the sheriff at first instance in the *Aberdeen City Council* case was to be preferred.

[7] The appellant's second argument was that the sheriff had improperly exercised his discretion in allowing the modification of expenses in terms of section 18(2). The sheriff should have had regard to the whole circumstances and background of the cases. The parties' mother had died intestate and the respondent had, with the agreement of his siblings, taken responsibility for the administration of the estate. He had failed to exercise his fiduciary duties and was said not to have administered the estate properly and according to law. He had not challenged Notices to Admit lodged by the respondents, and had thereby effectively admitted that he was in breach of his fiduciary duties. He had maintained an inept defence. His plea-in-law 4 demonstrated a false proposition that he had

no obligation to account for his actions in the administration of the estate, when clearly he had. The respondent was disingenuous in seeking a modification shortly after lodging a tender in which expenses were offered. The respondent had also not complied with the provisions in relation to the commission and diligence. The sheriff had been extremely accommodating to the respondent, assisting him in getting legal representation through the Law Society and the sheriff had failed to balance the equities which would affect the ongoing delay. It was inequitable that as a result of modification of expenses and the legal aid clawback provisions, which required that the principal sum was paid to the Legal Aid Board, the appellants would receive nothing as a consequence of the resolution of the dispute after approximately seven years.

[8] Proof in the cases had been discharged on three occasions. On the second occasion that resulted from the failure on the part of the respondent's agent to instruct counsel. That was a failure for which the respondent was to be held responsible. The sheriff was in error in not attributing errors on the part of his agent to the respondent. The sheriff failed to have regard to the prejudice and delay caused to the appellants between the motion being lodged and its being granted some eighteen months later.

Submissions for the respondent

[9] The respondent sought the leave of the court to allow the respondent's legal aid certificate for the appeals to be received and the court's indulgence to overlook the omission to design the respondent in the appeal papers as being a legally assisted person. It was submitted that in not every case was a legal aid certificate lodged forthwith as required by regulation 3, but such a failure did not result in that party no longer being a legally assisted

person, which was the logical consequence of the appellant's argument, were it correct. Section 16(2) of the 1986 Act defines a "legally assisted person" as "a person in receipt of civil legal aid in the proceedings in question, or a person in receipt of assistance by way of representation in any proceedings to which this part applies". There was no provision for legal aid to be withdrawn as a consequence of a failure to lodge a certificate timeously. There was no substance to the argument of the appellants that the delay in lodging a legal aid certificate prevented the appellant making an application for modification. The court was invited to prefer the approach adopted in *NB* v *EL* (*supra*). It was submitted that the purpose of regulation 3 was to make the court aware that the party was legally assisted. The appellants were aware legal aid had been provided to the respondent. There was no prejudice to the appellants which resulted from the respondents' failure to lodge the legal aid certificates. The regulations did not provide for a sanction for not lodging a certificate or marking up the process. The appellants' reference to the preamble to the legal aid certificate did not assist as there was no question, having regard to the definition of "legally assisted person" in section 16, but that the respondent was a legally assisted person, contrary to the position proposed by the appellants. Allowing the sheriff to exercise discretion on the matter of modification even if a legal aid certificate had not been lodged, or a party not designated a legally aided person in the process, did not give rise to an absurd result. On the contrary, a more absurd result would flow where it was known to their opponent that a party was a legally assisted person but they were excluded from seeking modification of expenses. The intention behind the regulations was achieved by the sheriff having discretion as to whether or not to allow modification. The appellate decision in the *Aberdeen*

City Council case did not provide any reasoning for the sheriff's decision and the decision of the sheriff in *NB* was to be preferred.

[10] In relation to the appellants' alternative argument that the sheriff had erred in the exercise of his discretion, it was submitted that it was not open to the sheriff to consider the facts of the case as the matter had not proceeded to proof. It was accepted that there had been no counter-notice following the notice to admit. It was also accepted that the sheriff had fallen into error in discounting the respondent's responsibility for the actions of his agent. Most critically the respondent's financial position remained as it was before the sheriff and he simply did not have the means to make any payment of expenses. The respondent's agent was unable to answer a question posed by the court as to whether or not the respondent had given his share of the estate to charity, as was suggested in the appellants' pleadings.

[11] On the first occasion the proof had been discharged a soul and conscience certificate had been lodged and no criticism could be attributed to the respondent in respect of that discharge, or for the discharge on the third occasion which followed the cases having been settled. It was, however, accepted that criticism could fairly be attributed to the respondent resulting from his agent's failure to instruct counsel, which resulted in the proof being discharged. The respondent's agent was again unable to respond to a question from the bench as to whether or not the defender might have a right of relief against his agents. The respondent's agent advised that the respondent was in poor health and it would be hard to determine whether he would take action against his former agents. She maintained that the respondent was not at fault for the considerable delay which followed the lodging of the motion for modification. The hearing of the motion had been delayed at the instance of the

court. The principal position advocated on behalf of the respondent was that the sheriff was entitled to take the view he did and there was no basis for this court to interfere with his finding. If the court did wish to look at matters anew, it should take a broad view that the expenses should still be modified taking account of section 18(2) having regard in particular to the respondent's lack of means. Section 18(3) made clear that the respondent's property (his house) is not to be subject to diligence. Accordingly, not to make the modification would render him liable for something that he could not afford to pay.

Decision

[12] We find there to be no substance to the appellants' argument that the failure to lodge a legal aid certificate timeously rendered modification incompetent. We do not have the benefit of the reasoning behind the first instance decision in *Aberdeen City Council,* but in any event consider the conclusions reached by the sheriff in *NB* to be sound, for the reasons he gives. We consider that the terms of rule 3 are directory rather than mandatory and in a situation where, as in this case, the other party is aware that their opponent is a legally assisted person the omission either to lodge the certificate, or to mark up the process to demonstrate that a party is a legal aided person, is not fatal to an application to for modification of expenses. It simply cannot be the case that a failure to take those steps results in the party ceasing to have the benefit of legal aid.

[13] As to whether the sheriff exercised his discretion in granting modification, we consider that he fell into error in discounting the respondent's responsibility for his agent's actions. We also accept that there were criticisms to be made of his agent's actions in relation to the discharge of the proof, which resulted from the agent's failure to instruct

Counsel. We therefore conclude that the sheriff has erred in the exercise of his discretion in excluding these factors. *Cullen* v *Cullen* 2000 SC 396 makes it clear that in this situation it is not for the appellate court, contrary to the submissions made to it in the present case, to consider matters of new, but rather that the reassessment of the liability of the assisted person falls to be carried out by the sheriff, "subject to whatever directions are considered by the appeal court to be appropriate."

[14] As far as the respondent's conduct is concerned, we consider that the respondent's conduct, and that of his agent, for which he must bear responsibility, is worthy of criticism. His agent's actions prolonged the litigation. Moreover, and more critically, we accept the submission that, standing the deemed admission following the service of the Notice to Admit, there never was a defence to this action, and in that sense the respondent can be said to have abused his legal aid certificate.

[15] We were referred in submissions to paragraph 30 in *Bell* v *Inkersall Investments Ltd* 2007 SC 823 where the Lord Justice Clerk (Gill) giving the opinion of the court stated:

> "The court's discretion to allow modification is not unfettered (*Cullen* v *Cullen*). Section 18 of the 1986 Act envisages that the court may not make an award that exceeds what in the circumstances would be a reasonable sum for the assisted person to pay; that in making that decision the court has to have regard to the means of the parties and the amount of the expenses; and that, having assessed what might be reasonable, the court may still modify the assisted person's liability to less than that sum and even to nil. In making its decision the court has to consider how the parties conducted the litigation, and, in particular whether the assisted person has used his position to obtain an unfair advantage. It should not modify to nil or to a nominal figure as a matter of course; but it should not modify to a figure so high as to be beyond the assisted person's resources, even if his conduct has been improper (*Armstrong* v *Armstrong*; *Orttewell* v *Gilchrist*; *Masson* v *Masson* (Assessment of Liability) (No 1)).

[16] While we observe that in *Greenan* v *Courtney* [2007] CSOH 200 it was found that the defender's conduct was of such an extreme nature that modification was not granted to any

extent, even where she might not have the means to satisfy the award in full, *Bell* is binding authority and the sheriff and this court must give due regard to the stricture in the last sentence that modification must be to a figure which the assisted party is able to pay, even where there has been improper conduct. That limits the discretion available to the sheriff and may well result in his reconsideration of the matter arriving at the same conclusion he reached when he first considered it. Had the matter been at large for this court that is the view we should have reached given the terms of *Bell.*

[17] We should express considerable concern that the sheriff took some eighteen months to determine this motion. That delay was not in the interests of justice. It should have been apparent to the sheriff that this matter required earlier resolution. The delay in his determining the matter is to be deprecated. We trust that he will proceed to deal with the motion for modification with due expedition.

[18] For the reasons stated we shall therefore recall the sheriff's interlocutors of 21 December 2018 and remit the motions back to the sheriff for consideration of new having regard to the observations which we have made. Parties were agreed that expenses should follow success. In the event of the appellants succeeding the agent for the respondent invited us to modify those expenses to nil in the light of the respondent's means. Having regard to his means and noting also that there was no criticism of the conduct of the respondent in the context of the appeal we shall grant that motion and modify the expenses payable by the respondent for the appeal to nil.