SHERIFF APPEAL COURT

[2020] SAC (Civ) 25
DBN-AD12-18

Sheriff Principal C D Turnbull

OPINION OF THE COURT

in the appeal in the cause

MD

Petitioner and Respondent

against

JM

Respondent and Appellant

Petitioner and Respondent: Inglis, advocate; J.K.Cameron
Respondent and Appellant: Leighton, advocate; Livingstone Brown

02 December 2020

Introduction

[1] The appellant (who is the respondent in the proceedings at first instance) appeals, without permission, against the sheriff's interlocutor of 2 September 2020 which, *inter alia*, (i) refused the appellant's motion to grant commission and diligence for the recovery of certain documents; and (ii) granted the petitioner's motion directing that the proof (which at that

stage had run for a number of days) begin, of new, before a different sheriff. The decision recorded in the interlocutor of 2 September 2020 is said to have been given *ex tempore* on 31 August 2020.

[2] As procedural Appeal Sheriff, I am required to determine a question about the competency of the appeal, namely, whether or not it can proceed in the absence of the permission of the sheriff. Appeals from a sheriff to this court are regulated by section 110 of the Courts Reform (Scotland) Act 2014 ("the 2014 Act"). In so far as relevant for present purposes, that section provides:

> "(1) An appeal may be taken to the Sheriff Appeal Court, without the need for permission, against—
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> (a) a decision of a sheriff constituting final judgment in civil proceedings, or
>
> (b) any decision of a sheriff in civil proceedings—
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> (i) granting, refusing or recalling an interdict, whether interim or final,
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> (ii) granting interim decree for payment of money other than a decree for expenses,
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> (iii) making an order ad factum praestandum,
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> (iv) sisting an action,
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> (v) allowing, refusing or limiting the mode of proof, or
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> (vi) refusing a reponing note.
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> (2) An appeal may be taken to the Sheriff Appeal Court against any other decision of a sheriff in civil proceedings if the sheriff, on the sheriff's own initiative or on the application of any party to the proceedings, grants permission for the appeal."

Submissions for the Appellant

[3] The permission of the sheriff not having been granted, the appellant must rely upon the terms of sub-section 110(1)(b) of the 2014 Act. The submissions advanced on behalf of the appellant fall under two distinct headings. Firstly, he contends that the part of the interlocutor which refused commission and diligence rendered the interlocutor appealable, in terms of sub-section 110(1)(b)(v), in that the interlocutor refused proof. Secondly, the part of the interlocutor which directed that the proof begin of new rendered the interlocutor appealable, also in terms of section 110(1)(b)(v), in that the interlocutor allowed proof.

Commission and Diligence

[4] The argument for the appellant is that this court is bound by the decision of the Inner House in *D.C. Thomson & Co Ltd* v *W.V.Bowater & Sons Ltd* 1918 SC 316. It was argued that a decision refusing proof includes one which refuses a commission and diligence for the recovery of documents. Any attempts to distinguish *D.C. Thomson & Co Ltd* are flawed – the rule or section is found in the same context (appeal without permission). That the rule in the Court of Session has been changed and that in the sheriff court has not does not detract from the weight of the earlier Court of Session case. It has the opposite effect.

Proof to Begin of New

[5] The appellant contends that the interlocutor complained of brought the case to an end and then allows an entirely new proof, with the effect that sub-section 110(1)(b)(v) of the 2014 Act is engaged. The interlocutor brings the existing case to an end and so brings the entitlement of the parties to that proof to an end. If that is not correct then the appellant will continue on with the part-heard proof. The situation here is a new step – it is not the same

proof that has been adjourned or continued – it is an entirely different hearing. The key point is that it is a different proof. It is not delaying the start of the same proof from one day to another; it is not continuing the same proof from one day to another; it is bringing the (original) proof to an end and starting a new one. The witnesses could be different. If the same witnesses are called, they will be called for examination in chief and cross-examination – they will not be being recalled. These circumstances are covered by the phrase "allowing proof".

[6] That the first proof has concluded means that any further proof is a new allowance of proof. It is a renewal of the allowance of proof. The allowance of proof anew is appealable without permission (see *Murphy* v *M'Keand* (1866) 4 M 444 at 447). The use of the phrase "of new" by the sheriff supports this analysis. The (original) allowance of proof came to an end with the interlocutor complained of. The sheriff then revived the allowance of proof. Such an approach is the same as allowing proof (and is, thus, appealable without permission) – see *Murphy*. The decision in *Murphy* does not turn on any speciality of section 10 of the Sheriff Court (Scotland) Act 1853 – as can be seen from the terms of the section. It is not just that the parties have been permitted to go to probation on their averments.

[7] The "allowance of proof" is not an unrepeatable step of process. A modern example of that repetition can be seen in *Eurocopy (Scotland) plc* v *British Geological Survey* 1997 SCLR 392. The difference between when the allowance is appealable and when it is not can be seen in *J & W Kinnes* v *Fleming* (1881) 8 R 386 – where the court approved of the earlier approach in *Murphy*.

[8] The appellant also argued that the interlocutor complained of being appealable without permission is entirely consistent with what one might expect in terms of the legislation. In general, interlocutory appeals are not permitted unless the decision is a significant one. Bringing a proof to an end and starting a whole new one is clearly a significant decision.

Submissions for the Petitioner

Commission and Diligence

[9] The appellant's motion for commission and diligence was refused *in hoc statu*. Any appeal, even with leave, was therefore premature. An interlocutor refusing commission and diligence for the recovery of documents is not one which refuses proof, see *Mowbray* v *Secretary of State for Scotland* 1992 SLT (Sh Ct) 84, following *Buchan Supply Stores* v *Morgan* 1954 SLT (Sh Ct) 7. Reference was also made to Macphail, "*Sheriff Court Practice*" (3rd ed.) at paragraph 15.65.

Proof to Begin of New

[10] The petitioner refutes the contention that the appeal falls within sub-section 110(1)(b)(v) of the 2014 Act. Reference was made to "*Sheriff Court Practice*" at paragraph 18.42. The correct interpretation of the sheriff's interlocutor is that the earlier allowance of proof (contained in the interlocutor of 21 June 2019) had not lapsed. The sheriff assigned a new diet where the proof had not proceeded to a conclusion on the day originally assigned. A lapse of proof occurs where, for example, the petitioner fails to appear on the proof date and no evidence is led, see *Murphy*. In addition, the assignment of a new proof may be

necessary where the addition of a new party alters the character of the previously allowed proof, see *Sinclair* v *McColl* (1894) 10 Sh Ct Rep 144. Nothing resembling or analogous to these cases has occurred in the instant case. The appeal against the sheriff's determination of the petitioner's motion is incompetent because the required permission has not been obtained.

Discussion

[11] The issue for determination at this stage is whether or not the proposed appeal is competent, permission to appeal not having been granted in terms of sub-section 110(2) of the 2014 Act. In light of the decision I have reached on the competency issue, it is unnecessary for me to address the somewhat contradictory position adopted by the appellant who, in effect, argued that the interlocutor complained of both refused and allowed proof. It is also unnecessary for me to consider the effect, if any, that the nature of the documents which the appellant sought to recover might have on the argument advanced by him.

Commission and Diligence

[12] The appellant's argument turns entirely upon the decision of the Inner House in *D.C. Thomson & Co Ltd*. The appellant contends that this court is bound by the decision in that case. That contention is misconceived.

[13] The decision in *D.C. Thomson & Co Ltd* was considered in some detail by Sheriff Principal Nicholson in *Mowbray* at page 85 F-L. As noted therein, there appears to have been no subsequent reported decision on this point until *Galloway* v *Galloway* 1947 SC 330, in

which the Lord President (Cooper) observed that he had "failed to follow the explanations of the Court" in *D.C. Thomson & Co Ltd* and expressed regret that there had been no motion to convene a larger court in order to review it. The revised Rules of Court issued in 1948 expressly provided that leave was required for an appeal against either the grant or the refusal of a commission and diligence for the recovery of documents. Accordingly, insofar as the Court of Session was concerned, the decision in *D.C. Thomson & Co Ltd* ceased to have practical effect over 70 years ago.

[14] For the reasons set out in *Mowbray* at pages 85L to 86I, Sheriff Principal Nicholson concluded that he was not bound to follow *D.C. Thomson & Co Ltd* and that, in terms of section 27(d) of the Sheriff Courts (Scotland) Act 1907 ("the 1907 Act"), an interlocutor refusing commission and diligence for the recovery of documents could only be appealed with leave. Section 27 of the 1907 Act is no longer of relevance; the position now being governed by section 110 of the 2014 Act (see paragraph [2] above).

[15] In my opinion, nothing turns upon the fact that the sheriff refused the motion for commission and diligence *in hoc statu*. That does not alter the fact that that motion was refused. The appellant's submission (see paragraph [4] above) that the relevant sheriff court rule has not changed is simply wrong. As noted above, the position is now governed by section 110 of the 2014 Act. The terms of section 110 are clear and unequivocal. An interlocutor refusing commission and diligence for the recovery of documents does not fall within any of the classes of case set out in sub-section (1); permission to appeal against such an interlocutor is, accordingly, required in terms of sub-section (2).

[16] I reject the appellant's argument under this heading. This court is not bound by the decision in *D.C. Thomson & Co Ltd*. In terms of the 2014 Act, permission to appeal is required to bring under review an interlocutor refusing commission and diligence for the recovery of documents.

Proof to Begin of New

[17] The starting point in a consideration of this issue is that there is no dispute that a proof had been allowed prior to the interlocutor of 2 September 2020. The interlocutor of 21 June 2019 did so. The question then is whether or not the interlocutor of 2 September 2020 "allowed" a proof of new.

[18] Under reference to *Murphy*; *J & W Kinnes*; *Sinclair*; and *Eurocopy (Scotland) plc*, the third edition of "*Sheriff Court Practice*", at paragraph 18.42 states:

> "Where a proof has been allowed, it is the interlocutor allowing it which is subject to appeal, and not any separate interlocutor fixing the diet of proof, or assigning a new diet where the proof has not proceeded on the day originally assigned. If, however, the allowance of proof itself has lapsed, and it is necessary to allow proof of new, the interlocutor reviving the allowance of proof is subject to appeal without leave."

[19] The circumstances of the present case are markedly different from those in *Murphy*. In *Murphy*, the petitioner sought interdict against the sale of a quantity of larch bark, which he alleged to be his property and which had been poinded by the respondent while in the possession of a Joseph Mitchell for a debt due to the respondent by James Rankine. A proof was allowed on 2 February 1865, and a diet fixed for 13 February 1865. That diet and a subsequent one were adjourned, with the proof scheduled to proceed on 16 February 1865. On that day no appearance was made for the petitioner, and no proof was led. On 25

February 1865 the petitioner moved for a new diet of proof, which was allowed (subject to a condition as to expenses). On appeal to the sheriff, the petition for interdict was dismissed. The petitioner appealed to the Inner House, arguing that the appeal to the sheriff had been incompetent.

[20] The (then) Lord Justice Clerk (Glencorse) at page 447, referring to the proof scheduled to proceed on 16 February 1865, said this:

> "On that day there was no appearance entered for the petitioner. The effect of this would appear to be that under the 10th section of the statute the petitioner was no longer in a position to say that he had any right to a proof. He had failed to avail himself of the allowance granted by the sheriff. The sheriff-substitute should evidently have dismissed the petition. But nine days elapsed before anything was done, and this although the interim interdict was standing. At last, on the 25th, a new motion is made, and the sheriff-substitute grants the motion most indulgently, and on grounds that appear to me altogether inadequate."

[21] The statute referred to is the Sheriff Courts (Scotland) Act 1853 ("the 1853 Act"). The court's interpretation of section 10 of the 1853 Act was that, in the circumstances which pertained in *Murphy*, the right to a proof had been lost. As a consequence, the subsequent interlocutor of 25 February 1865 was one which allowed a proof and was, thus, one which was appealable to the sheriff by virtue of section 19 of the 1853 Act.

[22] As Lord President, Lord Glencorse returned to his opinion in *Murphy* in *J & W Kinnes* saying this of *Murphy* at page 389:

> "It was a case in which the petitioner sought to have an interdict which would have the effect of stopping a diligence. The petitioner had been allowed great indulgence, and had done nothing, and when the sheriff-substitute pronounced the interlocutor appealed against the petitioner had lost his right to lead a proof. The interlocutor

> was a renewal of the proof previously granted, and that allowance was absolutely necessary. In my opinion I am reported to have used this expression—"*I have no doubt that an interlocutor reviving allowance of proof is the same as one allowing a proof.*" To that expression I adhere."

[23] *Murphy* turns upon the effect of the terms of section 10 of the 1853 Act. The right to a proof had been lost. It required to be "revived". That is not the case in the present appeal. *Murphy* is of no assistance. Similarly, *Eurocopy (Scotland) plc* is of little assistance, relating, as it does, to a case in which successive interlocutors made the same allowance of proof. The fact that the Extra Division held that an appeal could be taken against the latter of the two interlocutors without permission is unsurprising.

[24] *Sinclair* is equally of limited assistance. After a proof was allowed by the sheriff-substitute it was discovered that the defender's husband had not entered appearance, and that he would take no part in the defence of the action. Thereupon, of consent of both parties, the sheriff-substitute appointed a curator *ad litem* to the defender and *quoad ultra* continued the cause. Upon the curator *ad litem* entering appearance, the sheriff-substitute repeated his interlocutor allowing a proof and an appeal was taken against the repeated interlocutor. It was argued, on appeal to the sheriff, that it was incompetent for the sheriff-substitute to repeat that interlocutor. The sheriff explained the position, thus:

> "When a curator *ad litem* is appointed he is entitled, if so advised, to have the record opened up, if it has been closed, in order that he may lodge new defences and begin the *lis de novo*. It follows that he may say at any stage that he wishes the position of the cause reconsidered. In fact, he is regarded as a new party, or as the party to whom he is curator from the time of his appearance in the process. I have always understood that this is quite a settled point in practice. I accordingly hold that it was perfectly competent for the sheriff-substitute to repeat his interlocutor."

While *Sinclair* turns on circumstances which can, at best, be described as anachronistic, the *ratio* of the decision would hold good in circumstances where, for example, a proof was allowed and then a new defender convened. The prior allowance of proof would lapse in such circumstances. In the present case the right to a proof was not lost prior to the interlocutor of 2 September 2020.

[25] The submission for the appellant relative to the policy of the 2014 Act fails to have regard to its terms. They are clear and unequivocal. An interlocutor which directs that a previously allowed proof begin, of new, before a different sheriff is not one which allows, refuses or limits the mode of proof. It is therefore an interlocutor in respect of which permission to appeal is required.

Disposal

[26] Permission to appeal against the interlocutor of 2 September 2020 not having been granted, the present appeal is accordingly incompetent. I will, therefore, refuse the appeal as incompetent in terms of rule 7.8.(1)(a). The case will be remitted to the sheriff at Dumbarton to proceed as accords. I will reserve meantime the question of expenses. Any motions in that regard should be made forthwith.