FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 66
XA25/18

Lord President
Lady Paton
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Appeal

in causa

ABDUL KHALIQ

Pursuer and Respondent

against

ALVIN GUTOWSKI

Defender and Appellant

Pursuer and Respondent: D D Anderson; Drummond Miller LLP
Defender and Appellant: Party

17 October 2018

Introduction

[1] This case arises out of an appeal by the defender to the Sheriff Appeal Court against an interlocutor of the sheriff dated 8 May 2017 granting decree for payment to the pursuer of £10,946. The appeal was refused by the SAC on 30 October 2017, primarily as a consequence of the defender's failure to lodge an appeal print timeously. The appeal raises questions concerning: (1) the operation of the SAC rules on the lodging of documents and decrees by default; (2) the test for reviewing a decision of the SAC pronouncing decree by default; and

(3) the relationship of a court with a party litigant. The latter concerns the extent to which a court should: (a) assist a party litigant in relation to matters of substantive law; and (b) excuse a party litigant's failure to comply with procedural rules. The case raises a subsidiary issue of whether permission to appeal to this court can be restricted to one or more grounds of appeal.

The Sheriff Appeal Court Rules

[2] The Sheriff Appeal Court Rules provide (SAC rule 6.5) that, once a Note of Appeal (rule 6.2) has been lodged, the procedural Appeal Sheriff will make an order for intimation of the appeal to the respondent within 7 days. When an appeal is appointed to the standard appeal procedure (rule 6.6.(1) and (2)), a timetable is to be issued specifying the dates by which certain procedural steps must be taken (rule 7.2.(1)). These include the lodging of the appeal print and any necessary appendix. The timetable may be varied on special cause shown (rule 7.6(1) and (2)). The appeal print must be lodged within 21 days of the timetable being issued (rule 7.9(1)). It consists of the pleadings, interlocutors and any note by the sheriff (rule 7.9.(2). The appendix is to be lodged no later than 7 days before the procedural hearing (rule 7.10(1). It is to contain: (a) any document lodged in process which is founded upon in the grounds of appeal; and (b) the notes of evidence "if it is sought to submit them for consideration" (rule 7.10.(2)). The procedural hearing is fixed at the time of the issue of the timetable (rule 7.2.(2)). Its purpose (rule 7.14) is to enable the procedural Appeal Sheriff to fix an appeal hearing, if the parties are ready, or to make an order to secure the expeditious disposal of the appeal. It is, in essence, a case management hearing.

[3] The rules provide (3.2.(1) to (3)) that, where a party is in default, the procedural Appeal Sheriff may make any order to secure the expeditious disposal of the appeal. This

includes an order to refuse the appeal, if the party in default is the appellant. A party is in default if, inter alia, he fails: (a) to comply with the timetable; (b) to implement an order of the court within the specified period; and (c) to appear at a hearing. In terms of a general dispensing power (rule 2.1.(1)), the court can relieve a party from the consequences of a failure to comply with the rules, but only (rule 2.1.(2)) if the party shows that the failure is due to a mistake, oversight or any other excusable cause.

The Sheriff Court Process

[4] The subject of the dispute is a building contract, dated November 2012, whereby the defender was to build an extension to the pursuer's shop. The action for payment which followed commenced on 13 February 2014. On 14 August, the sheriff granted decree by default against the defender, when he failed to appear at a debate; the defender's agent having intimated his withdrawal from acting late in the day. The defender instructed new agents. The decree was recalled by the Sheriff Principal on 6 October, but with the defender having to pay the expenses. An amendment procedure followed, with the defender introducing a counterclaim for £15,629. The defender's new agents withdrew from acting in March 2015. The defender began adjusting the pleadings himself. A debate was fixed for 12 October 2015. At that time the sheriff described the pleadings as a mess, with, for example, the defender trying to amend a Minute of Amendment. The debate was discharged, with the defender being again found liable in the expenses of the discharge. The defender was allowed a further period in which to amend his pleadings, for the expenses of which he was also found liable. A further debate was fixed for 7 January 2016.

[5] The pursuer's pleadings focused the dispute, in so far as they made it clear that the pursuer's position was that the defender had left the building site in about April 2013

without completing the works. This, he averred, was in breach of contract. The pursuer averred a contract price of £45,875 plus £6,000 extras. There was a difference between the parties of £5,000 in respect of the sums which had been paid; £40,875 or £35,875. The pursuer therefore said that £11,000 had been owed to the defender, but not payable at the time of the breach. The pursuer's primary claim in the principal action was for £12,346, consisting of £23,346, which he said that he had spent in having the works completed, less the £11,000 due. After debate, this was all deemed suitable for proof, as was a subsidiary claim for £5,200, in which the pursuer maintained that he had lost in rent as a result of the defender's failure to complete the work timeously.

[6] In his note following upon the debate, the sheriff referred to the record as follows: "Much of it is repetitive and on the part of the defender lacking in both form and focus". The sheriff recorded that, despite the rambling narrative, he had attempted to do justice between the parties and "within limits extended some latitude to the defender" with a view to establishing whether or not he had a relevant defence to the principal action. In relation to the former, there was the dispute over the £5,000 which, it was accepted, required to go to proof. Otherwise, the sheriff found in favour of the defender to the extent that he accepted that the defender had pled a relevant defence in the form of a counter breach of contract on the part of the pursuer in preventing the defender from completing the work. The defender may have been entitled to insist on payment before completing that work. The defender founded upon a report from Abacus Surveyors, which valued the work which he had done, but had not been paid for, at £15,629.

[7] In relation to the counterclaim, the sheriff found that: "there is absolutely no basis whatsoever in the averments of the defender supporting a claim in the sum sued for". Without repeating the sheriff's note at length, there was a "fundamental lack of clarity and

focus". The sheriff considered that "it would be unfair for the pursuer to have to respond to a case, the basis in law for which is not known". Even extending "considerable latitude" to the defender as a party litigant, it was "inappropriate and improper to allow this counterclaim to proceed to proof". The sheriff reasoned that he "must apply fairness to both parties".

[8] By interlocutor dated 4 February 2016, the defender's counterclaim was dismissed. There was a further finding of expenses for the defender to meet. On 16 March 2016, a proof was fixed for 21 July. The defences upon which the proof was to, and did, proceed, although deemed relevant, were problematic in both form and substance. They often consisted of a repetition of the pursuer's averments followed by a response, in bold font and sometimes underlined, in the first person. The reader has the daunting task of trying to tease out the relevant points. The defences referred to the price being simply an estimate and not a fixed amount. It was changed when Falkirk Council insisted on the installation of a concrete firewall and the pursuer instructed an additional large window. The defences referred to a report from Abacus, which was said to be a fair and accurate costing and "should be admitted in court". There were references to delays, omissions from the drawings, and unforeseen problems. The averments referred to the defender having witnesses and photographs to prove certain matters. The defender maintained that there had only been one payment of £5,000 on 8 March 2013. Otherwise the defender's position, that he had been put off site prematurely, was relatively clear.

The Proof

[9] The original proof diet was discharged because of lack of court time. Another diet was fixed for 17 November, by which time the defender had secured the services of another

(third) law agent. The agent withdrew from acting on 15 November, having prepared a Minute of Amendment, which was ultimately not insisted upon by the defender. The proof was part heard. A further diet was fixed for 5 January 2017, but that appears to have been discharged in favour of 27 March. The proof was eventually concluded after a further day on 7 April.

[10] The sheriff issued his judgment on 8 May 2017. He found in fact that, in November 2012, the pursuer had accepted the defender's estimate and schedule of payment, consisting of four instalments of £10,500, £11,000, £10,000 and £14,375. The final instalment was due upon "completion and to the satisfaction of building control at Falkirk Council" (presumably the issue of a completion certificate). Work had begun in January 2013. By 8 March, the pursuer had paid the first three instalments. The first was paid through the pursuer's solicitors. The second consisted of £6,000 paid through the solicitors on 14 February, and £5,000 in cash, again paid through the solicitors, on 8 March. Meantime, the sheriff found that a further £5,000 had been paid in cash by the pursuer directly to the defender on 26 February, for which the defender had signed a receipt witnessed by a member of staff at the shop. Another cash payment of £5,000 was made by the pursuer to the defender at the shop on 8 March 2013. This was in addition to that which was made through the solicitors on the same day. This additional payment had been witnessed by the pursuer's son. The sheriff found that these payments had been made even although the relative work had not all been carried out. On 14 March 2013, extra works were agreed at £4,000. On that day, the pursuer paid the defender £4,375. This all left a balance at £14,000. Further extra work to the roof at a price of £2,000 was agreed and paid on 3 April.

[11] The sheriff found that, despite no further payments being contractually due until completion, the defender requested a further £1,000 for materials, which was paid. On

12 April, a further £2,000 was paid, leaving the balance at £11,000. On 17 April, the defender told the pursuer that no further work would be carried out unless £7,000 was added to the price. The pursuer instructed solicitors, who, on 18 April, wrote to the defender calling on him to recommence work on the basis that he would be paid when the work was completed. If the defender did not re-start work, the pursuer would determine the contract. On the same day, the defender wrote to the solicitors insisting upon the additional £7,000 before he would continue. The sheriff found in fact that "Accordingly, the defender was not prepared to continue with the work in terms of the contract". He held that the defender's actions, in refusing to carry out the works without further payment, were a material breach of contract, entitling the pursuer to rescind.

[12] The pursuer instructed Nicholas Wainwright, who was a painter, decorator and tiler, to complete the works by co-ordinating the relevant tradesmen. A document was prepared by Mr Wainwright, in consultation with the pursuer, setting out the work which had not been done. By 17 June, the pursuer had had the work completed. Mr Wainwright prepared another document, which was produced, listing the work which had been done and the tradesmen who had done it. This did not include extra roof tiling. The total was £23,346, but this included a sum of £1,400 for work which was not in the contract. This left £21,946. Deducting the outstanding balance of £11,000 due to the defender, the difference was £10,946, for which the sheriff granted decree.

[13] The sheriff found that the pursuer had intended to lease the extension as a takeaway for £13,000 *per annum* from March 2013, but had been unable to do so until November 2013 because of a number of factors including a delay in the provision of utilities. He did not find the defender liable for any damages arising from the delay.

[14] The sheriff observed:

> "The fact that the defender represented himself at the Proof and had previously adjusted the pleadings himself, put him at a serious disadvantage. As I did at the Debate, I extended considerable latitude to the defender in an effort to do justice between the parties. I made it clear to the defender as best I could the purposes of the Proof and the way in which evidence required to be presented. For example I made it clear to him on more than one occasion that if he wished documents to be put in evidence they must be spoken to by a witness. The defender had a fairly large amount of productions most of which were never put to any witness. However, I regret that the defender did not appear to understand or appreciate what was required of him at the Proof. Unfortunately, quite apart from the requirements of evidence or procedure, the defender had little appreciation of how to conduct himself during the proceedings. He was at times aggressive and confrontational with witnesses and indeed the other party to the Proof and his solicitor. I had to warn him on more than one occasion to moderate his behaviour. It got to the stage that I had to warn him that he might be in contempt of court. Notwithstanding those problems I did my best to fairly assess the evidence on its own merits and not let the conduct of the defender colour my views as to the merits of his case".

[15] The pursuer had given evidence and had called his son and Mr Wainwright. The defender gave evidence, as did his son. Generally, the sheriff found the pursuer and his witnesses to be credible and reliable, even if the testimony of the pursuer and his son was "to some extent coloured by their own perspectives". He did not consider that the same could be said of the defender. On the main issue, he found that the contract was for an agreed price, although it had been phrased by the defender as an estimate. The sheriff rejected the defender's contention that, after the works had started, new drawings were produced which "changed the whole scope of the work and impacted on the scheme of payment". The original estimate had referred to "revised drawings". The contract price had been increased by £6,000 to £51,875. There was an eventual outstanding balance of £14,000, which was ultimately reduced to £11,000. This was due only on completion.

[16] The sheriff recorded:

> "In those circumstances it is not (*sic*) difficult to avoid the conclusion that the defender was in breach of contract. He had been paid all the sums he was entitled to and more. He had a clear contractual obligation to complete the work. He wished to unilaterally increase the price; something which he was simply not entitled to do… In those circumstances, I had no hesitation in finding that the defender was in material breach of contract entitling the pursuer to rescind it".

[17] The sheriff dealt separately with the conflict over the payment of £5,000. His finding that there were two payments of £5,000 was reasoned on the basis that, first, it was not disputed that one had been made through the solicitors and was vouched by a "card". There was another document; being a receipt for £5,000 bearing the same date and signed by the defender. Although the pursuer said that no-one had been present when this payment had been made, the sheriff concluded that he was mistaken about that, because his son had said that he had been in the shop at the time of this cash payment. The defender only issued receipts when he had been paid in cash; not when the payment was made through the solicitors. Furthermore, balances as set out in receipts issued by the defender later in March and April, and in a letter sent to the solicitors on 18 April, would only be accurate if there had been two £5,000 payments. Thus, when the defender left the site, he had been paid £40,875 and was due, but only on completion of the works, the balance of £11,000.

[18] On quantum of damage, although there was no breakdown of items on Mr Wainwright's list of work, the sheriff accepted his evidence that this is what had been done to complete the works, with the exception of the £1,400. He accepted that this was the cost; notwithstanding the absence of receipts. The total was therefore £21,946. The sheriff noted that the defender had taken issue with certain works to the roof, but these had not been included in the list. The roof work had been completed after the list had been compiled on 17 June 2013.

The Appeal Procedure

[19] The defender appealed to the SAC. On 26 May 2017, he was ordered to intimate the Note of Appeal (Form 6.2) to the pursuer within 7 days. The defender did not do so timeously, but this was excused. The Note contained 14 grounds of appeal, commencing with: "(1) The ... sheriff did not give me a fair hearing and was biased towards me throughout the hearing". It makes general points about the sheriff: failing to accept "important factors" (unspecified); refusing to decline jurisdiction (recuse himself); not dealing with perjury; ignoring points (unspecified) of construction law; ignoring the pursuer's solicitor's conflict of interest (unspecified); contradicting his counterclaim decision; failing to acknowledge the pursuer's breach of contract (unspecified); ignoring "a valuable piece of evidence" (unspecified); failing to take account of the Abacus report; erring in finding *quantum* proved without vouching; and finally "(14) Sheriff ... made the wrong decision against me given all of the facts produced in court, thus denying me a fair hearing."

[20] The appeal was provisionally appointed to the standard procedure. A timetable was set by interlocutor dated 21 August. The defender was present at the hearing. The interlocutor required the defender to lodge the appeal print by 11 September and the appendix by 23 October, in advance of a procedural hearing fixed for 30 October 2017.

[21] The defender failed to lodge the appeal print timeously. The pursuer moved for decree by default, referring to previous procedural failures. The pursuer submitted that, although the need to comply with court orders had been impressed upon the defender at the previous hearing, he had lodged the appeal print only upon intimation of the pursuer's motion for decree by default. There had been no vouching of the contention, which was advanced in the defender's opposition, that the defender had been unwell. He had said that

he had had a bacterial stomach infection and heart related problems, which his GP could verify, if required. Even allowing for illness, the defender had failed to explain why the appeal print could not have been lodged. The appendix did not comply with SAC rule 7.10(2). It contained selected highlights of only one day of the proof rather than a transcription of its entirety. Two documents in the appendix had not been productions. Although the defender had pleaded impecuniosity, he had then said that he could borrow from his family.

[22] In terms of the substance of the appeal, the procedural Appeal Sheriff recorded that the defender's grounds, as advanced orally at the hearing, were, put shortly, that: (i) the sheriff had failed to "recuse" himself on grounds of bias, having previously found the defender in default and dismissed his counterclaim; (ii) the sheriff should have believed the defender rather than the pursuer and his witnesses; and (iii) the defender had been entitled not to do any work until outstanding amounts had been paid. The Appeal Sheriff held that there was no proper basis for an assertion of bias beyond the fact that the sheriff had previously found against the defender twice. There was not a "scintilla of hope" of showing that the sheriff had not been entitled to reach the view which he had on the evidence. The third ground was not contained in the Note of Appeal.

[23] On 30 October, the Appeal Sheriff granted the pursuer's motion and refused the appeal. He reasoned that it was not appropriate to prolong the appeal by giving the defender more time. The grounds were very unlikely to succeed; and they did not contain at least one of the arguments which the defender proposed to make. In all of the circumstances, the Appeal Sheriff decided to exercise his discretion by refusing to relieve the appellant from the consequences of his failure to comply with the timetable.

Application for permission to appeal

[24] The defender lodged his proposed grounds of appeal in advance of the hearing on permission to appeal (RCS 40.2(5)). The first of these stated: "unfair judges decision"(*sic*). The others, in summary were: a failure by the sheriff to adjudicate on construction law; abuse of process constituted by lies and deceit on the part of the pursuer and his agent; burden of proof; the sheriff ignoring important points in dispute and documents; the pursuer calling witnesses not previously mentioned or present at previous hearings; and perjury on numerous occasions.

[25] Permission to appeal was granted by a Procedural Judge on 16 February 2018, but on the appellant's "first ground of appeal only"; repeated in the relative interlocutor to be "unfair judges decision". In his Note, the Procedural Judge correctly observed that he required to apply the second appeals test, of whether the appeal raised an important point of principle or practice or there was some compelling reason for the court to hear the appeal (Courts Reform (Scotland) Act 2014 s 113(2)). The judge understood "unfair judges decision" to mean that the refusal of his appeal on procedural grounds was "unfair". He had understood the Appeal Sheriff to have accepted that the ground advanced, whereby the defender had been entitled to decline to do any more work until outstanding sums had been paid, was "stateable" although it had not featured in the Note of Appeal.

[26] The Procedural Judge continued:

> "It must be remembered that the [defender] appeared in person as a party litigant. He cannot be expected to know the rules as well as those qualified to practice (*sic*) law. Even if he can follow what the rules say, understanding how that impacts upon what has to be done in practice cannot be easy. This applies equally to the contents of the note of appeal. It must… be arguable that where the court recognises that the appellant has a stateable ground of appeal which is not articulated in the note of appeal, it should take steps to encourage the appellant to amend the grounds of

> appeal so as to focus the real point in issue. It must also be arguable that… had the court taken that approach, it might have reached a different view on the outcome. Further, it must be arguable that to refuse the appeal for delay in lodging the appeal print, when it was then available to be lodged, and for omissions in the appendix was disproportionate. Taking these points together… this appeal raises issues as to what might… be characterised as an over rigid application of the Sheriff Appeal Court Rules.
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> It might be argued that matters of procedure should be left to be dealt with by the Sheriff Appeal Court. There is much force in that point. However, when those matters of procedure give rise to broader access to justice issues, raise questions as to proportionality and fairness, and bring into play article 6 ECHR, then they merit consideration by the Court of Session. …[T]his raises an important point of principle or practice justifying the grant of leave to appeal; but even if it does not the circumstances of the present case amount to some other compelling reason for the grant of leave to appeal".

The Appeal

[27] The phrase "unfair judges decision" does not appear in the first, or any, of the 22 grounds of appeal, which were subsequently lodged (RCS 40.11.2(d)) on 9 May 2018. These grounds were all directed at the sheriff's decision. Many, but not all, had featured in the Note of Appeal to the Sheriff Appeal Court. They founded *inter alia* on: the sheriff's failure to decline jurisdiction; various "abuses of process", including parts of the defences being removed from the record; the sheriff ignoring a major part of the defence, including the Abacus report; procedural unfairness by the sheriff not being fully conversant with construction law; wrong decision on breach of contract; wrong findings in fact and on the credibility of the pursuer and his witnesses, given the absence of vouchers, such as receipts; false and vexatious averments; the use of witnesses not mentioned at earlier hearings; perjury by witnesses; conflicts in testimony regarding the £5,000; a conflict of interest on the

part of the pursuer's solicitor; incorrect name and post code of a witness; and the sheriff's finding that there had been a fixed price when the paperwork said that it was an "estimate".

[28] On 3 July, the appellant lodged six "revised grounds of appeal", which were mostly directed against the decree by default. The phrase "judges unfair decision" does not appear in the "revised grounds" either, but an allegation of unfairness can be inferred from their terms in two respects, *viz*: (i) the Appeal Sheriff relied on the absence of vouching for the defender's illness, when the defender had only stated that his GP could verify the illness if required; and (ii) the Appeal Sheriff took into account the defender's previous failure to attend court, when that had been the fault of his former law agent. The other grounds related *inter alia* to: the defender's impecuniosity relative to his failure to lodge a full transcription of the proof and the irrelevance of his ability to borrow money from a family member; the existence of a notice to admit, which demonstrated that there had only been one £5,000 payment; the existence of the Abacus report showing that the defender was owed £15,600 by the pursuer; and erroneous findings on credibility and reliability of witnesses. There was also reference to a general need for increased clarity and certainty of construction contracts, a fairer payment regime, improved rights of contractors to suspend their work in "non-payment circumstances" and adjudication to be more accessible; these statements being taken from a webpage of a firm of solicitors.

[29] The pursuer submitted that, in so far as it was argued that the sheriff had no basis for making his findings-in-fact, the assessment of credibility and reliability was for the judge at first instance; there was nothing in the grounds of appeal that would entitle this court to substitute findings in fact. The defender had failed to specify what the conflict of interest relating to the defender's solicitor actually was. The Appeal Sheriff was entitled to refuse to allow the appeal print late in the exercise of its discretion. Before it could allow the appeal,

the court would have to be satisfied that there had been an unreasonable exercise of that discretion (*McCallion* v *Apache North Sea Ltd* [2018] SAC (Civ) 1). No reasonable excuse had been advanced for the defender's default in terms of SAC rule 3.1, nor could it be said that the Appeal Sheriff had exercised its discretion under SAC rule 2.1 unreasonably. A request for recusal did not require to be complied with. The Appeal Sheriff in considering the merits of the action was attempting to highlight the futility of an appeal on the facts.

Decision

[30] The appeal is against a decision of the Appeal Sheriff to refuse an appeal, in terms of the Sheriff Appeal Court rules, primarily because the defender, at whose instance the appeal proceeded, had failed to lodge an appeal print timeously. Whether to recall a decree by default may in certain situations be a matter for the discretion of the appellate court (*Battenberg* v *Dunfallandy House* 2010 SC 507, Lord Eassie, delivering the Opinion of the Court, at para [13]). This occurs where new circumstances, unknown to the inferior court, are brought to light on appeal. However, whether to grant or refuse an application for decree by default in the first place is also a matter for the discretion of the inferior court, having regard to the particular circumstances of the case, including the nature of the default, the explanation tendered and the merits of the case. Unless there are new circumstances which explain the default, the court will not lightly interfere with a discretionary decision in the absence of the well-known errors such as: taking into account an irrelevant consideration; failing to take account of a relevant one; or reaching a decision that no reasonable court could have done (*Moran* v *Freyssinet* 2016 SC 188, Lady Paton, delivering the Opinion of the Court, at paras [35-45]; cf *Bridging Loans* v *Hutton* [2018] CSIH 63, *DTZ Debenham Thorpe* v *I Henderson Transport Services* 1995 SC 282, LP (Hope), delivering the

Opinion of the Court, at 285 and authorities there cited). None of these have been identified in this appeal.

[31] The Appeal Sheriff took into account the nature of the default, which was primarily a failure to carry out the simple step of complying with the court's timetable and the relative rule by lodging the appeal print. This is not a complex document or task. Although, in many cases, granting decree by default for this reason alone may seem harsh, regard must be had to the surrounding circumstances. In this appeal, the defender had been specifically advised by the court of the need to adhere to the timetable, but had failed at the first hurdle; as he had also failed timeously to intimate the appeal. The defender's excuse for failing to lodge the print was illness, yet it was not explained how anything which he suffered from stopped him, or someone else whom he might have enlisted, from carrying out the straightforward task of preparing or lodging the print or, simpler still, asking the court for more time to do so. He complains that his GP would have confirmed his position, but he produced no report or certificate from his GP at the hearing before the Sheriff Appeal Court. He has still not produced such material.

[32] Looking at the broader picture at first instance, the progress of the case had been significantly hampered by the actions of the defender. Decree of default had already been pronounced, when the defender had failed to appear at a debate. He blames his then law agent for that. The court cannot determine the facts of that, but it does not matter. The defender must take responsibility for the actings of his agent (*Aslam* v *Glasgow City Council* [2016] CSIH 78, LP (Carloway), delivering the Opinion of the Court, at para [32]). The occurrence of an earlier default is a significant factor in the history of the case.

[33] The court is unaware of the reasons for the defender not having retained the services of some three sets of law agents who had previously accepted instructions. He maintained

that it was a lack of money on his part, although he was, at least at the time of the contract, in business as the Falkirk Roofing Company, which was said to be a "25 years Established Family Business". If this is the true reason, his decision making must be viewed as a false economy. His lack of legal representation has resulted in the procedure being prolonged by the state of his pleadings. The prospect of a result in his favour had been jeopardised by his lack of understanding of the basic requirements of averment or proof. All of this has resulted in significant, and, in many instances, avoidable awards of expenses against him.

[34] His own failings may, to a degree, be understandable. They are not, however, capable of being excused. The courts are familiar with the problems which arise when a party attempts to conduct a civil proof. They may, as the sheriff clearly did in this case both at the debate and the proof, afford the party a degree of latitude, but they cannot excuse compliance with the rules of procedure without proper cause. These rules are designed to meet the requirement of access to justice and fairness; but this must be fairness to both parties. It must be recognised that affording one party excessive latitude can prejudice the other, especially in relation to the proper progress of, and expenses associated with, the litigation.

[35] These well-known difficulties were put into sharp focus in *Barton* v *Wright Hassall* [2018] 1 WLR 1119, in which Lord Sumption, in the majority, said (at para 18):

> "Turning to the reasons for [the party's] failure to serve in accordance with the rules, I start with [his] status as a litigant in person. In current circumstances any court will appreciate that litigation in person is not always a matter of choice. ... Their lack of representation will often justify making allowance in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules ... The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications ... for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of

> court against him ... The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights ... Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take."

Lord Briggs, in the minority, added (at para 42):

> "... there cannot fairly be one attitude to compliance with rules for represented parties and another for litigants in person, still less a general dispensation for the latter from the need to observe them. If, as many believe, because they have been designed by lawyers for use by lawyers, the [Civil Procedure Rules] do present an impediment to access to justice for unrepresented parties, the answer is to make very different new rules ... rather than to treat litigants in person as immune from their consequences ... His being a litigant in person with the particular consequences described above merely mitigates, at the margin, the gravity of non-compliant conduct which, had it been done by a legal representative, would have been more serious as an impediment to validation."

[36] The approach in *Barton* v *Wright Hassall* (*supra*) was followed in *AW* [2018] Fam LR 60, in which Lady Paton refused permission to appeal against a decree by default incurred by a party litigant who had already been granted certain indulgences in the appeal process. As Lady Paton said (at para 14):

> "... the fair balance achieved by the rules of court will inevitably be disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent".

[37] It may be that the Appeal Sheriff's reliance, such as it was, on a defective appendix was not entirely merited. Even if a party seeks to challenge findings-in-fact by attacking the credibility and reliability of a witness, he or she is not bound to reproduce the proof. It is just that he may fail if he has not done so. However, this failing was not a material factor in the Appeal Sheriff's decision.

[38] Before granting decree by default, the Appeal Sheriff also considered the merits of the appeal. Although, on a motion for default, the court should not delve too deeply into the merits, where an appeal is obviously devoid of merit, that is a strong factor in favour of granting decree. Failure to take such a factor into account would result in unnecessary expense on the part of not only the respondent but also the appellant; quite apart from the court time which the process may occupy.

[39] The defender's appeal to the Sheriff Appeal Court fell into the category of one with no real prospects of success. The grounds, as summarised by the Appeal Sheriff, included, first, a failure by the sheriff to decline jurisdiction (recuse himself) because he had already granted the earlier decree by default and had dismissed the counterclaim. There was no merit in this ground. These matters were unrelated to the issues, which the sheriff had to determine, after proof. The fact that a sheriff has previously made a decision adverse to a party on procedural or unrelated matters, is no basis, *per se*, for declining jurisdiction. The second ground was a failure to find the pursuer, rather than the defender, credible and reliable. This was a ground with little prospect of success; the assessment of witnesses being primarily a matter for the court at first instance (*SSE Generation* v *Hochtief Solutions* 2018 SLT 579, LP (Carloway) at paras [280-282]).

[40] The third ground advanced by the defender was that he had been entitled to stop work pending payment. The Appeal Sheriff rejected this because it was not in his Note of Appeal (form 6.2). That was an entirely correct approach. Once again, it is not for the court to ignore the rules, just because a party is proceeding without legal representation. Grounds of appeal have become an important part of appeal procedure. They give advance notice of the case to be met by the respondent and addressed by the court (*Eurocopy Rentals* v *Tayside Health Board* 1996 SC 410, LP (Hope), delivering the Opinion of the Court, at 413). A party

will not normally be allowed to advance an argument which is not contained in the grounds of appeal.

[41] The Procedural Judge took the view that, where a court recognises that a ground, which is not included in the written version, is stateable, it should encourage the party to amend the Note. This is not the function of the court as independent arbiter. The court should not take it upon itself the role of adviser to a party in relation to what grounds of appeal should be advanced. It should not become the party's law agent, just because he appears unrepresented. If it were otherwise, the court would fall foul of the principle that it should not act in a manner by which the fair minded and impartial observer would conclude that there was a real possibility of bias (*Helow* v *Advocate General* 2007 SC 303). Especially in a case which involves two small businesses, such a possibility is easily inferred where the court adopts the role of a party's advocate. In any event, standing the sheriff's finding on the date when the balance became payable, as defined by the contract, there was, and is, no merit in this ground. In these circumstances, the appeal must be refused.

[42] The court has taken some time to explore whether there is any merit in any of the other many grounds upon which the sheriff's decision is attacked. There is none. Most of them proceed upon a misunderstanding of the law in relation to the conduct of a proof or an appeal. This court's reflections mirror the remarks of the sheriff. Nothing turns on the allegation that parts of the pleadings had allegedly been removed. The sheriff has adjudicated on the main matters in dispute. There is no indication from his findings-in-fact or the relative note, that he was not conversant with the law of contract, including that relating to construction, although no specialities in that respect arose. The sheriff did not take into account the Abacus report because its maker was not called to give evidence. It may not even have been spoken to by the defender at the proof. The sheriff could have

rejected the testimony of Mr Wainwright as unreliable because of the absence of vouchers. He was not, however, bound to do so. He was, especially in the absence of any contrary evidence, entitled to accept Mr Wainwright's figures as accurate. The sheriff adequately reasoned and resolved the conflict regarding the £5,000. The alleged conflict of interest which the pursuer's agent may have had has no bearing on the outcome of the case. The fact that a witness's name or postcode was not correct is immaterial. The sheriff's finding that the contract was a fixed price one, notwithstanding the use of the word "estimate", is adequately explained. The content of the Notice to Admit had no ultimate relevance and the defender's failure to reproduce the proof in the form of a full transcription was not the principal reason for the Appeal Sheriff's decision.

[43] The fact that the court has answered the issues raised in the appeal in some detail, does not carry with it an assumption that this appeal, involving a relatively small sum, ought to have reached this court. As in *Bridging Loans* v *Hutton* (*supra*) the court is again concerned that permission to appeal to this court has been granted in a case which raises no point of principle or practice, far less an important one, and there was no compelling reason for this court to hear the appeal. The issue before the Appeal Sheriff was one involving the use of a discretion, which was reviewable only upon conventional grounds. No such grounds were presented. "Unfair judges decision" is neither a specific ground of appeal nor a proper basis for review.

Postscript

[44] In terms of the Courts Reform (Scotland) Act 2014, section 113(1), permission is required for an appeal from the Sheriff Appeal Court to this court. Before permission can be granted, the potential appellant must lodge a statement of the proposed grounds of appeal

(RCS 40.2(5)). There is no provision permitting the court to grant leave on restricted or specific grounds. The rules envisage that the actual (as distinct from the proposed) grounds are lodged after the permission stage (RCS 40.11.2(d)). Accordingly, the task for the Procedural Judge is simply to determine whether permission should be granted or not. If there is a ground which raises an important point of principle or practice or there is some other compelling reason for the court to hear the appeal, permission should be granted *simpliciter*. However, the Procedural Judge should specify, in the interlocutor or a separate Note of Reasons, which grounds are considered to meet the statutory test. That may be useful at least on the question of expenses, should a party seek to found on other grounds, which the court ultimately determines to be without merit.