



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 43
XA4/23

Lord President
Lord Pentland
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the appeal under section 113 of the Courts Reform (Scotland) Act 2014

in the cause

CABOT FINANCIAL (UK) LIMITED

Claimants and Appellants

against

RYAN BELL

Respondent

Claimants and Appellants: Davie KC; Nolans Solicitors
Respondent: No appearance

21 November 2023

Introduction

[1] This appeal concerns what is required to effect formal service by post in Simple Procedure prior to the grant of a decree in absence.

[2] The appellants raised a Simple Procedure Claim against the respondent. They sought payment of a credit card debt. The appellants commenced service of the Claim on the respondent at his home address. Service was by a next-day postal service which records delivery. The appellants lodged a Confirmation of Formal Service (Form 6C of the Simple Procedure Rules). The Post Office acknowledgement of receipt of the envelope containing the Claim was attached to it. This included a tracking number but a Royal Mail Track and Trace confirmation of delivery, which can be obtained when available from the Royal Mail website, was not lodged.

[3] The question is whether, in the absence of confirmation from Track and Trace, the appellants had validly served the action in terms of rule 18.2. At first instance, the summary sheriff held that what the appellants had lodged was not sufficient and that evidence of delivery to the respondent was required. He dismissed the action. The Sheriff Appeal Court upheld that decision.

Relevant statutory provisions

The Citation Amendment (Scotland) Act 1882

[4] Section 3 of the 1882 Act created what is now a long established presumption in civil cases generally that proof of postage constitutes legal service of a summons or other initiating writ unless the contrary is proved by the intended recipient. It reads as follows:

“Citation may be by registered letter

In any civil action or proceeding in any court ... any summons ... of a person ... or judicial intimation, may be executed in Scotland...by an enrolled law agent, by sending to the known residence ... of the person ... a registered letter by post containing the copy of the summons ... or other document ... to be served ... and such posting shall constitute a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence ...”.

Recorded delivery is an alternative to registered post (Recorded Delivery Service Act 1962, s 1).

The Interpretation and Legislative Reform (Scotland) Act 2010

[5] The 2010 Act creates a presumption that a document which is posted has been received 48 hours after it was sent, unless the contrary is proved, as follows:

“26 Service of documents

(1) This section applies where an Act of the Scottish Parliament or a Scottish instrument authorises or requires a document to be served on a person ...

(2) The document may be served on the person—

...

(b) by being sent to the proper address of the person—

(i) by a registered post service ... or

(ii) by a postal service which provides for the delivery of the document to be recorded ...

...

(5) Where a document is served ... on an address in the United Kingdom it is to be taken to have been received 48 hours after it is sent unless the contrary is shown.”

The Simple Procedure Rules

[6] The version of rule 18.2 which applies in this case is that which is applicable to actions raised prior to 31 May 2023 (Act of Sederunt (Simple Procedure) 2016 (2016/200) as amended). It reads:

“18.2 How can you formally serve a document on someone who lives in Scotland?

(1) When these Rules require a document to be formally served, the first attempt must be by a next-day postal service which records delivery.

...

(3) The envelope which contains the document must have the following label written or printed on it: **THIS ENVELOPE CONTAINS A [NAME OF DOCUMENT] FROM [NAME OF SHERIFF COURT] IF DELIVERY CANNOT BE**

MADE, THE LETTER MUST BE RETURNED (*sic*) TO THE SHERIFF CLERK AT [FULL ADDRESS OF SHERIFF COURT]

(4) After formally serving a document, a Confirmation of Formal Service must be completed and any evidence of delivery attached to it.

(5) Where a solicitor ... has formally served the document, then the Confirmation of Formal Service must be sent to the sheriff court within one week of service taking place.”

[7] Following a conflict of sheriff court decisions (*infra*), rule 18.2 was amended by

paragraph 2(2)(cc)(v) of the Act of Sederunt (Simple Procedure Amendment)

(Miscellaneous) 2022. The amended version applies to cases raised after 31 May 2023. In

contrast to the version applicable to this case, the new version reads:

“(4) After formally serving a document, a Confirmation of Formal Service must be completed and any evidence of sending or, in the case of email, proof of receipt attached to it (for example, a postal receipt or a copy of an email acknowledgement).”

This was an attempt to make it clear that what required to be lodged with the Confirmation

Form 6C was any evidence of sending, such as a receipt from the Post Office, not evidence of delivery to the respondent.

Facts

[8] The appellants’ law agent completed a Simple Procedure Claim Form for Falkirk Sheriff Court. This sought repayment of a debt of £4,105.42 relative to the respondent’s credit card agreement. The appellants are assignees of the credit card company. The form specified the respondent’s address for service. This was in Camelon, Falkirk; which was only about half a mile away from the court. The form was placed in the appropriate envelope in terms of rule 18.2 with the label requiring any undelivered envelope to be returned to the sheriff court.

[9] On 23 July 2021, agents tendered the envelope to Kirkintilloch Post Office for processing by the Royal Mail's "Recorded Signed For" service (ie recorded delivery). The envelope was given a tracking reference. A record of this procedure (ie a Post Office receipt) was given to the agent, duly stamped by the Post Office and dated "23 JL 21". A sticker with the tracking reference was attached to it. The agent then completed Form 6C. This is headed "The Simple Procedure Confirmation of Formal Service". It commences: "This is a Confirmation of Formal Service. It is used to inform the court when and how something has been formally served". The agent completed the subsections headed "C1 Who did you formally serve something on?"; "C2 What did you formally serve?"; and "C3 How did you formally serve it?" The latter section has a tick box menu on which the agent selected "By a next-day postal service which records delivery". Subsection C4 "When did you formally serve it?" was dated 23 July 2021. The form was duly signed by the agent. It was then lodged with the court within the required period.

[10] The Simple Procedure Timetable provided that the last date on which the respondent could answer the Claim was 6 September 2021. No response was lodged. On 9 September the respondent applied for decree ordering payment of the debt (see rule 7.4(2)). On 26 November the summary sheriff ordered parties to attend a hearing on 25 January 2022 (*ibid* rule 7.4(3)). It does not appear that any steps were taken to intimate this to the respondent who, as already noted, lived a short distance away. Having made *avizandum*, on 8 March the summary sheriff issued a written judgment (*infra*). On 8 April he dismissed the Claim. On 25 April, an application for recall of the dismissal was lodged. This was granted on 17 May when the summary sheriff *ex proprio motu* dismissed the Claim again.

The decisions of the summary sheriff and the Sheriff Appeal Court

[11] The summary sheriff set out (2022 SLT (Sh Ct) 154) the terms of the legislation and rules of court at some length. He analysed *Cabot Financial UK v Finnegan* 2021 SLT (Sh Ct) 237 and *Cabot Financial (UK) v Donnelly* 2022 SLT (Sh Ct) 147, which broadly supported the appellants' position, before discussing whether the material produced by the appellants, *viz.* Form 6C and the Post Office receipt were sufficient to prove service and thus to warrant decree. In carrying out this exercise, some time was spent analysing the efficiency of the Royal Mail's Track and Trace system whereby a sender can ascertain the status of an envelope on-line. The summary sheriff recognised the longstanding presumption of postal deliveries (para [36]), but added that they "are not what they once were". The presumption was pragmatic in that, before Track and Trace, there was no speedy way to prove delivery. The presumption had become weaker over time as postal services declined (para [45]). It was regularly rebutted. The sheriff appears to have taken account of certain anecdotal instances of failed, but reportedly successful, citations. He did not accept that the recall procedure (rule 13.6) provided a respondent with protection in the event of an error.

[12] The crux of the summary sheriff's decision (para [45]) was that the words "any evidence" in rule 18.2(4) included any evidence which was easily obtainable. A claimant did not have a discretion on whether to obtain evidence which was easily accessible. Proof of delivery from the Track and Trace website was easily obtainable and ought to have been lodged. This would not hamper the business of the court. The presumption in section 3 of the 1882 Act had been modified by the provision, that evidence of delivery had to be lodged, in rule 18.2(4) (Courts Reform (Scotland) Act 2014, s 104). Whatever presumptions existed, a sheriff was entitled to be satisfied regarding service and ought not to grant a decree if

concerned (*Wallace v Keltbray Plant* 2006 SLT 428). A sheriff should not act as a rubber stamp.

[13] The Sheriff Appeal Court agreed. The appellants' agent had certified that service had been effected by a next-day postal service which records delivery. Where service was effected in this way, that record of delivery was evidence of delivery. It had to be attached to Form 6C. The appellants had not provided that evidence, contrary to the requirements of rules 18.2(4) and (5). A claimant could not circumvent the requirements of the rules by electing not to obtain the evidence of delivery. The presumption in section 26(5) of the 2010 Act was not engaged in the absence of any evidence of delivery. The contrary conclusions which had been reached by the sheriffs in *Cabot Financial UK v Finnegan* and *Cabot Financial (UK) v Donnelly* were erroneous.

The appellants' submissions

[14] The appellants reported that, even after the change in rule 18.2, some sheriff courts would not grant decree in absence unless proof of service under the Track and Trace system was lodged. An instance of this occurring, even after a time to pay application had been lodged by the respondent, was mentioned. Internal guidance, which had followed the decision of the Sheriff Appeal Court, was still being applied in one sheriff court despite the amendment to the rule.

[15] The Sheriff Appeal Court erred in interpreting the Simple Procedure Rules as requiring a record of delivery to be lodged in order to prove service. That interpretation was not consistent with the wording in rule 18.2(4), which specifically related to what was to be done *after* formal service had been effected; not what was required before service. The use of the word "any" was critical; evidence required to be lodged but only if it was

available. The SAC ignored the effect of the presumption in section 26(5) of the 2010 Act. Rule 18.2 required to be read as though section 26 had been written into it. The presumption arose as a result of the claimants having sent the Claim Form to the address of the respondent by recorded delivery post. The burden was then on the respondent to demonstrate that the Form had not been delivered. The Simple Procedure Rules did not suggest, expressly or impliedly, that section 26 did not apply, or that the presumption was displaced. Evidence of delivery would often not be available until after the last day for lodging Form 6C. Service, by means other than recorded delivery post, might provide evidence sooner, but, in Simple Procedure, these methods could not be attempted until after postal service had been attempted. The SAC's decision increased the complexity and cost of Simple Procedure and undermined its efficiency and fundamental principles.

Decision

[16] The presumptions that registered or recorded delivery post constitutes valid service, and that a letter which has been posted was received 48 hours later, as set out in section 3 of the Citation Amendment (Scotland) Act 1882 and section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010, are not contradicted by paragraph 18.2 of the Simple Procedure Rules. On the contrary, rule 18.2(1) requires a party to attempt service of the Claim Form in the first instance by means of an appropriate postal service. If service fails, the envelope containing the Form will be returned by the Royal Mail to the sheriff court (rule 18.2(3)). In due course, if service has failed, the court, and not the server, will thereby become aware of it. Whatever its deficiencies in the modern era, and whether or not a server can ascertain the state of service by visiting the Royal Mail's Track and Trace website, that is the system embodied in the law. If it is to be changed, for example by including a reference

to a tracking system, that can only be achieved by an amendment to the Rules and possibly primary legislation. That would involve the normal process for amendment through the Scottish Civil Justice Council with appropriate research into the current postal service and consultation.

[17] Rule 18.2(4) requires that, after formally serving the Claim Form, by giving the envelope containing it to the Royal Mail, a party must provide any available evidence that he has done so. In the present case, the appellants' law agent certified, by completing the prescribed Form 6C, that he had formally served the Claim Form. He produced the appropriate paperwork from Royal Mail, namely the Post Office receipt, dated and stamped 23 July 2021. He produced what evidence of delivery was available to him and thereby complied with rule 18.2(4). Decree for payment ought to have followed in the absence of any information that service had failed. There was none. If it had been brought to the appellants' attention that service had failed, other considerations, notably of an ethical type, might arise, but there is no suggestion of that in this case.

[18] The court approves *Cabot Financial UK v Finnegan* 2021 SLT (Sh Ct) 237 (Sheriff Martin-Brown at para [14]) whereby:

“...completion of the form 6C, together with proof of recorded delivery posting, creates a rebuttable presumption that formal service has been effected, without the need for a delivery receipt. That presumption can be rebutted by the return of the document to the sheriff clerk. In the event that a party is in possession of a delivery receipt, then that ought to be lodged in process as evidence of delivery. However, the absence of a delivery receipt is not fatal, provided a completed form 6C has been lodged together with proof of recorded delivery posting.”

Cabot Financial (UK) v Donnelly 2022 SLT (Sh Ct) 147 (Sheriff Kinloch at para [32]) is to the same effect and follows *Finnegan*.

[19] Simple Procedure is supposed to be simple and not difficult. Completion of formal service does not depend upon evidence from a third party. There is a deadline for lodging

the Form 6C, of one week after service has been effected, which requires to be met (rule 18.2(5)). Unless the party has information that service has failed, he does not require to search for it. He does not need to provide evidence of anything more than that he has served the Claim by posting it. In line with the long-established presumption, proof of sending is proof of delivery.

[20] The appeal is allowed. The interlocutor of the Sheriff Appeal Court dated 24 October 2022 and those of the summary sheriff dated 8 and 25 March, 8 April and 17 May 2022 will be recalled. The court will find that the lodging by the appellants' agent of Form 6C, together with the Post Office proof of postage receipt, constituted service in terms of rule 18.2(4). The cause will be remitted to the sheriff to proceed as accords. It is regrettable that complexity has been introduced into a system which is designed to assist parties, including those seeking the recovery of debt, and where the principle enshrined in rule 18.2(4) has a long established and well-known provenance.