[2016] SAC (Civ) 6
XO76/16

Sheriff Principal C A L Scott QC
Sheriff Principal M Lewis
Sheriff Peter J Braid

OPINION OF THE COURT

delivered by the Vice President, SHERIFF PRINCIPAL C.A.L. SCOTT QC

in the appeal by the defender

in the cause

SC

Pursuer & Respondent

Against

TC

Defender & Appellant

Appellant: Cartwright, Advocate.
Respondent: Speir, Advocate.

18 August 2016

Introduction

[1] This appeal arises from the sheriff's decision to repel the defender's first plea-in-law challenging the jurisdiction of the court.

[2] The parties are husband and wife. They have three children. In March 2014, the defender left the pursuer taking the two youngest children with her. For some time,

thereafter, the whereabouts of the defender and the two children were unknown to the pursuer.

[3] It is beyond dispute that an initial writ was presented to the court on behalf of the pursuer on 19 December 2014. The writ was accepted and processed by the court. A case reference number was allocated to the action. A number of interlocutors were pronounced over a 9 month period.

[4] It should be noted that the court pronounced two interlocutors each dated 19 December 2014. One of them, headed up "FORM OF WARRANT OF CITATION IN FAMILY ACTION" was duly signed by the presiding sheriff and, *inter alia*, contains warrant to cite the defender. However, the foregoing interlocutor bears the following words superimposed in handwritten capitals immediately prior to the heading:

"THIS HAS BEEN REPLACED – SEE NEW INTERLOCUTOR".

[5] The "replaced" interlocutor will be the subject of further discussion. However, for present purposes and, indeed, for the purposes of the hearings before the sheriff, matters proceeded upon the other interlocutor dated 19 December 2014. That interlocutor was signed by the same sheriff. It contained an order under section 33 of the Family Law Act 1986. It did not contain any warrant to cite the defender.

[6] It appears that efforts to trace the defender and the children ultimately bore fruit and on 11 September 2015, the court pronounced an interlocutor, *inter alia*, granting warrant to cite.

[7] In order to found jurisdiction in the present case, (in relation to orders regulated by part I of the Family Law Act 1986) the pursuer required to rely upon the habitual residence provisions within sections 9 and 41 of the 1986 Act. Particularly with regard to

section 41(1)(b), the pursuer required to make application to the court within one year of the date upon which the children were removed from the jurisdiction by the defender.

[8] Whilst the general focus of the proceedings at first instance and on appeal related to what constituted the making of an application, before the sheriff it appears that the defender's primary contention was that the date of application equated to the date of service. The "fall-back position" was that when the action was warranted it was incompetent and as such could not constitute an application. (See para 11 in sheriff's note dated 26 February 2016 hereinafter referred to as "the first note".)

[9] On appeal, the order of priority given to the arguments appeared to be reversed with counsel for the defender opening her submissions with an attack upon the "competency" of the initial writ lodged on 19 December 2014 and associated criticism of the writ not being in proper form. Counsel's ancillary argument focused upon the absence of any warrant to cite until 11 September 2015 and what she contended amounted to a "service requirement" imported by article 16 of Council Regulation (EC) No 2201/2003.

Submissions for defender and appellant

[10] Counsel for the defender maintained that an "application" in proceedings involving craves for residence and contact required to take the form of an initial writ. The writ, as framed, had to comply with certain procedural requirements. Counsel referred to the case of *Doughton* v *Doughton* 1958 SLT (Notes) 34 and to OCR 3.1. concerning the form of an initial writ as regards the manner in which a party must be designed in the instance.

[11] Counsel also made reference to OCR 5.6. (concerning service where the address of a person is not known) and to OCR 33.7.(5) (concerning the situation where the address of a

person mentioned within the provisions of that rule "…is not known and cannot reasonably be ascertained…"

[12] The court was reminded by counsel for the defender that the sheriff had reached the conclusion (at para 29 in the first note) that the date of the application was when the action had been entered in the court system, the fee taken and a warrant granted, all of which, in normal circumstances, should have occurred on the same date. The sheriff had found support for that view in the case of *Tor Corporate AS* v *Sinopec Group Star Petroleum Corporation Ltd* 2008 SC 303. As we understood her submission, counsel sought to distinguish the case of *Tor* on the basis that there had been no suggestion in that case that the petition for judicial review was not in proper form. Counsel's contention appeared to be that had the petition in *Tor not* been in proper form the application would not have been treated as having been made.

[13] In adhering to her written note of argument, counsel maintained that, as at December 2014, the initial writ was not in proper form. It was an incompetent writ and, as such, could never have equated to an application to the court.

[14] In the writ, the defender had been designed in the instance as "whereabouts unknown". Counsel criticised the pursuer's reliance upon OCR 3.1.(6). She argued that it was not open to the pursuer, on the one hand, (a) to aver that the defender's whereabouts were unknown and could not be reasonably ascertained and, on the other hand, (b) to make averments from which it might be inferred that, *via* the social work department, the defender's whereabouts *could* be reasonably ascertained. That, contended counsel for the defender, was a wholly illegitimate approach which undermined the competency of the writ.

[15] It was also argued that the pursuer's failure to seek a warrant for service on the defender, following the lodging of the writ in December 2014, all in terms of OCR 5.6. and 33.7., meant that the writ could not be regarded as being in proper form.

[16] At para 34 in his first note, the sheriff's own "fall-back" position involved him being satisfied that the granting of the section 33 motion equated to a warrant to arrest. Counsel for the defender claimed that the sheriff's approach was flawed. She submitted that such an order could only be made in "proceedings"; that "proceedings" could not exist until an action had "commenced"; and that the "date" of an application did not equate to the commencement of proceedings. (See *Macphail*, 3rd Edn paras 6.01 and 6.06).

[17] Counsel for the defender also criticised the sheriff's reasoning (within the first note) as being contradictory. There was "internal inconsistency". Reference was made to para 2.1.iii within the defender's note of argument.

[18] The ancillary argument to which we refer at para [9] *supra* concerned the application and effect of article 16 of the 2003 Council Regulation. Counsel's position before this court appeared to be to the effect that article 16 *had* application but that the extent of its applicability was not entirely clear. At all odds, on the hypothesis that the terms of article 16 *did* have a bearing on the case, it was counsel's submission that those terms "…clearly imported a service requirement". *Prima facie* there had been a duty on the pursuer to proceed to serve the writ on the defender in some way. That duty had not been complied with. "Seising" under article 16 could not have been achieved in this case until the warrant for citation dated 11 September 2015 had been issued. Once again, the improper form of the writ had, until then, precluded the issue of such a warrant.

Submissions for pursuer and respondent

[19] At the outset, counsel for the pursuer acknowledged that the defender's arguments had, in effect, been realigned. As such, he immediately sought to confront the criticism directed towards the *quality* of the "application" made to the court. He commended the sheriff's attempt, as counsel put it, "…to temper principle with a pragmatic approach".

[20] Counsel for the pursuer maintained that OCR 3.1.(6) did not preclude a writ being framed and being accepted by the court as *prima facie* competent in form, on the basis of the defender's whereabouts being unknown, all combined with an order being made under section 33 of the 1986 Act. It was counsel's basic submission that such a writ, as in the present case, nevertheless constituted "an application".

[21] Counsel for the pursuer submitted that, in any event, the issue of whether the writ had been competently presented to the court (in December 2014) could be tested by reference to what had followed thereafter. He argued that the making of a section 33 order meant that proceedings had come into existence. An application to the court was made at the point when the writ was accepted into the court system. If the defender's argument were correct, there could have been *no* procedure following the lodging of the writ.

[22] Counsel challenged the argument that the pursuer ought not to have been entitled to a warrant under OCR 5.6. He stressed that the case of *Doughton* had not been approved in the case of *McLean* v *McDonald* 1997 GWD 25-1236 (as counsel for the pursuer had submitted). Had it been intended that making application to the court also embraced service of the documentation founding such an application then the legislation would have made that explicit.

[23] With regard to para 2.1.ii in the defender's note of argument, counsel for the pursuer submitted that the proposition advanced, viz. that the court was required to grant a warrant

for citation immediately following the grant of the first order under section 33 of the 1986 Act was not, in fact, supported by the authors of *Macphail* at paragraphs 6.06 and 11.23. Para 2.1.iii, counsel maintained, misconstrued what the sheriff had intended to convey. The sheriff's remarks had been made in the context of a section 33 order being deemed equivalent to a warrant.

[24] In relation to the article 16 argument, counsel for the pursuer contended that even allowing for application of the article, it did not affect the analysis as to whether there had been an application to the court as at December 2014. The terms of article 6 might be regarded as a "further check" as to whether application to the court had been made. It was, however, plain from those terms that the seising of a court takes place *before* service. Therefore, proceedings can and do exist prior to service of the initiating documentation.

Discussion

[25] In the course of her submissions to the court, counsel for the defender accepted that the defender's argument was a narrow one. Moreover, she conceded that, at the time when the initial writ was presented to the court on 19 December 2014, as far as the pursuer was concerned, the defender's whereabouts were unknown *and* her whereabouts could not be reasonably ascertained by the pursuer. That concession, to our mind, places the defender's "lack of proper form" argument in serious jeopardy.

[26] In substance, therefore, as at 19 December 2014, the pursuer *did* comply with what the defender's counsel contends (within her note of argument) to be "an essential requirement of the right to design a defender as 'whereabouts unknown'". In any event, as we read the articles of condescendence in the initial writ, the pursuer's averments can readily be construed as meeting the terms of OCR 3.1.(6). The defender was designed in the

instance as being "whereabouts unknown" and the pursuer, in effect, averred in the condescendence the sort of steps taken to ascertain the defender's whereabouts at that time. For instance, the pursuer had reported the defender missing to the police. He also contacted the social work department regarding the children's whereabouts. (Article 3 refers).

[27] Therefore, in so far as the defender argues that the initial writ was not in proper form (with particular reference to para 2.1.i in the note of argument) we disagree with that proposition.

[28] The writ was in proper form when presented to the court. The *form* of the writ was an entirely separate matter from the issue of *service*. Where the writ was in proper form (and was accepted by the sheriff clerk as being so), to our mind, it certainly cannot be said that the failure by the pursuer to procure a warrant for service (under OCR 5.6 and 33.7) thereby precluded the making of an application to the court. In our opinion, that proposition is fallacious.

[29] Of course, as already alluded to, it is arguable that warrant to cite the defender *was* granted by way of "the replaced interlocutor" also dated 19 December 2014. That signed interlocutor bore to form part of the process before us. There was no explanation as to the precise circumstances in which that interlocutor was purportedly departed from. "Correction" of interlocutors is permissible in limited, prescribed circumstances. (See *Macphail*, 3rd Edn paras 5.87 – 5.90). Whilst the existence of the replaced interlocutor is not determinative of this appeal, we would observe that sheriffs and sheriff clerks must always take care over the purported replacement of any interlocutor deemed, for whatever reasons, to be erroneous in its terms.

[30] Looking to the question of whether the requirements of section 9 of the 1986 Act have been met in its wider context, we adopt the sheriff's observation regarding the

statutory wording. The jurisdiction of the sheriff is determined solely by the date of "the application", nothing more, nothing less. In this context, we take "application" to mean a formal request to an authority, viz. the court.

[31] The vehicle for such a request is, indeed, an initial writ. However, in our view, in applying the terms of section 9, the court ought to be concerned with substance over form. The key feature will always be whether, on a fair reading of the document presented as an initial writ, a request or application for a part I order can be discerned therein. If it can, then the requirements of section 9 will be satisfied. The court ought not to subject the form of writs to undue scrutiny where a colourable application for a part I order is plainly before it.

[32] Of course, from a procedural standpoint, it is to be noted that the defender's plea of "no jurisdiction" is actually founded upon an argument which rests with the proposition that the proceedings *ab initio* were *incompetent* owing to the initial writ being in improper form. However, nowhere within the defender's pleadings do we find any preliminary plea to the competency of the action such as would properly serve to support the making of such an argument. Whilst the lodging of an appeal against the sheriff's interlocutors of 26 February and 5 April, both 2016, in turn, exposes the court's earlier interlocutors to review, no discrete argument has been advanced to support the contention that *per se* the court's interlocutors from 19 December 2014 onwards were anything other than competently pronounced.

[33] We also note that much of counsel for the defender's submissions appeared to conflate "commencement" of proceedings with the section 9 requirement, viz. the making of an application to the court. In our view, the sheriff was correct when he stated that "…commencement is a quite different concept from date of the application". (See para 31 in the first note). In any event, as was pointed out in the course of the appeal hearing,

counsel's reliance upon, particularly, para 6.06 in *Macphail* was, in our estimation, ill-conceived. It is plain from the second sentence within the passage concerned that the authors have merely identified the "principal qualifications" of the general rule regarding service marking the commencement of an action. We do not consider those to be the *only* qualifications. We reiterate that no service requirement has been or ought to be imported into the wording of section 9.

[34] In that connection, we do not consider that the defender's article 16 argument assists her cause. The construction favoured by counsel for the defender is demonstrably incorrect. Article 16 does not embrace the proposition that "…a court cannot be seised until service is *possible*." (See note of argument for the defender at para 2.2.). It merely qualifies the statement that:

> "A court shall be deemed to be seised:
>
> (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court,…"

…with the proviso that the applicant must not have "…subsequently failed to take the steps he was required to take to have service effected on the respondent."

[35] In the present case, it simply cannot be suggested that the pursuer has, at any stage, fallen foul of that proviso. The only service requirement ordered by the court arose by way of the interlocutor dated 11 September 2015. Service on the defender appears to have been effected and a notice of intention to defend was lodged. The defender was represented at the next calling of the case on 9 October 2015. At all odds, the pursuer's inability to serve the writ on the defender at any time prior to September 2015 did not impact upon his compliance with section 9 of the 1986 Act even where the terms of article 16 1.(a) are taken into account.

[36] For the rest, we do not hold to the view that there is any force within the argument presented at para 2.1.iii in the defender's note of argument. It might be said that the sheriff could have framed the relevant part of the first note in a manner designed to avoid the appearance of contradiction. However, looking to the whole circumstances, it is clear what the sheriff intended to convey, viz. that the date of the application is the date when the writ is accepted and processed by the court. All else being equal, the three features mentioned by the sheriff (the action being entered in the court system, a fee being taken and a warrant being granted) will all coincide but not necessarily.

[37] With regard to paragraph 35 in the first note, it is plain that the sheriff makes reference to the action being "warranted" in the sense that the action had been afforded the requisite authorisation or sanction from the court as evidenced by the interlocutor of 19 December 2014. The criticism of the sheriff in this connection is entirely without foundation.

Summary

[38] In our opinion, therefore, the sheriff was correct to repel the defender's plea of no jurisdiction. The initial writ lodged at Jedburgh Sheriff Court on 19 December 2014 constituted an application to the court for the purposes of section 9 of the Family Law Act 1986. Such application having been made at a time when the children of the parties' marriage were still deemed to be habitually resident within the sheriffdom (ie within the period of one year beginning on 6 March 2014; see section 41 of the 1986 Act) the court at Jedburgh had jurisdiction. The appeal is without merit and falls to be refused.

[39] It follows that we shall adhere to the sheriff's interlocutors. It is to be hoped that, in terms of further procedure, an early date can now be identified for the purposes of the child welfare hearing anticipated by the sheriff over 4½ months ago.

[40] When it comes to the expenses of the appeal, we were informed that both parties are legally aided. Therefore, given the outcome of the appeal, we shall find the defender liable to the pursuer as an assisted person.