SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

[2024] SC ABE 7

ABE-F417-21

JUDGMENT OF SHERIFF PHILIP MANN

in the cause

M

Pursuer/Minuter

against

E

Defender/Respondent

Pursuer/Minuter: Ritchie; DJP Solicitors
Defender/Respondent: Not represented

ABERDEEN, 6 February 2024

The sheriff, having resumed consideration of the cause in respect of the minute number 13 of process as adjusted and answers thereto number 14 of process as adjusted, Finds the defender/respondent in contempt of court by failing to obtemper the interlocutor of this court dated 23 August 2002, that is by failing to make the child H available for contact with the pursuer/minuter between the date of the interlocutor and 24 October 2023 and in particular on 25 August 2022, 29 August 2022, 22 September 2022, 26 September 2022, 29 September 2022, 3 October 2022, 6 October 2022, 10 October 2022, 31 October 2022, 3 November 2022, 15 December 2022, 19 December 2022, 22 December 2022, 26 December 2022, 29 December 2022, 5 January 2023 and 2 February 2023;

Continues the cause to a hearing on 8 March 2024 at 10:00am, in person, within the Sheriff Court at Aberdeen, Civil Centre, Queen Street, Aberdeen, AB10 1AQ for parties to appear

and address the court and, in particular, for the defender/respondent to have the opportunity to address the court in mitigation before the court proceeds to sentence;

Ordains the defender/respondent to appear in person at said hearing, giving notice that if she fails to appear a warrant for her apprehension will be issued; pointing out to the defender/respondent that between now and the said hearing she has an opportunity to mitigate the penalty (that is, to make the penalty less severe) by complying with the court's interlocutor of 23 August 2022 and making arrangements with the pursuer/minuter for there to be contact between him and the child;

Continues the question of expenses to said hearing;

Ordains the pursuer/minuter to intimate this interlocutor to the defender/respondent forthwith personally by sheriff officer.

Sheriff Philip Mann

Note

Preliminary

[1] In this note I will refer to the pursuer/minuter as M and to the defender/respondent as E.

[2] This is a process by way of minute and answers in which M is seeking a finding of contempt of court by E for failing to obtemper an order of the court which is contained within the court's interlocutor dated 23 August 2022 and pronounced in the underlying action between the parties in which M seeks an order for contact with the child of the parties relationship, H. The interlocutor is in the following terms:

> "The sheriff, having heard parties' procurators, *ad interim* Makes an order whereby the pursuer shall exercise contact with the child, H, each Monday and Thursday from 1pm until 4pm, commencing 25 August 2022; thereafter,

> Continues the child welfare hearing until 25 October 2022 at 10.00am, to monitor contact."

The peremptory diet of 24 January 2024

[3] On 24 January 2024 this case called as a peremptory diet which had been fixed to enable E to advise the court whether or not she intended to "continue with her action". I am satisfied that E will have understood that what the court was seeking was her confirmation as to whether or not she intended to continue with her defence to M's minute for contempt of court. E failed to attend that hearing. In advance of the hearing she copied the court into an email sent by her to M's agent in which she said:

> "I have been in contact with [M] he had told me he's dropping the court case, I am not well I won't be attending. I have a sick line to be handed in, your client has said enough bad about you I have the proof."

E did not hand in any sick note, nor has she yet done so.

[4] Mr Ritchie, solicitor, who appeared for M at that hearing, advised me that M had no intention of dropping the case and that he continued to seek a finding of contempt of court against E. He urged me to discharge the proof on the minute and answers which was fixed for 26 January 2024 and to make a finding of contempt forthwith.

[5] I declined to make a finding of contempt of court there and then. Instead, I resolved that E should be taken not to be intent on continuing her defence to the minute, even though she referred to being unwell and having a sick line. I regarded E's email as a disingenuous attempt to cause further delay in the proceedings. In coming to that conclusion I had regard to the procedural history of the case which I set out hereafter, of necessity at some length. I discharged the proof diet and held E to be confessed, by which I intended to convey that E had forfeited her right to resist the crave of the minute by cross examining M and by leading evidence to prove her own averments in answer. I then made avizandum on the question

whether E should be found to be in contempt of court. I did this in order that I might have the opportunity to carefully consider the whole matter before deciding whether or not to make such a finding.

The procedural history

[6] M's minute seeking a finding of contempt was lodged on 22 September 2022. By interlocutor of 30 September 2022 E was ordained to lodge answers and a hearing on the minute and answers was assigned for 3 November 2022. On 12 October 2022 E's then solicitor resigned from acting. A peremptory diet was assigned for 25 October 2022.

[7] On 25 October 2022 E appeared personally and was ordained to appear on 4 November 2022 to answer the charge of contempt of court and to explain her failure to obtemper the court's interlocutor of 23 August 2022. The hearing on the minute and answers fixed for 3 November 2022 was later discharged and continued to the same date, namely 4 November 2022. On 4 November 2022 E advised the court that she was seeking new legal representation. She was ordained to lodge answers within 4 weeks and the matter was continued until 13 December 2022. The sheriff continued the contact order of 23 August 2022 subject to a change in handover arrangements.

[8] On 13 December 2022 E did not appear. The sheriff fixed 7 March 2023 as a diet of proof on the minute with a pre-proof hearing on 9 February 2023. He varied the contact order of 23 August 2022 so as to prescribe alternative handover arrangements.

[9] On 9 February 2023 I was presiding. E was again absent. On M's motion I continued the matter to the proof diet of 7 March 2023. On 2 March 2023 I pronounced an interlocutor discharging the proof fixed for 7 March 2023. This was on M's unopposed written motion number 7/1 of process on an *esto* basis, alternative to allowing the proof to be conducted via

the webex platform, as he was unable to attend the proof in person. I expressed concern in that interlocutor that the proceedings on the minute should not be conducted in the absence of E, having regard to the penalties which could be imposed in the event of a finding of contempt of court against her. I fixed 7 March 2023 as a diet for E to appear personally to reassure the court that she would attend in person at the proof diet to be fixed. I gave notice that if she failed to appear a warrant for her apprehension would be granted. This hearing was subsequently reassigned to take place on 21 March 2023 to allow for intimation to be made to E. E was, of new, given notice about a warrant for apprehension.

[10] On 21 March 2023 E failed to attend. I granted a warrant for her apprehension to be brought before the court on 19 April 2023. On 19 April 2023 E appeared and denied being in contempt of court. She was ordained to lodge answers and to appear in person on 18 May 2023 which was fixed as a hearing on the minute and answers. My notes for the hearing on 19 April 2023 record that I had had to have a word with E on account of her attitude towards the court which I noted as being "bordering on contemptuous", leaving me with the distinct impression that she had no intention of complying with the contact order of 23 August 2022 at that time. I advised E that it would be to her advantage if she were represented in the proceedings.

[11] On 18 May 2023 E was represented and thereafter, answers having been lodged on 20 June 2023, the court expressed an interlocutor on 29 June 2023 fixing a proof on 27 October 2023 with a pre-proof hearing on 21 September 2023. By interlocutor of 21 September 2023 the pre-proof hearing was reassigned to 19 October 2023. In that interlocutor it was ordained that examination in chief be based on affidavits and parties were ordained to lodge those affidavits by 17 October 2023. On 19 October 2023 the cause was continued to the proof on 27 October 2023, E's opposed motion to discharge the proof,

apparently made on the basis that she had been unable to engage with her agent due to having suffered a personal tragedy, having been refused.

[12] Thereafter, E's agent withdrew from acting citing that he was unprepared for the proof due to E's inability to engage with him. The consequence was that the proof fixed for 27 October 2023 was discharged and reassigned to 1 December 2023, being a date which it was thought could accommodate E's agent, he having made it known that he could continue to represent E if a suitable date could be found. As it transpired, that date was not suitable for E's agent and following some further procedure the proof diet of 26 January 2023 was eventually fixed.

[13] On 18 January, E's agent then resigned again, citing that E had failed to cooperate with him in regard to the preparation of affidavits which parties had been ordained to lodge by the interlocutor dated 21 September 2023 (albeit no further order had been made following failure by E to lodge affidavits by 17 October 2023; as regards M his unsigned affidavit was lodged on 17 October 2023 - unsigned due to his being offshore at the time - and his signed affidavit was lodged on 24 October 2023 following his being back onshore). There was also a suggestion that E was claiming that correspondence which the agent knew to have been received by E had not been received. The peremptory diet of 24 January 2024 was then fixed.

[14] Throughout this, regrettably lengthy, procedure M was expressing to the court that E was continuing in her failure to obtemper the contact order made on 23 August 2022.

Whether E is in contempt of court

[15] Turning now to the question whether or not E is in contempt of court for failing to obtemper the contact order of 23 August 2022 I observe that failure to obey an order of court

is not automatically contempt. The court requires to look at all the facts and circumstances. As explained by Lord Malcolm at para [29] in the case of *AB, CD* v *AT* 2015 SC 545, there must be a deliberate lack of respect for or defiance of the authority of the court.

[16] I must apply the criminal standard of proof beyond reasonable doubt. This is confirmed at para [43] in the case of *CM* v *SM* [2017] SC 235, which also confirms that the alleged contemnor (E, in this case) is not a compellable witness.

[17] The test that I have to apply is set out in in para [44] in *CM* v *SM* as follows:

> ".. all that needs to be proved in such a case is that the court made an order for contact, that contact did not take place in accordance with that order and … that the failure resulted from wilful disobedience."

[18] The starting point in this case is M's sworn affidavit dated 24 October 2023 which sets out a history of E's complete disregard for the contact order. I see no reason not to accept this affidavit as being a source of credible and reliable evidence. The affidavit was lodged in support of M's averments on record, including the averment at Article 6 of condescendence that "The respondent continues to wilfully fail to obtemper the order of this court". M refers to productions consisting of date and time stamped photographs showing no-one present at the designated pick-up point on various dates at the allotted times.

[19] E has eschewed the opportunity to participate in the proceedings to enable her to cross examine M or to present evidence in support of her own averments on record. I have noted, however, that whilst E acknowledges on record that contact has not taken place in accordance with the interlocutor of 23 August 2022, she offers no explanation other than unproven averments that on two occasions H refused to have contact and that on other occasions M did not turn up for contact. I have also noted that E admits an averment that she sent an email to M's agent which said "tell your client he isn't seeing my daughter". Notable by absence is any averment that contact is not conducive to H's welfare. I can also

tell from the court's integrated case management system that E has never lodged a minute seeking to vary the contact to nil.

[20] Having regard to the foregoing I am satisfied beyond reasonable doubt that E has failed to comply with the contact order of 23 August 2022 without reasonable excuse. I am satisfied that that failure is wilful and, further, that it constitutes wilful disobedience of the court's order and a wilful lack of respect for the court. I am satisfied that E is thereby in contempt of court as set out in the interlocutor to which this note is appended.

Further procedure and the question of sentence

[21] I have fixed a hearing on 8 March 2024 to consider the question of sentence. E is ordained to appear.

M's right to appear and make representations at the sentencing diet

[22] In *TJ* v *SB* 2017 Fam. L.R. 119, at para [11], the sheriff appeal court declined to answer the question whether a minuter in proceedings such as these (M in this case) has any locus to address the court on the precise punishment to be imposed upon a contemnor (E in this case). The question of what punishment to impose upon E is a question for the court and for the court alone. But, it seems to me that whilst M does not have a locus to seek to persuade the court to impose any particular punishment upon E he does have a locus, nonetheless, to address the court on whether or not E should be punished in the first place.

Mitigation of penalty

[23] At paras [27] and [28] in the related case of *TJ* v *SB* 2018 S.L.T. (Sh Ct) 277 the sheriff appeal court held that the court should allow a contemnor in a case such as this (E in this case) an opportunity to mitigate penalty, recognising that:

> "As punishment or threat of punishment in cases of civil contempt is said to be coercive the court is entitled to use its powers or the threat of their use to enforce compliance with its order."

[24] The penalties for contempt of court in Scotland are set out in section 16 of the Contempt of Court Act 1981. Section 15(2)(a) specifies that where the contempt is dealt with by the sheriff in the course of or in connection with proceedings other than criminal proceedings on indictment (in other words, cases including cases of this kind) the maximum penalty shall not exceed three months' imprisonment or a fine of level 4 on the standard scale (that is, a fine of £2,500) or both.

[25] By section 15(3) of the 1981 Act certain sections of the Criminal Procedure (Scotland) Act 1995 are made to apply in relation to persons found guilty of contempt of court in Scottish proceedings (E in this case). None of the provisions concerned apply in this case.

[26] I have considered whether the provisions of the 1995 Act relating to the imposition of community payback orders and restriction of liberty orders as alternatives to a custodial sentence might apply to persons found to be in contempt of court. Tempting as it may be to so find, I have come to the conclusion that they do not apply. Section 15(3) of the 1981 Act (which was inserted by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995) does not apply them and if the legislature had intended that they should apply it would have made such a provision. Further, section 15(3) makes a clear distinction between contempt of court and offences which, in my view, means that the definition of "offence" in section 307 of the 1995 Act as being "any act, attempt or omission punishable by law" does

not include acts constituting contempt of court. Further, both section 227A and section 245A of the 1995 Act which deal with community payback orders and restriction of liberty orders, respectively, speak of these orders as being imposed instead of a sentence of imprisonment. Section 307 of the 1995 Act defines "sentence", whether of detention or imprisonment, as meaning a sentence passed in respect of a crime or offence and does not include an order for committal in default of payment of any sum of money or for contempt of court. One can see again the distinction between an offence and a finding of contempt of court. The reason for that distinction is, of course, that proceedings for contempt of court are *sui generis* (of their own kind) and are not criminal proceedings.

[27] E should understand, therefore, that if I decide to impose punishment upon her, then faced with the stark choice between a fine and imprisonment there is a real prospect that I might decide on a period of imprisonment. All will, of course, depend on what E tells me in mitigation of sentence and, if I am minded to impose imprisonment, what is said in a social background report which I will order to be prepared.

[28] I have confirmed in my interlocutor that E has an opportunity between now and the sentencing diet to mitigate penalty by complying with the court's interlocutor of 23 August 2022 by making arrangements with M for there to be contact between him and the child. In light of what I have said about punishment E would be well advised to take that opportunity. She would also be well advised to consider arranging legal representation at the sentencing hearing. She should easily be able to obtain legal aid to do so.

Expenses

[29] I have continued the issue of expenses to be dealt with at the next hearing.