SHERIFF APPEAL COURT

[2017] SAC (Civ) 8
PER-A49-14

Sheriff Principal Abercrombie QC
Sheriff Morrison QC
Sheriff Principal Lockhart

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL I R ABERCROMBIE QC

in

APPEAL by

STEPHEN AND CAROL GREEN

Appellant

against

JOHN CHALMERS, THOMAS CHALMERS AND IAIN CHALMERS

Respondent

Appellant: L C Kennedy; instructed by Hodge Solicitors LLP
Respondent: Morris; Blackadders LLP

22 December 2016

[1] This case is about the neighbours who fell out in spectacular style.

[2] The pursuers and appellants live at Gowdiehill Farmhouse, Bankfoot. The defenders and respondents farm land adjacent to the Farmhouse.

[3] After proof the sheriff found that, between July 2010 and June 2014, the defenders, or one or other of them, engaged in an intentional course of harassment of the pursuers, by

committing the following acts: poisoning the pursuers' dog with rat poison[1]; killing their pot plants by spraying weed killer on them[2]; spraying their western boundary hedge with chemicals, damaging it[3]; carrying out significantly noisy operations using a grain dryer operated by a tractor engine into the early hours of the morning or throughout the night[4]; causing grain dust to adversely affect the pursuers' subjects[5]; positioning grain dryers, combine harvesters and a cattle trailer close to the pursers' boundary for no apparent reason, so that they were easily visible to and had a visual impact upon the pursuers[6]; further deliberate spraying of weed-killer on their hedge and birch saplings in July 2011 and the spring of 2012 damaging and killing some of them[7]; sealing the lid of the pursuers' septic tank with silicone[8]; positioning a tractor with its raised forks, plastic tanks and a large 'bogey' trailer in a tipped position, without reason, close to the pursuers' property so that they were clearly visible from the pursuers' house[9]; intentionally opening, unwrapping and leaving silage bales close to the pursuers' boundary so that they would deteriorate and create a foul smell which was very noticeable in the pursuers' garden and house[10]; driving a tractor at speed towards the second pursuer when she was weeding the hedge[11]; positioning two harrowers for no reason close to the pursuers' boundary so that they were clearly visible

[1] Findings in Fact 22 & 23
[2] Findings in Fact 25 & 26
[3] Finding in Fact 20, 25 & 27
[4] Finding in Fact 28
[5] Finding in Fact 28
[6] Findings in Fact 32, 33, 37 & 38
[7] Findings in Fact 35 & 39
[8] Finding in Fact 46
[9] Finding in Fact 51
[10] Finding in Fact 53
[11] Finding in Fact 55

from the pursuers' house[12]; leaving a bogey filled with cattle dung close to the pursuers' boundary for 18 days causing an unpleasant smell which prevented the pursuers from sitting in their garden or opening their windows[13] and regularly burning rubbish including plastics, causing unpleasant acrid smoke and smells to permeate the pursuers' house[14].

[4] The sheriff found that these activities amounted to harassment of the second pursuer in contravention of section 8 of the Protection from Harassment Act 1997. He also awarded the second pursuer damages of £3000 in terms of section 8 (5) of the Act, for the loss, injury and distress that she had suffered. He refused to grant a non-harassment order as craved third, or to grant interdict to protect either or both pursuers from further harassment by the defenders as craved fourth.

[5] Section 8 of the Protection from Harassment Act 1997[15] (which together with sections 9, 10 and 11 apply to Scotland) provides that:

> (1) Every individual has a right to be free from harassment and, accordingly, a person must not pursue a course of conduct which amounts to harassment of another and—
> (a) is intended to amount to harassment of that person; or
> (b) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person.
> […]
> (3) For the purposes of this section—
> - "conduct" includes speech;
> - "harassment" of a person includes causing the person alarm or distress; and
>
> a course of conduct must involve conduct on at least two occasions.
> […]

[12] Finding in Fact 56
[13] Finding in Fact 57
[14] Finding in Fact 58
[15] Hereinafter referred to as the 1997 Act

(5) In an action of harassment the court may, without prejudice to any other remedies which it may grant—
(a) award damages;
(b) grant—
(i) interdict or interim interdict...

On appeal, no issue was taken with the sheriff's refusal to grant a non-harassment order.

[6] The proposition advanced by the appellants was that the sheriff erred in law by refusing their second crave in law, as amended, for interdict.

[7] Four principal reasons were advanced by the appellants in support of this proposition:-

1. The sheriff was wrong to hold that the pursuers' claim for interdict failed because there was no individual crave for each pursuer;
2. The sheriff was wrong to refuse interdict because the appellant had installed CCTV which acted as a significant deterrent;
3. The sheriff was wrong to find the wording in Craves 2 (v), (vi), (vii) and (viii) was too imprecise, vague and uncertain and;
4. The sheriff erred in holding the incidents complained of were "one off' or historical and were therefore unlikely to be repeated.

[8] This case is unusual in that there was no challenge by either party to the Findings in Fact, summarised above. Nor was there any real dispute that the respondents pursued a course of conduct which amounted to harassment, either intentionally, or in circumstances where it would appear to a reasonable person that it would amount to harassment of them.

[9] We shall deal with each of the reasons advanced by the appellant in turn.

1. THE PURSUERS CLAIM FOR INTERDICT FAILED BECAUSE THERE WAS NO INDIVIDUAL CRAVE FOR EACH PURSUER

Sheriff's decision

[10] The sheriff decided that he could not competently order interdict in terms of the statute because the legislation "provides a remedy to an individual and the order sought requires to be in the name of that individual". If there is another person "who may have also been the subject of the same harassment at the hands of the same wrongdoer" he or she must seek separate remedies. There "require to be separate orders sought in the name of each pursuer" as opposed to what are in effect joint orders. The reason suggested by him for reaching this view was that if a wrongdoer is subsequently alleged to have acted in breach of the interdict…. "by acting in the manner prohibited against one of the parties, but not the other, then such a joint order has not been breached". In this respect, the learned sheriff refers (at page 31) to the case of *Dickie v Flexicon Glenrothes Ltd* 2009 W.L. 2848187, 4 September 2009, unreported. He refers with approval to the comments of Sheriff Braid that the conduct complained of "must be targeted at an individual". He uses this comment to justify his conclusion that "there is no averment specifying which individual is targeted by this conduct". As we observe below, we consider that the pleadings could not be clearer in specifying that a course of conduct amounting to harassment was pursued against both appellants.

Appellants' Submissions

[11] The appellants submitted that, in circumstances where the averments, evidence and the sheriff's Findings in Fact related to both pursuers – who were spouses and living

together – there was no requirement to specify which of the two individual pursuers was the victim of the course of conduct amounting to harassment. As the sheriff indicated[16] "it is clear that the pursuers' case in essence was that they had each been the victim of harassment at the hands of the defenders, either as intended by the defenders or in circumstances in which it would have appeared to a reasonable person that the defenders' actions amounted to harassment of the first and the second pursuer". The 1997 Act did not say that an individual ceased to be the target of harassment simply because the harassment was directed to two individuals rather than a single victim. Likewise there was nothing in the 1997 Act to prevent a court from interdicting a defender from acting unlawfully towards two individuals in an action brought by them containing a single crave. The sheriff erred in placing stress on the word "individual" in section 8. This error was compounded when he came to consider the pursuers' entitlement to remedy. Mr Kennedy also sought to rely on various English authorities such as *Levi v Bates* [2016] QB 91 which deal with the "forseeability" test, applicable in England. He submitted the sheriff erred in his approach to the concept of "targeting" and in holding that the conduct in question had to be directed at an individual only. He referred to *D.P.P v Dunn* [2001] 1 Cr App R 352 where the court held that while evidence might be given of incidents at which only one of two complainants was present, the court could find that the course of conduct was aimed at "the unit concerned" on consideration of the evidence as a whole. He also referred to *Robertson v Vannet* 1999 SLT 1081 where a non-harassment order was granted to the defender's former girlfriend and her father. Burn Murdoch, "*Interdict in the Law of Scotland*" at page 74, was authority for the proposition that even unconnected persons can sue in the same or joint

[16] At Page 41 of his Judgment

action if they have been aggrieved by the same act of the defenders. There was no logical or practical reason to prohibit this. Breach of interdict proceedings could be brought by either the first or second pursuers or by both, depending on whether one or both the pursuers were being harassed. The Interpretation Act 1978 "provided that for 'singular' one should read 'plural'".

Respondents' Submissions

[12] The respondents submitted that "although the appellants had proved harassment in terms of Craves 2(v), (vi) & (viii), the sheriff was correct as the order sought could not competently be made in favour of both appellants". The appellants had failed to set out their case in proper form with each appellant seeking separate craves for interdict, with pleadings specifying how each was affected by the conduct complained of. It was also necessary to have separate pleas-in-law. The appellants perilled their case by proceeding together and despite having opportunities to amend, continued with their "joint enterprise" causing their claim for interdict to fall. The appellants had eventually restricted their claim for damages to the second pursuer only and correctly so; they should have done likewise in separating out their claims in terms of Craves 2(v), (vi), (vii) & (viii). Section 8(1) of the 1997 Act was clear in its terms. It commences with the words "Every individual….." Albeit that there may be cases, such as the present, where the facts relied upon by each victim are identical, or overlap substantially, each victim must at the end of the day present pleadings and evidence to enable the court to determine that each victim has satisfied the Section 8 test. While the 1997 Act does not prevent two or more closely connected persons from

seeking section 8(5) Orders, great care must be taken in framing the craves and pleadings, as well as in the preparation and presentation of evidence. That had not been done in the present action particularly by the first appellant who was absent from "the immediate area", if not the country, for much of the period in question.

Decision

[13] We agree with the appellants' position.

[14] Adopting a straightforward, purposive interpretation, Parliament's intention is to protect individuals from harassment by others. The purpose of the statute is not to seek to prevent harassment in cases only where individuals are affected and not where two or more individuals experience it. The Long Title of the 1997 Act is "An Act to make provision for protecting **persons** from harassment and similar conduct" (emphasis added). Section 8 itself commences with the words; "Every individual has a right to be free from harassment…" The words "every individual" in this sense means "everyone" or "all individuals". We consider that the sheriff adopted an overly prescriptive meaning of the word "individual" which set him off on the wrong track. Furthermore, there is nothing in the applicable Scottish sections of the 1997 Act (sections 8-11) to suggest any restriction on the right of more than one person to sue together in the same action provided the necessary community of interest is established.

[15] We also consider that he was misled by the amending provisions of section 1A of the Act which only apply to England. Firstly, there was no challenge to the appellants' assertion that this amendment was considered necessary specifically to deal with animal rights

protesters pursuing a course of conduct against a "disparate group of people within the same company".

[16] Secondly, we cannot accept that if there was a perceived problem in respect of two or more people conjoining in bringing an action against their harasser, that Parliament would not have taken the opportunity to amend the provisions of the Act relating to Scotland at the same time.

[17] In this respect we did not derive any assistance from any of the authorities cited to us by both parties. As was conceded in argument, these cases were primarily concerned with establishing intent and were not germane to the issue before us.

[18] The sheriff's restrictive interpretation also ignores the words in section 8(1) of the 1997 Act that "…. **a person** must not pursue a course of conduct….." (emphasis added). These words have not been interpreted as strictly by the sheriff so as to prevent this action being raised against three separate defenders. This interpretation is not only inconsistent with his view of the meaning of the words at the start of the section, it is also inconsistent with Parliament's intention.

[19] The provisions of the Interpretation Act 1978, which the respondents accepted were applicable, put the matter beyond doubt. As the appellants' counsel stated: "for singular, read plural".

[20] The sheriff justified his view that individual craves for each pursuer were required on the basis that, if only one pursuer was the subject of future harassment, he or she would have no remedy against the defenders for breach of interdict. This analysis ignores the words in Crave 2: "….harassment of the pursuers or <u>of either of them</u>…" (emphasis added).

These words would entitle either or both the pursuers, depending on the circumstances, to raise breach proceedings against the defenders.

[21] The respondents' support for the sheriff's approach collapsed with his concessions that both pursuers could raise an action in their joint names and that the Findings in Fact related to both appellants. These concessions were, in our view, properly made.

[22] The averments clearly specify that **both** pursuers were subject to the course of conduct in question. The sheriff has accepted evidence and made findings in fact that **both** pursuers were at the receiving end of conduct which amounted to harassment. The findings in fact relate to the pursuers' dog, the pursuers' septic tank, the pursuers' amenity, the pursuers' hedge, trees and pot plants, the impact of odours on the pursuers' use of their property and so on. The simple reality of the situation is that both pursuers were living together as husband and wife in the same house. In short, the pursuers perilled their case on proving that a course of conduct amounting to harassment was being pursued against them both. That case was established in evidence and the sheriff made Findings in Fact to that effect. In such circumstances we see no requirement to have separate averments, separate craves and separate pleas in law relating to each pursuer[17].

[23] As the sheriff himself observes, at page 37 of his judgment, there are only two examples of either of the pursuers being "allegedly targeted" as individuals, the most notable being when the third defender drove a tractor directly towards the hedge at which the second pursuer was working.

[17] This has been settled law in Scotland for generations. See Burn Murdoch "Interdict in the Law of Scotland", page 64 at paragraph 74 "where several unconnected persons have been aggrieved by the same act of the defender or have a joint interest in the matter libelled, one action in their joint names is competent…" (referring to *Brims & Mackay v Pattullo* 1907 SC 1106; Lord Low at 1111)

[24] The lengthy discussion by the sheriff between pages 31 and 37 of his judgment is clearly not matched by his Findings in Fact relating to both pursuers. Although Finding in Fact 10 specifies that the first pursuer worked away for 10 weeks out of every 13 until the start of 2013, and was away for a period from June 2013 (specified as five months on page 35 of the judgment) , the sheriff has nevertheless made Findings in Fact relative to harassment of both pursuers.

[25] In our view, the Findings in Fact accord with common sense. Simply because the first pursuer may be away working from time to time from the home shared with the second pursuer, does not mean that a course of conduct amounting to harassment directed at both their pets, hedge, trees, pot plants and amenity does not amount to harassment of him. The reality of the situation is brought home in Finding in Fact 31 when at a mediation meeting in January 2011, "The Defenders intimated that they would cause the Pursuers problems" (emphasis added).

[26] For all these reasons we find that the sheriff erred in holding that the appellants' claim failed because there was no individual crave for each pursuer. For the reasons we have given, we will alter Finding in Fact and Law 17 on page 17 of the sheriff's judgment by deleting the words "second pursuer" and inserting therefor the word 'pursuers'.

2. THE APPELLANTS HAD INSTALLED CCTV WHICH ACTED AS A SIGNIFICANT DETERRANT

Appellants' Submissions

[27] The appellants submitted that the installation of CCTV cameras was a relevant factor which the sheriff could take into account when considering whether the conduct

complained of was likely to continue. However, the sheriff had placed excessive weight on this factor. His justification for doing so was to be found in a single sentence on page 51 of the judgment, where he states that CCTV "appears to have acted as a significant deterrent". That was inaccurate, as the defenders' pursuit of a course of conduct had continued after the installation of the cameras in question. The sheriff had omitted to take into account the serious and persistent nature of the conduct in question and the fact that before a final judgment is pronounced, the dependence of an action has, of itself, a deterrent effect. The pursuers were justifiably concerned about what would happen when the action ended.

Respondents' Submissions

[28] The respondents argued that the sheriff saw the CCTV cameras on his *locus* inspection. While it was clear that part of the reason for its installation was the gathering of evidence (see for example the sheriff's reference to spread sheets), the sheriff was correct to give the matter the weight he did.

Decision

[29] We agree that the sheriff placed too much weight on the CCTV cameras as a significant deterrent for future activity. In particular, the persistent nature of the conduct over a period of years, and the serious nature of the conduct in question, were factors which should also have been taken into account and given equal or more weight. Furthermore notwithstanding the spraying of herbicide to damage the pursuers' hedge ceased after the installation of the last cameras in February 2013, other incidents of a different kind continued to occur thereafter. We also consider that the sheriff was wrong in principle to

find that the victims (as they are described in the Act) had in effect to rely on these devices for future protection.

[30] As was accepted by the respondent, the purpose of the cameras may well have been to gather evidence, such as spraying of the pursuers' hedge,[18] as opposed to deterrence. No consideration appears to have been given to the fact that the appellants will have to maintain the cameras in perpetuity, and at their own cost. Nor was the effectiveness of the system in question considered by the sheriff when reaching his decision – or if it was, it was not referred to by him. This is a matter of concern particularly given the defenders' continued conduct after the final installation of the cameras in question. We also consider that there is considerable force in the appellants' submission that the appellants have justifiable concerns for the future, particularly when this action is finally determined.

[31] Finally, in Finding of Fact 46, the sheriff records the respondents' attitude to the cameras in question and to their insistence that they should be repositioned away from their steading. We were not told during the appeal that the respondents' views had changed in any way.

[32] For all these reasons, we consider that the installation of CCTV cameras would not by itself be a reason for not granting interdict and, for the additional reasons given in paragraphs [36] and [38] below, we consider that there is a real risk of further incidents.

[18] Finding in Fact 50

3. THE WORDING IN CRAVES 2(v), (vi), (vii) & (viii) TOO IMPRECISE, VAGUE AND UNCERTAIN

Respondents' Submissions

[33] The respondents submitted that because of the imprecise and vague phrases and words used by the appellants in Craves 2 (v), (vi), (vii) & (viii) the respondents did not have the requisite degree of certainty about what they were prohibited from doing. Such certainty was necessary given the serious consequence of breaching an order for interdict. The words and phrases complained of included "close to the boundary", "noxious material", "close up to the boundary" and "visual amenity".

Appellants' Submissions

[34] The appellants submitted that the sheriff was wrong to hold that these phrases were too imprecise. Each phrase was sufficiently clear and precise to be enforceable against the respondents particularly because each of the specific craves were preceded by the "general introduction" requiring that any course of conduct had to be intended to amount to harassment, or had to occur in circumstances where it would appear to a reasonable person that the conduct would amount to harassment.

[35] We recognise, as have Courts before us, the difficulties inherent in framing orders for interdict in precise terms, particularly for the reasons advanced by the respondents. However, in this case we consider that the wording of Crave 2 is sufficiently clear to give the respondents sufficient notice of what they can and cannot do.

[36] For example, Crave 2(v) prohibits the unwrapping and storing of dung at or close to designated boundaries. This would not preclude the respondents from carrying out any normal agricultural activity – such as spraying dung on fields immediately adjacent to the appellants' property. What they cannot do is unwrap and store dung at or close to the boundaries in question. The words "at" or "close to" mean exactly what they say and because of the context in which they are used, do not warrant microscopic analysis. We do not think it is necessary, as the sheriff did, for a specific distance to be specified, particularly as it is a prerequisite that any such operation requires to be intended to amount to harassment of the pursuers or which occurs in circumstances where it would appear to a reasonable person that the course of conduct would amount to harassment of the pursuers. Similarly, the words "any noxious material" follow the words "rotting silage" and "dung" so that their meaning is clear and sufficiently unambiguous. These words are obviously "coloured" and given a real context by the preceding words.

4. THE INCIDENTS COMPLAINED OF WERE "ONE OFF" (OR HISTORICAL) AND WERE THEREFORE UNLIKELY TO BE REPEATED

[37] In our view the sheriff was mistaken to refuse to grant interdict for the following reasons.

[38] The question is not whether individual incidents or repeated incidents of the same kind, were likely to be repeated – but whether the course of conduct (amounting to harassment of the appellants) comprising several incidents, was likely to continue. Likewise, just because the respondents may not have repeated a specific act for several years, it does not follow that their harassment of the appellants has ceased. As is readily

apparent from the Findings in Fact there appears to be no end to the defenders' ingenuity in finding ways to harass the pursuers.

[39] In this case, we consider that, if the sheriff asked the right question, as we have just formulated it, he would have decided to grant interdict.

[40] The respondents made life as uncomfortable as possible for the appellants over a considerable period of time. We consider that there is considerable force in the appellants' submission that given the scale, persistence, variety and length of time over which the conduct in question occurred, that such conduct is likely to continue. We also share the appellants' concern that once the action is finally disposed of, there is every chance that the harassment will resume. At the end of hearing this case the sheriff could have been in little doubt that the serious and persistent course of conduct complained of had not ceased until some months after the action was raised. As can also be seen from the sheriff's comments about the defenders' attitude and the pointed warning he felt necessary to give them about their future conduct, we consider that it is necessary to provide the appellants with the protection they seek.

[41] For these reasons we shall uphold the appeal, recall the sheriff's Interlocutor of 18 August 2016 and grant interdict in terms of Crave 2 as amended.

[42] Given this decision, there is no requirement to consider in detail the appellants' submission to the effect that interdict should be granted in terms of the first part of Crave 2 only. In our view an order in general terms interdicting "the respondents from pursuing a course of conduct which is intended to amount to harassment of the pursuers or of either of them …. or which ….occurs in circumstances where it would appear to a reasonable person that the course of conduct would amount to harassment…..", without the addition of the

specific examples in Craves 2(v), (vi), (vii) and (viii), would be too general and vague. These examples colour and provide a matrix within which the preceding words should be interpreted.

[43] Nor is it necessary to deal with the appellants' further submission to the effect that where the craves for interdict are "not exactly suitable" the court can, at its own hand, effectively re-write the crave. The passage relied upon by the appellants in Burn Murdoch "*Interdict in the Law of Scotland*", page 98 at Paragraph 110, does not support that submission. It is however competent for the court to revise, tighten, restrict or modify the terms in which interdict is sought bearing in mind the substance of the crave. We have followed this course and after inviting parties to comment on proposed amendments, note that both responded positively without suggesting any further additions or deletions.

Expenses

[44] As the appellants have been substantially successful in the action and in this appeal, we consider that they should be awarded expenses. We are not persuaded by the respondents' argument that, as the appellants' third crave was refused after proof, the expenses of the proof should be shared. The evidence required to support the appellants' second crave was to all intents and purposes identical to that required in respect of the third crave and in our view very little, if any, extra time would have been taken up in respect of hearing evidence in respect of the third crave.

[45] The motion to certify Junior Counsel in respect of the appeal was unopposed and we shall grant it.