SHERIFF APPEAL COURT

[2022] SAC (Civ) 11
DNF-A63-21

Sheriff Principal M Stephen QC
Sheriff Principal M W Lewis
Appeal Sheriff W Holligan

OPINION OF THE COURT

delivered by APPEAL SHERIFF W HOLLIGAN

in the appeal

by

MONEYBARN NO. 1 LTD,

Pursuer and Appellant

against

MISS ABBEIGH HARRIS,

Defender and Respondent

Pursuer and Appellant: McClymont; DWF LLP

14 February 2022

Introduction

[1] In *Cabot Financial UK Ltd* v *McGregor* & Ors 2018 SC (SAC) 47 and *Santander Consumer (UK) Plc* v *Creighton* 2020 SLT (Sh Ct) 61 this court required to consider the extent to which, in an undefended action, a sheriff was entitled to refuse to grant decree in the terms craved

by the pursuer. This appeal is another example of a similar issue. We shall refer to the appellant as the pursuer.

Background

[2] In its initial writ, the pursuer avers that the parties entered into a conditional sale agreement for the purchase of a motor vehicle ("the vehicle") and for the price to be paid by instalments. In terms of the agreement, title to the vehicle would only pass to the defender once all sums due to the pursuer in terms of the agreement had been paid. The defender took possession of the vehicle and fell into arrears in making the instalment payments. The pursuer served a default notice in accordance with the Consumer Credit Act 1974 ("the 1974 Act"). On 17 March 2021, the pursuer terminated the agreement. The sum of £13,648.44 remains due and outstanding. The pursuer avers it is the owner of the vehicle and that the defender has no right to retain possession thereof following termination of the agreement.

[3] The pursuer has six craves:

> "1. To grant decree against the defender for payment to the pursuer of the sum of THIRTEEN THOUSAND SIX HUNDRED AND FORTY EIGHT POUNDS AND FORTY FOUR PENCE (£13,648.44) STERLING.
>
> 2. To grant an order for recovery of possession of [the vehicle] together with the keys, registration documents and service history therefor from the defender for the purposes of section 90(1) of the Consumer Credit Act 1974 (as amended).
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> 3. To grant an order permitting the pursuer to enter any premises in the occupation of the defender in order to recover possession of [the vehicle] together with the keys, registration documents and service history therefor from the defender for the purposes of section 92 of the Consumer Credit Act 1974 (as amended).
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> 4. To ordain the defender to deliver to the pursuer [the vehicle] together with the keys, registration documents and service history therefor and that within five (5) days of intimation upon the defender of the court's interlocutor to follow hereon or within such other period as the court may deem appropriate.
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> 5. To grant warrant to officers of court to search premises in the occupation of the defender and to take possession of [the vehicle], together with the keys,

registration documents and service history therefor, and to deliver them to the pursuer and, to that end, to open, shut and lock fast places.

6. For the expenses of the action…"

[4] The writ was properly served. The defender did not appear, nor has she ever done so. The pursuer's agent despatched a minute seeking decree in terms of craves 1-5 together with expenses of a specified sum. The sheriff was not willing to grant the decree in the terms sought.

[5] In his note dated 20 August 2021 the sheriff stated that an adequate description of the premises to be searched is one of the essentials of a warrant to search. He drew an analogy with warrants issued pursuant to the Misuse of Drugs Act 1971 ("the 1971 Act"). He went on to say that, before he was willing to grant an order in the terms sought, he required to be persuaded as to its competence "under reference to authority and consideration of the implications for Article 8 and Protocol 1, Art 1 ECHR". A diet was assigned for 15 September 2021 for the sheriff to be addressed.

[6] By interlocutor dated 28 September 2021, the sheriff granted craves 1-5 together with expenses. However, he did not grant craves 3 and 5 as craved. The sheriff modified both craves: in crave 3 he deleted "any premises in the occupation of the defender" and substituted a named address; in crave 5 he deleted "premises in the occupation of the defender" and substituted a named address.

[7] It is that interlocutor and the modifications inserted by the sheriff which are the subject of this appeal.

[8] The sheriff attached a note explaining his reasoning. His first criticism of the relevant craves was that they were excessively wide; they did not specify the premises

which the sheriff officers could enter; the crave would cover not only the premises presently occupied but any premises which the defender might come to occupy in the future. Secondly, the sheriff drew an analogy with warrants granted under the 1971 Act; specification of the premises to be searched is a prerequisite for the granting of a warrant. He referred to *Stoddart*, Criminal Warrants, 2nd Edition paragraph 1.19 and *Webster* v *Trotter* (1857) 2 Irv 596. Thirdly, section 6 of the Human Rights Act 1998 ("the 1998 Act") provides that a court acts unlawfully if it acts incompatibly with the European Convention on Human Rights ("the convention"). The sheriff held that section 6 applies whether or not an interested party enters the process. Article 8 guarantees the right to respect for the home and "home" has been defined widely. What is required is a legal rule which clearly authorises the interference which takes place. The sheriff stated that he had been unable to identify any rule of law which clearly authorises him to grant the warrant to search premises not identified other than by their occupation by the defender and none which authorises him to grant warrant to enter and search "hypothetical premises" not presently occupied by the defender but which may come to be so occupied at some time in the future. The sheriff's attention was drawn to a decision of this court in *Santander Consumer Finance Ltd*. However, the sheriff was of the view that the issue which he had identified had not been raised, debated or considered in that case. The sheriff concluded that a warrant to enter upon and search premises must specify the premises to be entered. Accordingly, in his opinion, craves 3 and 5 require to be modified.

Submissions for the pursuer

[9] The pursuer's agents lodged lengthy and detailed submissions in support of the appeal. In summary, the wording of a crave granting warrant to enter and search "any premises in the occupation or tenancy of the defender" was well established; reference was made to *North Central Wagon and Finance Co Ltd* v *McGiffen* 1958 SLT (Sh Ct) 62 and *Merchants Facilities (Glasgow) Ltd* v *Keenan* 1967 SLT (Sh Ct) 65 and *Santander Consumer (UK) Plc* v *Creighton*. The wording is also to be found in section 1(2) of the Law Reform Miscellaneous Provisions (Scotland) Act 1940 ("the 1940 Act") which relates to the enforcement of orders *ad factum praestandum*; and also in rule 23.9 of the Summary Cause Rules which deals specifically with orders relating to the recovery of possession of moveable property. The *Merchants Facilities* case held that a warrant couched in the foregoing terms was competent at common law, irrespective of the terms of the 1940 Act. Sections 90 and 92 of the 1974 Act do not impinge upon the craves (*Santander* at paragraph [13]). It is well established that in an undefended action the sheriff may only refuse to grant decree if there is a lack of jurisdiction or the remedies sought are incompetent. Neither of these conditions was satisfied. The practice in relation to the granting of criminal warrants under the 1971 Act was irrelevant. There is no requirement for the pursuer to name a specific property. By contrast, enforcement of a decree for payment by way of attachment would be more onerous in terms of intrusion into the defender's property. All that the pursuer seeks to do is to recover its own property.

[10] Article 8 it is not infringed. The court orders are reasonable, proportionate, and suitably restricted in their scope. They are in accordance with long established Scottish procedure concerning civil actions for delivery and the legislation governing the

enforcement of decrees *ad factum praestandum*. They are also fair, necessary and in the public interest to enable the effective operation of the civil legal system and to minimise costs for both parties involved in an action for delivery. Furthermore, in terms of Article 8 of the convention a private driveway or private garage is not a "home". The court orders sought do not seek to interfere with the respondent's dwelling house in any way (see also *Chappell* v *The United Kingdom* 1990 12 EHRR 1). There are a number of practical reasons why the current remedies sought ought to be granted.

Decision

[11] It is important to set this matter in its proper context. The unchallenged position of the pursuer is that it is the owner of the vehicle. The agreement whereby the defender had the use of the vehicle is at an end. The pursuer seeks recovery of possession of its property. As was noted in *Santander*, (at paragraph [11]), provided no other right of the defender is infringed, at common law, there would be nothing to prevent the pursuer from resorting to self-help by, for example, retrieving the vehicle when parked in the street.

[12] The extent to which a sheriff may refuse to grant an undefended action is something we regard as settled law. It is no part of the sheriff's function to advocate for a non-compearing party whose remedy, in the event of injustice, is to take part in the action before the court. A sheriff may only refuse to grant a decree as craved in the event of its incompetency or there being a want of jurisdiction (see *United Dominions Trust* v *McDowall* 1984 SLT (Sh Ct) 10; *Cadbury* v *Mabon* 1962 SLT (Sh Ct) 28; *Cabot* and *Santander*). Neither applies in the present case. The sheriff was bound by these authorities.

[13] The parts of craves 3 and 5 which caused the sheriff difficulty were expressly approved in the case of *Merchants Facilities*. They appear in section 1 of the 1940 Act and also rule 23.9 of the Summary Cause Rules. The sheriff was accordingly in error in saying that there was no rule of law which authorises the craves. Indeed it would be an odd conclusion if the very warrants permitted by the 1940 Act and the Summary Cause Rules were held to be impermissible.

[14] As was made clear in *Santander*, in an undefended action, sections 90 and 92 of the 1974 Act do not inhibit the exercise of the rights granted by the court. Before they are exercised, an order of the court is required but neither section ordains, nor limits the content of, any order the court deems appropriate to grant (see paragraph [13] of *Santander*). The extent of the court's powers in a defended action was not explored and we express no view thereon.

[15] The sheriff was also in error in drawing an analogy with warrants granted under the 1971 Act in the exercise of the sheriff's criminal jurisdiction. The nature of the warrants in this case is entirely different; the parties are private parties, engaged in a contractual relationship, there are no agencies of the state. There are specific statutory requirements provided in the 1971 Act as to the content of a warrant. In the present case, the pursuer invokes the aid of the court in exercising a civil right and that aid takes the form of diligence for that particular, limited purpose. That invocation arises by way of enforcement only in certain circumstances where the defender fails to return the vehicle to the pursuer.

[16] There are also practical considerations. As was identified in *Merchants Facilities*, were the warrant to be limited to a specific locus, it could easily be defeated by removing the vehicle from that locus, leaving the pursuer with no remedy other than to come back to

court for a fresh warrant relating to other premises, a process which may well suffer the same fate as the original warrant. By the same reasoning, it is neither necessary nor desirable that the craves sought in the initial writ need be granted piecemeal. Subject to what we have to say as to the ordering of the craves, we see no reason why the decree cannot be granted as craved. The ascending order of diligence arises only in the event of the defender remaining contumacious. It should be borne in mind (as was set out in *Merchants Facilities*) that the orders are granted *periculo petentis*; the pursuer is liable for wrongful diligence in the event of abuse.

[17] The sheriff referred to section 6 of the 1998 Act which provides that the court is a public authority which may not act in a manner which is inconsistent with the convention. If the defender's Article 8 rights are infringed the court must act. Whether this provision is engaged in undefended actions and what power, if any, it gives to the court to adjust the rights of the parties *inter se*, and substantive law and procedure, was not explored before us. It is sufficient to say that, in the absence of further argument, we do not endorse the approach of the sheriff on this point (see *Kay* v *Lambeth London Borough Council* [2006] 2 AC 465 and *Doherty* v *Birmingham City Council* [2009] 1 AC 367).

[18] However, assuming for present purposes that Article 8 is engaged in this matter, it provides the following:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority of the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

[19] The protean nature of Article 8 is well known. It can apply to many different situations. The right to private and family life is not absolute. We were not referred to any authority directly in point, either by the sheriff or by the pursuer's agent. The case of *Chappell* is not analogous. As set out above, there is a rule of law as to the grant of these craves. A balance requires to be struck between the interests of the pursuer and the defender in circumstances where the defender retains the property of the pursuer. The granting of the warrants is a necessary and proportionate exercise of the court's powers. We do not agree that the defender's Article 8 rights would be infringed. The sheriff was in error in so concluding.

[20] Accordingly, we shall allow the appeal and recall the interlocutor of the sheriff dated 28 September 2021. As in *Santander*, the matter is at large before us. We shall grant decree as craved. However, there is a degree of illogicality in the order of the pursuer's craves. Crave 1 seeks payment; crave 2 an order for possession; crave 3 entry onto premises; crave 4 an order for delivery; crave 5 a warrant to search premises; and a crave for expenses. It would be more sensible to grant decree in terms of craves 1, 2, 4, 3 and 5. In other words, payment; recovery of possession; delivery; warrant to enter premises; warrant to search premises; and then expenses. That seems to us to reflect the logical order in which the remedies fall to be granted. The pursuer's agent did not disagree.

[21] The defender took no part in these proceedings. The pursuer quite properly does not seek the expenses of the appeal.