SHERIFF APPEAL COURT

[2024] SAC (Civ) 7
DUN-A145-21

Sheriff Principal N A Ross

DECISION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in the motion in the appeal by

STUART WILLIAM LOGAN

Pursuer and Minuter

against

ANDREW BRUCE IRONS

Defender and Respondent

Pursuer and Minuter: Reid, Advocate; Jackson Boyd LLP
Defender and Respondent: MacAulay; Ennova Law

4 March 2024

[1] The parties are proprietors of adjoining properties. The pursuer and minuter (the "pursuer") sought declarator that the property owned by the defender and respondent (the "defender") was burdened with servitude rights of aqueduct and access, including the drainage to a septic tank serving the pursuer's property. He claimed also that the pursuer's property enjoyed a right of access for the purposes of laying, inspection, repair, maintenance and renewal of the septic tank. The sheriff heard debate and allowed a proof before answer on outstanding questions of fact. Both parties appealed. The appeal by the defender was

unsuccessful. The cross-appeal by the pursuer submitted that the sheriff ought to have granted decree de plano on admissions made.

[2] The cross-appeal by the pursuer was successful, and the Sheriff Appeal Court (SAC) granted decree dated 30 January 2023 finding and declaring that, in brief summary, the defender's property was burdened with servitude rights of aqueduct and access in favour of the pursuer's property, including the drainage to a septic tank serving the pursuer's property, and a right of access for the purposes of laying, inspection, repair, maintenance and renewal of the septic tank. The court also pronounced interdict against the defender and others from, amongst other prohibitions, interfering with or removing the septic tank and from interfering with the pursuer's right of access. Right of access was made conditional on the pursuer giving seven days' written notice to the defender, save in cases of emergency.

[3] Thereafter, the pursuer attempted to take access over the defender's property for the purposes of repair and renewal. On averment, there is damage to the septic tank and overflow from an inspection chamber. Urgent repair is required. On around 28 July 2023 the pursuer's agents gave seven days' notice of access being taken. The defender refused access. Further written notice was given on 15 September 2023. Access was again refused. Physical access was not possible because an access gate was locked.

[4] The pursuer lodged a minute for breach of interdict in the SAC process. The minute asked the court to ordain the defender to appear personally to explain breaches of the court's interdict, and for an order ordaining the unlocking of the access gate. The minute was opposed and a hearing fixed for 11 December 2023. Prior to that hearing, and following the defender taking legal advice, opposition to the motion was withdrawn. On that date, the court requested submissions on whether the minute ought properly to have been lodged in

the sheriff court process, rather than in the appeal court process. The motion was continued for parties to consider the position.

The minute for breach of interdict

[5] At the motion hearing, counsel for the pursuer sought orders under the minute. The agent for the defender elected not to make submissions: he accepted on behalf of the defender that the defender was in breach of the court's interdict not to interfere with the pursuer's access to repair the septic tank. He was in a position to give mitigation for the defender's actions. The matter proceeded on counsel's unopposed motion.

Pursuer's submission on procedure following breach of interdict

[6] Counsel for the pursuer recognised that this question, of breach of an interdict of an appellate court, had not been the subject of any reported authority. He submitted that there was no order of the sheriff court which had been breached, and therefore proceedings had to be raised before SAC. *Gray* v *McNair* (1826) 4 S 785 supported the proposition that an interdict granted by an inferior court was nonetheless properly brought before the appeal court so as to exclude the jurisdiction of the former. Historically, causes could be initiated in the Inner House, albeit procedures existed to permit that. SAC had all the powers inherent in any court (*Courts Reform (S) Act* 2014 s.47). In *MacIver* v *MacIver* 1996 SLT 733 the First Division had commented on customary procedure being to bring the matter before the court by way of initial writ, but that option was not open under SAC procedure. Procedure by minute was the equivalent. The important thing was (*AB and CD* v *AT* 2015 SC 545) that the alleged contemnor was able to know exactly what is being alleged, and to consider their position. He submitted a list of authorities.

Decision

[7] When a party alleges breach of an interdict, being an interdict granted by an appeal court (but not, or not in the same terms, by the first instance court), the question of forum does not appear to be settled. There appears to be no direct authority on competency. The first question is whether proceedings are competently raised directly in the appeal court which granted the interdict, or whether they must be raised in the inferior court. A second question is whether minute procedure is competent within an existing process, or whether a separate action for breach must be commenced.

[8] The facts of the present case are important. The sheriff refused interdict. The cause was appealed to SAC. By decree dated 30 January 2023, the court granted decree of interdict in favour of the pursuer, in the terms summarised above. That decree was extracted on 1 September 2023. In the meantime, both parties appealed to the Court of Session. That appeal did not proceed to judgment. On the motion of the appellant, of consent, the Lords by interlocutor dated 4 July 2023 refused the appeals, adhered to the SAC interlocutors, awarded expenses as taxed, and decerned.

[9] The authorities cited by the pursuer are discussed below. On that basis (and recognising that a contradictor was absent), I consider that in circumstances such as the present, the sheriff court and SAC ordinarily have concurrent jurisdiction. However, whether proceedings can be raised will also depend on the stage of procedure of the case. If the case is still in dependence before SAC, procedure may either be by way of fresh proceedings in the sheriff court, or by Chapter 16 minute procedure in the appeal proceedings. However, if the appeal has been finally disposed of, SAC is *functus officio*, and has no power to make further orders within the same process. Fresh proceedings are

required. That creates another obstacle: there is no procedure under the Act of Sederunt (Sheriff Appeal Court Rules) 2021 for raising new proceedings. They can only be raised in the sheriff court which has jurisdiction. Proceedings for breach of interdict will be by initial writ in a summary application.

[10] *Gray* v *McNair* (above) appears at first inspection to indicate otherwise. The parties had raised sheriff court proceedings relating to the discharge of water into coal works. They had submitted the matter for arbitration, which had ended without a final decree dealing with some of the points in dispute. The parties raised sheriff court proceedings, and the sheriff also pronounced interdict. The First Division became seised of proceedings due to a bill of advocation passed by the sheriff. During the appeal proceedings, breach of interdict was alleged, and a petition and complaint presented to the Inner House. The defender submitted that the petition was incompetent as the interdict had been granted by an inferior court. It was held that the whole cause had been brought to court by the advocation, had thereby been taken out of the jurisdiction of the inferior court, and that the complaint was competent. In my view *Gray* falls to be distinguished. It did not involve an award made on appeal, but by the Lord Ordinary, and accordingly is the obverse of the present case. The breach was raised by petition and complaint procedure, which Court of Session procedure provides. Most significantly, it involved a pending process, not a completed one. It decided that two courts could not be seised of the same process at the same time. It is noted by Burn-Murdoch: *Interdict in the Law of Scotland* (1933) at paragraph 450 that a sheriff court interdict is incompetently challenged before the Court of Session unless the original sheriff court interdict has been affirmed on appeal to the Court of Session. In the present case, however, neither the sheriff court nor SAC are currently seised of the action. That will remain the case unless and until the parties bring an alleged breach before the court.

[11] *Monro* v *Robertson's Trs* (1834) 12 S 788 involved a petition and complaint to the Inner House, based on a sequestration granted by the sheriff, and an interdict granted in the Bill Chamber. The Second Division (not the Bill Chamber, which did not have the necessary jurisdiction - see Burn-Murdoch, above, at para 450), founded on *Gray* and decided that:

> "Every Court has power to maintain its own dignity, and any complaint for contempt ought to be made to the Court itself, whose authority is alleged to have been violated".

[12] In *Mackenzie* v *Coulthart* (1889) 16 R 1127, a judge of the Second Division heard proof on alleged breach of interdicts granted by the Second Division. That case is authority that an appeal court has jurisdiction to consider breach of its own orders.

[13] In *MacIver* v *MacIver* (above), the First Division confirmed the customary procedure (at page 735 G-H) was to bring the matter before the court by means of a separate action commenced by initial writ. In *AB and CD* v *AT* (above, at paras 3 and 7) it was again confirmed that if there were no subsisting process, breach proceedings would be by petition and complaint (in the Court of Session) or by summary application initial writ (in the sheriff court). The only exception would be if there were specific power to bring proceedings by minute (such as the express power under OCR 33.44 in section 11 family proceedings).

[14] From the above, it appears settled that a court which has pronounced interdict has power to deal with alleged breach of that interdict, as part of its inherent power to maintain its own dignity. Where the process is pending, the alleged breach can be brought before the court by minute procedure, or equivalent. Where the process is no longer pending and the matter has been the subject of a final interlocutor, the matter cannot be raised within the same process. Fresh proceedings are required.

[15] In the present case, therefore, the present minute procedure is not available to the pursuer. The process has been dealt with by a final interlocutor, and accordingly SAC is

functus officio, as is the original sheriff court. There is no express procedure which regulates breach proceedings (contrast the petition and complaint procedure which is available in the Court of Session under RCS 14.2(d)), or which would permit proceedings by minute. The only remedy is by raising new proceedings in the same sheriff court, being the sheriff court which has the power to deal with the breach. That requires a separate summary application, initiated by initial writ. While SAC does have jurisdiction to deal with the breach of its own order, there is no available equivalent procedure to allow separate proceedings to be raised directly.

[16] It follows that the present motion must be refused as incompetent, as it is made in a process in which SAC is *functus officio,* and the minute dismissed. The pursuer does not, on the present facts, have a remedy in SAC.