EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 78
XA38/17

Lord Brodie
Lord Drummond Young
Lady Clark of Calton

OPINION OF THE COURT

delivered by LORD BRODIE

in the cause

by

MESSRS J & E SHEPHERD

Pursuers and Respondents

against

PAUL DAVID LETLEY

Defender and Appellant

Pursuers and Respondents: Upton; Thorntons Law LLP
Defender and Appellant: Howlin QC, Logan; Campbell Smith LLP

12 December 2017

Introduction

[1] This is an appeal against an interlocutor of Sheriff Principal Lewis pronounced on 18 July 2016 in proceedings at the instance of Messrs J & E Shepherd, a firm of chartered surveyors (the pursuers) against Paul David Letley (the defender) where the complaint is made of breach of interim interdict granted by the sheriff at Dundee on 10 June 2011. Although in

form an appeal against the decision by the Sheriff Principal on 18 July 2016 it brings under scrutiny the decision of the sheriff, following a proof, to find the defender in breach of the interim interdict to the extent that he solicited the custom of one Dr Sally Keenan.

[2] In so far as relevant, the interim interdict was in these terms:

> "ad interim interdicts the defender during the period of one year from 1 June 2011 from canvassing or soliciting the custom of any person, firm or company with which he had dealings during the period of partnership of the firm."

[3] The proceedings for breach are by way of summary application commenced in January 2013. Since then their course has been protracted, in part by reason of doubts over the proper mode of review of a finding of breach of interdict which required to be resolved by decision of a five judge bench which is reported as *Shepherd* v *Letley* 2016 SC 238.

[4] The sheriff (Way) heard proof in relation to the pursuers' complaints in January 2014. No order had been made for the recording or transcription of evidence. At paragraph 9 of his Note relative to his interlocutor of 16 June 2014, the sheriff explains that, after evidence had been led, counsel for the pursuers very properly and most helpfully focused attention on four events or instances which counsel submitted were proven instances of breach of the interim interdict, established beyond reasonable doubt, any one of which deserved condign punishment. As the sheriff goes on to explain in the course of his Note, he was not satisfied that three of these instances amounted to a breach. That left one in respect of which he did find there to have been a breach of interdict, that being the sending of an email to Dr Sally Keenan on 26 June 2011. The sheriff explains, at paragraph 9 and 12 of his Note, that at the relevant time the defender was estranged from his then wife. Dr Keenan was the defender's sister-in-law.

[5] At the beginning of his Note the sheriff finds "the following facts, proved, admitted or agreed". There then follows findings set out in 26 paragraphs. Some of these findings

relate to the instances in respect of which the sheriff found there to be no breach of interdict. The findings having some degree of relationship to the pursuer's complaint in so far as relating to the solicitation of Dr Sally Keenan are as follows:

"1) The pursuers are a firm of chartered surveyors…

2) The defender is Paul David Letely…

3) The defender was a partner in the pursuers from 1988 until 1 June 2011. The defender was a fixed-profit-sharing partner. The defender and the other fixed-profit-sharing partner operated under the instruction of the principal partners, namely George Brewster, Ian Cameron, Christopher Grinyer and Ian Fergusson.

4) The pursuers operated as part of their business a Property Letting Department which provided residential and management services to a number of clients. For many years before the termination of his partnership in the pursuers, the defender headed the Property Letting Department. The defender has or had other business interests which were disclosed to the pursuers without objection.

5) The defender either personally or through other business entities in which he had an interest, contracted with the pursuers to provide property management services to him or those entities. In April 2011 the defender either personally as agent was the largest single customer of the pursuers Property Letting Department.

6) In April and May 2011 the pursuers proposed to transfer the operation of their residential property letting department to a third party…

7) On 10 June 2011 this Court granted interim interdict against the defender for the period of one year from 1 June 2011 from canvassing or soliciting the custom of any person, firm or company with which he had dealings during the period of partnership of the firm…

8) The order of the Court was lawfully and effectively served on the defender on 13 June 2011 at Pavillion Properties, 86 Bell Street Dundee (Pavillion).

9) Pavillion is a property management company run by Ms Sally Cameron who is now the fiancé of the defender. In 2011 the defender's name appeared on the website of Pavillion where he was designed as having founded the firm of Pavillion. The defender has signed and signs his name on Pavillion's headed paper.

10) The clients with whom the defender had had dealings during his partnership with the pursuers included First London & Scottish Real Estate L.L.P.,

Caledonian Investments No. 1 L.L.P., RNP Properties, Letley & Braidwood, Letley & Williamson, Letley & Cheverenko, Letley Beaton & Williamson, Letley & Huyton, Springfield Group, Greenwich Residential and Mrs. J.P. Letley and Dudhope Properties Ltd.

…

22) In 2011 two flats at 184 and 164 South Victoria Dock Road were owned by Dr. Sally Keenan, Alan Beaton and Stuart Huyton. Dr. Keenan owned 50% of each of the properties and the other 50% was split equally between Messrs' Beaton and Huyton. The defender had no heritable interest in either of these properties.

23) The defender contacted Dr. Keenan, under cover of an e-mail dated 26 June 2011 (after the effective service of the interim interdict), at around 9.49 p.m. stating that:-

> *'I am only writing concerning the two flats above (referring to 164 & 184 South Victoria Dock, Dundee respectively). Alan and Stuart would prefer them to be managed by my new company Pavillion Properties as opposed to Direct Lettings. There are obvious benefits of lower costs. We are charging 8% + VAT with a 6% start up fee for two months for friends and family. I am not allowed to solicit from my former clients and have no wish to, most will be leaving Direct Lettings of their own accord'."*

Grounds of Appeal

[6] There are three grounds of appeal:

"1. The Learned Sheriff is obliged to make findings in fact of the relevant facts in terms of s50 of the Sheriffs Court (S) Act 1907. His findings in fact did not entitle him to conclude that the defender was in breach of the Court Order.

2. In making his findings in fact, the Learned Sheriff failed to have regard to the precise terms of the interdict, which operated by reference to persons with whom the appellant had had 'dealings' in the relevant period and not by reference to 'clients'.

3. The Learned Sheriff failed to give consideration to whether or not Sally Keenan was a person whose business could be solicited at the time that the interdict was obtained. The evidence clearly showed that with or without her consent the joint venture that she was a party to had already been transferred away from the pursuers/respondents prior to the relevant date."

Discussion

Third Ground of Appeal

[7] The third ground of appeal can be dealt with relatively shortly. Paragraph 37 of the sheriff's Note contains the following:

> "I have found the defender to be in breach of the interim interdict to the extent that he solicited the custom of Dr. Sally Keenon (*sic*), a client of the pursuers for the purposes of that order, by email dated 26 June 2011."

We shall have to return to the expression "a client of the pursuers for the purposes of that order" when considering the first and second grounds of appeal. For the moment we are only concerned with the proposition that in order to show that the defender had solicited the custom of Dr Keenan, the pursuers had to establish that, as at the date of receipt of the email of 26 June 2011, the two flats at 164 and 184 South Victoria Dock Road in which Dr Keenan had an interest were being managed by the pursuers. The defender's position, as recorded by the sheriff at paragraph 32 of his Note, was that by 26 June 2011 the properties were being managed by Pavillion.

[8] The third ground of appeal criticises the sheriff for failing to give consideration to whether or not Dr Keenan was a person whose business could be solicited, in other words as to whether Dr Keenan had business to solicit (as the Sheriff Principal put it in paragraph 19 of her Note). The sheriff did not fail to give consideration as to whether Dr Keenan had business (or to use the terms of the interim interdict, "custom") to solicit. He addresses the matter generally in respect of all four instances in the first of the two paragraphs of his Note which are numbered "27". There he expresses the opinion that "the pursuers still had customers, for the purposes of the <u>interim</u> interdict, even if their paperwork was removed from the pursuers' offices". The point is made in rather clearer terms by the Sheriff Principal at paragraph 22 of her Note: "[The interim interdict] is not confined to only those whose

portfolio of property was held by the respondents at the date of the interim order". We agree. As a matter of generality we would accept that when determining whether a particular overture amounts to a solicitation of custom it may be relevant to consider whether the person to whom the overture was made then had custom of an appropriate type to give to the maker of the overture. However, in order to be solicited for custom it is not necessary to have custom to make available. The sheriff was fully entitled to read the email of 26 June 2011 as amounting to a solicitation. Whether any properties in which Dr Keenan had an interest were then being managed by the pursuers was neither here nor there.

First and Second Grounds of Appeal

[9] The first and second grounds of appeal can be considered together. The contention for the defender and appellant is that the interim interdict prohibited the defender from "canvassing or soliciting the custom of any person, firm or company with which he had dealings during the period of partnership". Thus, in order to establish breach of the order, it was necessary for the pursuers to prove, to the satisfaction of the sheriff, that the defender had canvassed or solicited a person, firm or company and that that person, firm or company was a person, firm or company with which the defender had had dealings. That had not been done, as appeared from the sheriff's findings and facts; there was no finding that Dr Keenan was a person with whom the defender had had dealings. Accordingly, the sheriff had not been entitled to find the defender in breach of interdict.

[10] A curious feature of the sheriff's Note is the absence of any reference to (other than when quoting the terms of the interim interdict) far less discussion of, "dealings". This is particularly odd when one considers the crucial role of the concept of "dealings" in identifying whom it is that the defender was prohibited from approaching, but despite this

it appears to have been lost sight of. We could only speculate as to why this was so but we note that point does not appear to have been taken in the written submission for the defender which was provided to the sheriff and in the equivalent written submission for the pursuers the matter is taken no further than a statement that the properties at South Victoria Dock Road had been managed by the pursuers, "the responsible individual there having been the defender". There may have been a shared assumption by counsel that it was sufficient that Dr Keenan had been a client of the pursuers during the period of the partnership, with the sheriff then being misled into endorsing that assumption as he appears to do when, in paragraph 37 of his Note, he refers to Dr Keenan as "a client of the pursuers for the purposes of that order". It is not an assumption that we would share. If a party is to be found in breach of an interdict against soliciting a person with whom he has had dealings, we would expect an express determination that the person that he solicited was a person with whom he had had dealings and some explanation of the court's construction of "dealings". We would also expect there to be express findings of the primary facts upon which the conclusion that the defender had had dealings was based to be set out by the sheriff.

[11] Mr Upton, on behalf of the pursuers, accepted that it was for the pursuers to establish that Dr Keenan was someone with whom the defender had had dealings but he did not accept that the absence of any express finding in fact to that effect was determinative. Although breach of interdict may be visited with quasi-criminal consequences, proceedings to determine whether there had been such a breach were civil in nature and conducted by reference to pleadings. Accordingly, the sheriff did not require to make findings where a fact had been admitted on record. In the present case the sheriff had not required to apply himself as to whether the defender had had dealings with Dr Keenan, that had effectively

been admitted and thus the joint position of parties was that Dr Keenan was among the persons whom the defender was prohibited from soliciting. The sheriff's findings in fact and Note may not have been drafted as well as they might have been, but that was not the point. Rather, the question for this court was whether the sheriff's conclusion that the defender had breached the interim interdict was justified by his express findings in fact, the terms of his Note and the framework within which the litigation had taken place. If it emerged objectively from the process that the sheriff's decision was justified, that was sufficient. The argument which had been presented in support of the first and second grounds of appeal was one of form rather than substance. There was a reason in policy for rejecting it: efficient and rational litigation should focus on what is in issue and not what is not in issue.

[12] In submitting that it was admitted in the defender's pleadings that he had had dealings with Dr Keenan, Mr Upton drew particular attention to answers 4 and 7. In answer 4 there is this:

> "Admitted at the said meeting [on 8 July 2011] the defender agreed that the properties managed by the pursuers relating to… Sally Keenan… were to remain with the pursuers".

In answer 7 the defender avers:

> "Despite owning 50% of the flats Sally Keenan had always allowed and authorised the defender to make all decisions in relation to the management of the flats which she had never seen".

Although this averment was not specifically admitted by the pursuers, condescendence 7 contained no general denial and, accordingly, following the rule that what was not denied must be taken to have been admitted, in addition to the express admission in answer 4 that the pursuers had managed Dr Keenan's properties, there was an implied admission that she had "allowed and authorised the defender to make all decisions in relation to the

management of the flats". These admissions were quite sufficient to justify the sheriff in concluding that the defender had had dealings with Dr Keenan, at least in relation to these two flats. Counsel for the defender had not submitted otherwise before the sheriff.

Decision

[13] In her Note the Sheriff Principal records that from time to time during the hearing before her Mr Upton repeated the objection that there had been no transcription of the evidence led before the sheriff and that therefore the appellate court was bound by the express findings in fact which the sheriff had made. We see that as a sound objection, as did the Sheriff Principal. In a summary application the sheriff's decision is effectively final on the facts and in order to discover what facts he has accepted as having been established one looks to what he states as his findings. It follows that if the sheriff's decision is to withstand scrutiny there must be sufficient in his findings in fact to justify that decision. In the present case crucial to any finding of breach of interdict was a finding that the defender had "had dealings" with Dr Keenan prior to the defender sending the email of 26 June 2011. Without a finding that that fact had been established to the satisfaction of the sheriff, it could not be said that Dr Keenan was a person whom the defender was prohibited from soliciting. As Mr Upton accepted, such a finding is not included among the facts that the sheriff found "proved, admitted or agreed". On one view that is enough for us to allow the appeal.

[14] Mr Upton however argued that to determine the appeal on the basis of the sheriff's omission to state in terms what parties have all along agreed was in fact the case, would be to prefer form over substance. He pointed to the terms of the pleadings and the fact the defender's counsel does not appear to have taken the point in his submissions to the sheriff.

[15] We are not persuaded that the contention advanced in the first and second grounds of appeal relates only to matters of form. It is to be borne in mind that these proceedings are quasi-criminal in nature. If a court is to find that a party has been in breach of a court order it must ensure and then explain that anything which is necessary for such breach to be made out has been established to its satisfaction. In the present case, if the defender was to be found in breach of interdict it was necessary to establish that Dr Keenan was someone with whom the defender had "had dealings". Otherwise, the interim interdict did not prevent him soliciting her custom. In his finding in fact (10) the sheriff found the defender to have had dealings with a number of legal and natural persons. Dr Keenan is not included in the list. Mr Upton submitted that such a finding was unnecessary given the terms of the pleadings. We do not accept that submission. In neither of the passages to which Mr Upton drew attention is there reference to the defender having had dealings with Dr Keenan. In answer 4 it is admitted that the pursuers managed properties in which Dr Keenan had an interest but we do not see Dr Keenan having been a client of the pursuers as necessarily meaning that the defender had dealings with her. Neither do we see Dr Keenan having always "allowed and authorised the defender to make all decisions in relation to the management of the flats which she had never seen", which is the averment in answer 7 to which Mr Upton draws attention, as necessarily meaning that the defender had dealings of a commercial nature with her. He may have done so but in a situation of some complexity, involving a family relationship and the management of properties through agents, that does not necessarily follow. That it is said that Dr Keenan had never seen the flats at least opens the possibility that for Dr Keenan the properties were simply a vehicle for investment of a sort which might not require much in the way of "dealings" with the managers of the properties. Moreover, even allowing for the fact that the defender was a partner of the

pursuers and that he headed their Property Letting Department, it does not appear to us to follow that he would necessarily have dealings with every client whose properties were managed by that department. There is another difficulty with Mr Upton's argument that because the pursuers make no denial in condescendence 7 of what is averred by the defender in answer 7 all the averments in answer 7, including the averment "Sally Keenan had always allowed and authorised the defender to make all decisions in relation to the management of the flats", must be taken to have been admitted and therefore common ground as between the parties which did not need to be made the subject of the sheriff's findings in fact. While it is true that a failure to deny can be taken as an admission, that is not so when, although not containing the word "denied", the averments of the respective parties are contradictory of each other. In condescendence 7 the pursuers aver that the properties at 164 and 184 South Victoria Dock Road "were at all material times managed by the pursuers". In answer 7 the defender avers: "Despite owning 50% of the flats Sally Keenan had always allowed and authorised the defender to make all decisions in relation to the management of the flats which she had never seen". Now these respective averments may be attempts to describe states of fact which are not indeed inconsistent but on the face of it they do look to be contradictory of each other. That is not a satisfactory basis upon which to argue that the pursuers must be taken to have admitted what is averred by the defender.

[16] We shall accordingly allow the appeal. We shall recall the interlocutors of the Sheriff Principal dated 18 July 2016 and 27 October 2016. We shall recall the undated interlocutor of the sheriff where he made the finding of breach of interdict, recall the interlocutor of the sheriff dated 16 June 2014 and dismiss the Summary Application. We shall reserve all questions of expenses.