SHERIFF APPEAL COURT

[2019] SAC (CIV) 29
FAL-B339/17

Appeal Sheriff A G McCulloch

OPINION OF THE COURT

delivered by APPEAL SHERIFF A G McCULLOCH

in appeal by

THE ROYAL BANK OF SCOTLAND PLC

Pursuer and Respondent

against

ROSS JAMIESON otherwise ROSS DOUGLAS JAMIESON

Defender and Appellant

Defender and Appellant: Party
Pursuer and Respondent: Noor; Aberdein Considine

12 July 2019

[1] In 2004, the appellant took out a mortgage, and granted a standard security over his property. He was unable to maintain monthly payments and the account fell into arrears. The respondents have raised proceedings for the calling-up of their security on a number of occasions. This appeal is in respect of the most recent action, raised in 2017. After proof, the sheriff granted the decrees sought by the respondents, and the defender now seeks to challenge that outcome by this appeal. At the outset of the appeal, Mr Noor, for the respondents, sought to move a minute of amendment, to correct a minor error in the

company number in the instance. This was opposed, but allowed by me, as of little importance to the appeal, and of no prejudice to the appellant.

[2] The appellant raises five grounds of appeal, some of which overlap to an extent. The first ground relates to the service of the calling-up notice by the agents for the respondents. The sheriff found as fact that a calling-up notice was served on or about 26 July 2017, (finding in fact 4), and further found in fact and law (1) that the respondents had validly served a calling-up notice in respect of their security. These findings are challenged by the appellant, who points to an error of law by the sheriff.

[3] The procedure for service of calling-up notices is regulated by section 19 of the Conveyancing and Feudal Reform (Scotland) Act 1970. This is in the following terms:

> "19(6) For the purposes of the foregoing provisions of this section, the service of a calling-up notice may be made by delivery to the person on whom it is desired to be served or the notice may be sent by registered post or by the recorded delivery service to him at his last known address, or, in the case of the Lord Advocate, at the Crown Office, Edinburgh, and an acknowledgment, signed by the person on whom service has been made, in conformity with Form C of Schedule 6 to this Act, or, as the case may be, a certificate in conformity with Form D of that Schedule, accompanied by the postal receipt shall be sufficient evidence of the service of that notice; and if the address of the person on whom the notice is desired to be served is not known, or if it is not known whether that person is still alive, or if the packet containing a calling-up notice is returned to the creditor with an intimation that it could not be delivered, that notice shall be sent to the Extractor of the Court of Session, and shall be equivalent to the service of a calling-up notice on the person on whom it is desired to be served."

In the present case, the appellant argues that service on the Extractor, as happened, was invalid as it did not follow on from any of the three preconditions referred to in the section, namely address unknown, not known if alive, or packet returned undelivered. At the proof, in order to show what attempts had been made to serve the calling-up notice, the respondents had lodged various documents. These are 5/1/3 of process, and bear to be a "Form A" dated 21/07/2017 sent to the Extractor, acknowledged by the Extractor on 26 July

2017, and bearing a recorded delivery slip, addressed to the appellant, date stamped "11 Jul 2017". It was the appellant's position that if service on the Extractor was invalid, then the whole summary application itself was incompetent, as the 1970 Act required there to be a valid service of the calling-up notice before decree could be granted. His address was known, he was clearly alive, and there was no evidence to show that the packet had been returned. In his response, Mr Noor explained that what had happened was that a calling-up notice had been sent to the appellant by recorded delivery mail, on 11 July 2017, and that was the receipt attached in error to the execution on, and acknowledgement from, the Extractor. The postal service had been unable to serve on the appellant, there being no answer, and accordingly, service was made on the Extractor. In terms of the section, once service is made on the Extractor, the appellant is deemed to have been lawfully served. Agents were aware that service had failed by checking the "track and trace" online facility provided by Royal Mail. In that knowledge, they were entitled to serve on the Extractor. This, he explained was common, modern practice. In addition, Sheriff Officers had been instructed on 12 July 2017, and had attempted personal service on 13 July 2017, (production 5/3/1). This was unsuccessful, but they had deposited the calling-up notice. It was accepted that this did not conform to section 19(6). Also lodged (production 5/3/6) was an illegible Royal Mail Track and Trace screenprint. According to the appellant, the use of a magnifying glass had shown this to be dated 29 July 2017, with the same number as attached to the recorded delivery execution on an affected occupier. Mr Noor did not disagree.

[4] The appellant's second ground of appeal related to the completion of the necessary pre-action requirements set out in section 24 of the 1970 Act. The respondents relied on their agents' letter of 27 September 2017 (production 5/4/3) as containing all the necessary information. The appellant indicated that the letter did not in fact contain the information,

such as details of the security, details of added fees and charges, and full details of the mortgage account itself. He referred to his productions 6/3, 6/7, 6/9 and 6/11. The respondents argued, pointing to the case of *NRAM* v *Doyle and others* 2012 Hous LR 94, that the letter was sufficient, and that all necessary pre-action requirements were in place.

[5] The third ground of appeal sought to argue that the respondents' agents had been guilty of prejudicial conduct so as to cause there to be an unfair and unjust hearing. The appellant conceded that this ground was largely made up of the fourth and fifth grounds, and did not seek to expand much on it, save to say that he believed that the respondents were committing a fraud on him, by their failure to intimate a motion (7/3), to discharge the proof, which had been granted unopposed.

[6] The fourth ground was that the sheriff at proof had erred in law in allowing the respondents to lodge productions late, on the morning of the proof. The appellant had objected at the time, with the result that one of the proposed documents was not received into process, but the other two were allowed. These were the mortgage arrears statement, and a copy of the original mortgage application form. The appellant argued that it had been prejudicial, and in breach of the court rules, and thus the sheriff ought to have refused to allow the documents to be lodged. He claims now, as then, that he was placed at a substantial disadvantage by the lateness of the documents, and by allowing them the sheriff handed the respondents a significant benefit. Mr Noor, in response, pointed out that the power of the court to allow late documents was a discretionary power, that the sheriff had clearly weighed the matter carefully as he had refused one of the documents, and that there was no real prejudice at all to the appellant. The arrears statement was a more up to date version of one lodged earlier (production 5/4/1), and the mortgage application had been

completed in 2003/4 by the appellant, and was only lodged to show when matters had first commenced between these parties.

[7] The final ground of appeal was that the appellant had not been advised of the identity of the respondents' witness. Although he was aware that someone would probably be coming to give evidence, the identity of that person was unknown at the pre proof hearing. The sheriff had ordained the respondents to lodge with the court and intimate to the appellant, a list of witnesses within 7 days. This they had failed to do, as no intimation had been made to him, although a copy had been sent to the court. This was another example of the attitude of the respondents' agents in ignoring court rules. For the respondents, it was argued that as the matter was a summary application, rules were less rigid, and in any event there was no prejudice at all to the appellant. As the sheriff pointed out, he did not seek an adjournment after her examination in chief, but proceeded to cross examine the witness on matters of interest to him.

[8] The first ground of appeal is the only one with any substance, and I find that the second to fifth grounds are not made out. It is clear from the documents lodged, and the sheriff's findings, that the pre-action requirements were complied with. There is no error in law in so holding. I am unable to find any untoward behaviour by the respondents' agents. Whilst rules of court are set out to ensure that the litigation takes place within a defined and regulated environment, any failure to comply has not prejudiced the appellant, has been explained at the time, and relief given by the sheriff. I see no basis for the allegation of fraud. The late documents and absence of intimation of the identity of the witness are unfortunate acts, but again, they must be judged by any prejudice caused to the appellant. I find none. Again, there are no errors in law made by the sheriff in regard to the conduct of the

respondents' agents, in the exercise of his discretion in allowing certain documents to be lodged at the bar, and in allowing the respondents' witness to give evidence.

[9] That leaves the first ground. In the case of *Santander UK Plc* v *Gallagher* 2011 SLT (Sh Ct) 203 the court was concerned with service of a calling-up notice. It had been deposited by sheriff officer at the address of the defender, by what is colloquially called letter box service. It was argued that such service was akin to personal service. The court held that the terms of section 19(6) of the 1970 Act must be followed when serving a calling-up notice, and it was not possible for service to be effected by any of the modes of service provided for in the rules of court. In the present case, service was on the Extractor. For such service to be lawful, there had to be present one of three preceding requirements, all as specified in section 19(6). These are narrated in paragraph [3] above. Reading short, they are (1) address unknown, (2) unsure if alive, or (3) packet returned by Royal Mail. None of the three apply here. What the respondents' agents did was to attempt recorded delivery service, check to see if it had been signed for, and when it had not been signed for, they proceeded to serve on the Extractor. This, in my opinion, they were not entitled to do. It was going too far to deduce, as they must have done, that the address was unknown, merely because a recorded delivery letter had not been signed for, or there was "no answer". If the comment had been "Gone Away", as is sometimes the case, then service on the Extractor would be permitted. They did not wait to see if the packet was returned, which again would have allowed for service on the Extractor. What, then, is the effect on this action of the failure to serve in accordance with section 19? A calling-up notice is the foundation of the respondents' application to the court. Accordingly it is important that it be served in accordance with the provisions of section 19. It is not enough to say that section 19(6) provides that service on the Extractor is equivalent to service on the person on whom it is desired to be served and thus the calling

up notice procedure becomes valid. It does not. One can only proceed to serve on the Extractor in defined circumstances, not present here. A strict interpretation of the statute is required. See, for example, *Kodak Processing Companies Limited* v *Shoredale Limited* 2010 SC 113. As the calling-up notice was not served strictly in accordance with the provisions of section 19(6), it renders the subsequent procedure inept, and the summary application incompetent.

[10] It follows that the sheriff erred in law in holding that the respondents had validly served a calling-up notice in respect of the standard security granted in their favour by the appellant. The interlocutor of 11 March 2019 is recalled and the summary application dismissed.

[11] I was not addressed on expenses. However, as the appeal has been successful, I invoke the normal rule, and find the respondents liable to the appellant in the expenses of the appeal, and it follows that as the action was incompetent, for the expenses in the court below.