



SHERIFF APPEAL COURT

[2021] SAC (Civ) 13

KIL-SM19-19

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D L MURRAY

in appeal by

NATHAN BLAIR

Respondent/Appellant

against

HEATHER BAIRD

Claimant/Respondent

Respondent/Appellant: no appearance required

Claimant/Respondent: no appearance required

8 March 2021

[1] This is an appeal against the decision of the summary sheriff of 4 August 2020 requiring the appellant to return a television to the respondent within 48 hours of the date of intimation of the decision form.

[2] The summary sheriff sets out the factual and procedural background in his report. In short, the parties were neighbours and formerly friends. The appellant wished to purchase a television but could not obtain credit. The claimant claimed she entered into a hire purchase agreement for a television in terms of which she required to pay 156 weekly payments of £17.99. She then provided the respondent with the television and he agreed to make the

weekly payments to her. He ceased making payment to her after a few weeks following a falling-out between them. Despite repeated requests, the respondent refused to return the television to the claimant. The claimant seeks return of the television, failing which, £2,806.44, being the sum due under the hire purchase agreement. The respondent did not address the basis of claim in the response form, but averred that the claimant harassed and assaulted him which has negatively affected his mental health. On 21 February 2020 the respondent failed to attend the case management discussion and the case was continued ex proprio motu to 20 March for the respondent or his representative to attend. On 19 March the respondent's wife e-mailed the sheriff clerk's office at Kilmarnock Sheriff Court indicating that her husband would be unable to attend on 20 March as he and the rest of the household had been requested to self-isolate due to concerns about symptoms of Covid-19 being exhibited by a member of the household. By order of 20 March the respondent was required to provide written submissions within two weeks setting out the reasons why the television should not be returned to the claimant, making clear that unless he did so, decree would be granted. No reply was received within the two-week period set out in the Order of 20 March however this coincided with the court being affected by the Covid-19 pandemic and the case was paused administratively. By e-mail dated 16 April 2020 the respondent's wife contacted the sheriff clerk's office again indicating that the family were prohibited from leaving the house due to concerns about Covid-19, indicating that payments had been made to the claimant until the claimant became aggressive and abusive. The respondent had paid £400 towards the television and that was the only means of entertainment for the family, including their four-year-old daughter. By order of 17 June 2020 the claimant was required to contact the sheriff clerk's office by 3 July 2020 to indicate what she wanted to happen to the case following its having been paused. By letter received

on 22 June 2020 the claimant requested the case be progressed by the television being returned to her by order of the court. An unless order dated 29 June 2020 was made in the following terms:

“The sheriff orders the respondent to take the following step by 20 July 2020:

1. The respondent is ordered to respond to the claimant's assertions regarding the return of the television. In particular, the respondent is ordered to clarify the basis upon which the claim that it should be returned is disputed.

Possibility of decree

The sheriff considers that taking the steps listed above is necessary for the progress of this case. The respondent is **warned** that unless these steps are taken, decree will be granted without further warning.”

No response having been received from the respondent, the summary sheriff made the order for the return of the television which is appealed.

[3] As the sheriff records in his Note:

“(i) Rule 1.1 of the simple procedure rules defines the simple procedure process as follows:

‘1.1 What is simple procedure?

(1) Simple procedure is a court process designed to provide a speedy, inexpensive and informal way to resolve disputes.’

(ii) Rule 1.2 of the simple procedure rules sets out the principles of simple procedure as follows:

‘1.2 What are the principles of simple procedure?

(1) Cases are to be resolved as quickly as possible, at the least expense to parties and the courts.

(2) The approach of the court to the case is to be as informal as is appropriate, taking into account the nature and complexity of the dispute.

(3) Parties are to be treated even-handedly by the court.’”

(iii) Rule 1.4 sets out the sheriff's responsibilities as follows:

‘1.4 What are the sheriff's responsibilities?

(1) The sheriff must take into account the principles of simple procedure when managing cases and when interpreting these rules.

(2) The sheriff must ensure that parties who are not represented, or parties who do not have legal representation, are not unfairly disadvantaged.

(3) The sheriff must encourage cases to be resolved by negotiation or alternative dispute resolution, where possible.

(4) If a case cannot be resolved by negotiation or alternative dispute resolution, the sheriff must decide the case.’

(iv) The following responsibilities of the parties to simple procedure are set out at rule 1.5:

'1.5 What are parties' responsibilities?

- (1) Parties must respect the principles of simple procedure.
- (2) Parties must be honest with each other, with representatives and with the sheriff ...
- (7) Parties must follow the sheriff's orders.'

(v) The sheriff's powers, as far as they are relevant, are set out in rule 1.8:

'1.8 What are the sheriff's powers?

- (1) The sheriff may give orders to the parties, either in person or by giving written orders ...
- (3) The sheriff may do anything or give any order considered necessary to decide the case ...
- (10) The sheriff may decide a case without a hearing.'

(vi) Rule 8.4 of the simple procedure rules sets out the power of a sheriff to make an unless order as follows:

'8.4 What are unless orders?

- (1) The sheriff may give a party an order which states that unless that party does something or takes a step, then the sheriff will make a decision in the case, including:
 - (a) dismissing the claim,
 - (b) awarding the claimant some or all of what was asked for in the claim form.
- (2) If that party does not do the thing or take the step that the party was ordered to, then the decision in the case must be made.'

(vii) Rule 8.5 of the simple procedure rules sets out the powers of a sheriff where a party fails to follow an order as follows:

'8.5 What if a party does not follow an order?

- (1) Where a party does not follow an order the sheriff may make a decision in the case,
Including:
 - (a) dismissing the claim or part of the claim,
 - (b) awarding the claimant some or all of what was asked for in the Claim Form'."

Submissions for the respondent

[4] The respondent in his grounds of appeal stated (i) that he was not given the chance to appear at court. He was not told when the court date was as no email or letter was received telling him when the case was going to be called and (ii) that he was making

payments for the television until the claimant came to his house and abused him and his wife and assaulted his wife. He stated that he was willing and able to pay £30 every two weeks towards the cost of the television.

[5] In the written submissions on behalf of the respondent it was simply stated that he “never got the chance to give his sides of the events”.

Submissions for the claimant

[6] The claimant submits her claim should be successful because she entered into a hire purchase agreement and the respondent agreed that he would make the payment due to her in return for use of the television. He has failed to make those payments and the sheriff was correct to make the order for delivery of the television. The respondent waited until the last day to lodge an appeal and the matter has been going on too long.

Decision

[7] The procedural background leading up to the unless order is recounted above. I commend the summary sheriff for his efforts to case manage this case during the pandemic. I find there to be no error in his decision to issue an unless order. The respondent’s principal ground of appeal is that he never received that order. In this case in the response from the respondent indicated that he should be contacted by post. The court process contains no verification that the unless order was sent to him. In the circumstances it cannot be demonstrated that the respondent was aware of the terms of the unless order. I am not satisfied that the respondent can be said to have failed to comply with the unless order. The summary sheriff proceeded on the basis that the respondent received the unless order. I have reached the view that he was not entitled to do so as it cannot be established that the

unless order was received by the appellant. As a result the decision of the sheriff must be recalled and the claim remitted back to the sheriff. The appellant now clearly has knowledge of the terms of the unless order. To enable the expeditious progress of the case the respondent must now respond to the unless order by 22 March 2021. The respondent is ordered to clarify by that date the basis upon which the claim that the television should be returned is disputed. The respondent is again warned that unless he does so decree will be granted without further warning.

[8] This case has highlighted a potential lacuna in the simple procedure rules. Rule 8.4 which provides for an unless order omits to specify how an unless order is to be intimated where it is made in the absence of a party. I shall draw this matter to the attention of the Scottish Civil Justice Council who may wish to consider an amendment to the rule to clarify how intimation should be made on a party. Pending that review I consider that given the importance of an unless order and the consequence of noncompliance it is desirable that where an order is made when the party on whom the order is made is not present the order should include a direction that it is to be formally served upon them in terms of rules 18 and 19 of the simple procedure rules so the court may be satisfied they have knowledge of the order.