SHERIFF APPEAL COURT

[2024] SAC (Civ) 17
KIL-B691-22

Sheriff Principal Pyle
Sheriff Principal Ross
Appeal Sheriff Sheehan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL ROSS

in the appeal in the cause

ANDREW SNODGRASS McCANDLISH

Pursuer and Appellant

against

BENJAMIN JOHNSTON and ALISON SWEENEY

Defenders and Respondents

Pursuer and Appellant: J. Brown, advocate; Levy & McRae Solicitors LLP
Defenders and Respondents: Parties

8 April 2024

[1] This is a summary application for breach of an interdict. The pursuer is the owner of several fields adjacent to Harelaw Farm, Fenwick. The defenders operate the farm steading at Blair Farm, Fenwick. By interlocutor dated 8 July 2022 the pursuer obtained interim interdict against the defenders relating to use of an access track. The defenders take access to Blair Farm by a track which leads from the A77 to Blair Farm and which passes over the land owned by the pursuer. The track is owned by the pursuer.

[2] The track is long, and has three gates. The first gate is situated at the entrance to the track adjacent to the A77. The second gate (the "middle gate") is near the mid-point between the A77 and Blair Farm. The third gate is adjacent to Blair Farm.

[3] The terms of the interim interdict are somewhat remarkable. It purports to prohibit the defenders from:

> "(a) leaving the gate(s) between the land at Harelaw Farm and the A77 road open after use in exercise of the servitude; and (b) leaving the gate(s) situated approximately halfway up the track between Harelaw Farm and Blair Farm open, after passing through in exercise of the servitude until further order of the court".

The terms appear to compel positive action. The sheriff refused, without discussing the competency of the interdict, but on the evidence alone, to find a breach of interdict established. The pursuer appealed. The defenders opposed the appeal but were not legally represented.

Parties' submissions

[4] Counsel for the pursuer submitted that the sheriff ought to have found the interdict to have been breached. The defenders were in wilful defiance of the order of the court. There were two questions to be addressed: whether the interdict had been breached and, if so, whether the breach was a wilful contempt of the court's interlocutor. The sheriff had considered the first question but not the second, and the action should be remitted. He had erred in finding there to be no breach, and in inadequately considering the evidence. This court should recall the interlocutor, make amended findings of fact, and find the breach to be established.

[5] The terms of the interdict reflected the underlying law of servitude, which required access to be exercised civiliter, and in doing so to close gates after use (Paisley, *Rights*

Ancillary to Servitudes at paragraph 19-014; *Drury* v *McGarvie* 1993 SC 95). In any event, the interlocutor remained an order of court which required to be obeyed. A party could not be free to ignore an order on the basis they disagreed with the basis for granting it. The interdict prohibited the defenders passing through the gate and leaving it open, whether or not they had opened it. In any event, the sheriff had failed properly to record the evidence, had missed out entirely the evidence of one witness, and had made only superficial findings. He had speculated on the evidence. Further, the sheriff had improperly excluded evidence on the basis of lack of fair notice, when it had not been objected to. The lay status of the defenders was irrelevant. Counsel then examined whether, had the facts been properly considered, the breach was contemptuous, and submitted that it was.

[6] The defenders were unrepresented at appeal. They did not present any legal submission. They made submissions of fact, including reference to an ongoing dispute with the pursuer, allegations of improper behaviour and of ulterior motives relating to a windfarm and the pursuer's business. We advised that we could not take these factual submissions into account at this stage, but noted that they opposed the appeal.

Decision

[7] This appeal is refused.

[8] The requirements of interdict or proof of breach are trite law. A crave for interdict must be "so precise and clear that the defender is left in no doubt what he is forbidden to do" (Macphail, *Sheriff Court Practice* (4th ed) at 21.50). Similarly, breach:

> "constitutes a contempt of court which may lead to punishment so it is necessary in the interest of fairness that the alleged contempt should be clearly and distinctly averred and the proceedings confined to such averments" (ibid, 21.62).

That is the lens through which this action must be viewed.

[9] Leaving aside the wording of the purported interdict, we do not accept the submission that the defenders were given fair notice of the purported breaches. The pleadings are so sparse that they amount to little more than repetition of the terms of the crave. The pursuer's averments do not set out the details of the breaches, which gate they related to, which defender was involved, or dates and times. In simple terms, the pleadings failed to set out the when, the who, the what or the how of any alleged breach. These are minimum requirements, particularly for proceedings which carry sanctions which include imprisonment for contempt of court. These pleadings were wholly deficient for breach proceedings.

[10] Examining the interim interdict for the required precision and clarity, the relevant part of the interim interdict was against "leaving the [middle gate] open, after passing through in exercise of the servitude." The appeal was presented without examination of competency: the plain terms require positive action, which is the function of an action *ad factum praestandum*, and not of interdict. Upon challenge, counsel did not present authority for what appears to be an illicit use of interdict. His position was that this reflected the underlying law of servitude, and therefore was competent. Counsel relied entirely on the underlying law of servitudes, which requires exercise of a servitude to be civiliter, or with the minimum inconvenience to the servient property. In this case, it was submitted that this required the middle gate to be closed after use. Further, the interdict was clear as to what it required, and the defenders knew that they were in breach.

[11] Unfortunately, the defenders were not represented and were not in a position to present a challenge to competency or relevancy. They are lay persons and that is entirely understandable. In the absence of argument we are not prepared to recognise this interdict as competent.

[12] This purported interdict does not prevent conduct. It compels action, namely the closing of a gate. The submission for the pursuer was clear as to what was intended: the pursuer regards this interdict as compelling the defenders to close the gate even if they did not open it. The pursuer sought the interdict for that purpose. It is not, in our view, a competent interdict, as an interdict cannot compel positive action. Far less force the defenders to act as unpaid gatekeepers. Reference to the law of servitude which underpins this action does not affect matters. Interdict is a sword not a shield.

[13] That raises a wider question of law, namely whether a court is obliged to enforce an interdict, by way of breach proceedings, where the interdict itself is in defective or challengeable terms. The defenders, through no fault of their own, were not in a position to present authority on this, and we do not comment further. In the particular circumstances of this case, that question does not require to be resolved. That is because there are three further problems for the pursuer. These are, firstly, that the wording is sufficiently ambiguous that the purported interdict is unenforceable; secondly, that the interdict is not proved to apply and; thirdly, that the evidence was insufficient to prove breach.

[14] Even if the interdict were competent, the question of "leaving open" is ambiguous as to whether it applies only to when they have opened it. It requires a purposive reading in order to exclude the absurdity of requiring the defenders to close the gate when it had been opened by others. The wording does not exclude that possibility. An interdict requires to be unambiguous and clear as to what conduct is required. It is a matter of regret that this feature was not discussed by the sheriff.

[15] Secondly, the sheriff identified that the description in the interdict did not describe the correct locus. He noted that the track ran over land adjacent to, but not part of, Harelaw Farm. It did not run "between" Harelaw Farm and Blair Farm. He did not deal with this as

parties did not raise it. It is, however, fatal to any breach proceedings. Counsel did, at appeal, attempt to identify the locus by reference to the title drawings, but these are not sufficiently specific for the purpose. We are left with the sheriff's assessment, as a matter of fact, having heard evidence. The interdict purports, on its wording, to describe a track which is not the track in question.

[16] Thirdly, we do not accept that the evidence showed that there was a breach of this purported interdict. Notwithstanding the pursuer's position on averment, that the breaches were so frequent that no further specification was required, the pursuer led evidence of only four breaches, namely on 10 August, 11 August and twice on 15 August, all 2022. They all related to the middle gate, or part (b) of the interdict, and were based on CCTV footage. How the defenders were expected fairly to identify that there were only four incidents, and to lead evidence to refute these specific events, is not addressed. The unfairness to the defenders in not being given fair notice, and the shortcomings of the pursuer's pleadings, are evident. Had the defenders been legally represented, no doubt the matter would have been taken straight to debate on a challenge to competency and relevancy. The requirement (above) that "the alleged contempt should be clearly and distinctly averred" has not been observed in the pleadings, or even attempted.

[17] Notwithstanding this, the sheriff heard and recorded the evidence of the four alleged breaches, on 10 August, 11 August and two events on 15 August, all 2022. The evidence did not amount to proof of breach.

[18] In relation to the 10 August 2022 event, the sheriff found the second defender to have driven thought the open gate. He also found that she did not close the gate due to a following car. There is no finding that the second defender did not close the gate at any time. The interdict is without timescale. Had the second defender returned later to close the

gate, she would not be in breach of the interdict. Counsel submitted that concepts of reasonable time were engaged. That cannot be so. The interdict requires to leave the interdicted party in no doubt as to what is prohibited. Reasonableness has no place in that exercise.

[19] In relation to the 11 August 2022 event, the sheriff found a similar event involving the first defender. The same points apply. The two further events on 15 August 2022 raise the same points. The sheriff's findings do not amount to proof of breach, and he so decided. We were urged on appeal to make fresh findings, but in the absence of a transcript this task is not possible, even were it appropriate.

[20] After the first day of the proof, purportedly as an excess of caution, the pursuer attempted to introduce a minute of amendment, following belated comment by the sheriff as to specification. The sheriff refused the minute. The appeal criticises the sheriff for that decision. It is sufficient to note that a pursuer must come fully prepared for proof, and has no entitlement to amend pleadings at the last minute. Amendment remains in the discretion of the sheriff. The sheriff's decision on amendment cannot be faulted.

[21] This action, and appeal, must fail for the foregoing reasons. It is therefore not necessary to examine in detail what the sheriff actually found in fact and law. We accept much of counsel's analysis of the shortcomings of the decision, which did not differentiate between facts and evidence, did not properly relate the findings in fact to the wording of the interim interdict, did not consider the question of intention, and were incomplete. Given the wider difficulties with the pursuer's case, it does not assist him.

Decision

[22] We will refuse the appeal and adhere to the interlocutor of the sheriff. Parties agreed that expenses should follow success. The defenders appeared as party litigants, but they were at one stage represented. They are entitled to an award of the expenses of process, including this appeal, as taxed.