

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT STORNOWAY

[2018] SC STO 18

B55/15

JUDGMENT OF SHERIFF DAVID OMAN SUTHERLAND

In the cause

KENNETH McLEOD, in his capacity as inspector appointed in terms of section 49 of the Animal Health and Welfare (Scotland) Act 2006 by Comhairle Nan Eilean Siar, a local authority constituted as the Western Isles Council in terms of the Local Government Etc. (Scotland) Act 1994 and having changed its name in terms of the Local Government (Gaelic Names) (Scotland) Act 1997, having its principal offices at Council Offices, Sandwick Road, Stornoway, Isle of Lewis, HS1 2BW

Pursuer

Against

STEPHANIE NOBLE

Defender

Pursuer: Mohammed;
Defender: Buchanan;

Stornoway, 27 March 2018

The sheriff, having resumed consideration, grants decree in favour of the pursuer as craved ordering,

1. That the female Connemara pony known as Grey Lady Too belonging to the defender be sold.
2. Appointing Comhairle Nan Eilean Siar to carry out the sale or otherwise disposal of the animal in accordance with the order, and
3. Requiring that the defender reimburse Comhairle Nan Eilean Siar for any expenses reasonably incurred by it in connection with carrying out the disposal of the animal.

All in terms of section 34 of the Animal Health and Welfare (Scotland) Act 2006.

Finds the defender liable to the pursuer in the expenses of this action as taxed and certifies the cause as being suitable for the employment of junior counsel.

Finds in Fact

- 1) The pursuer is Kenneth McLeod. He is employed by CNES as an Animal Welfare Officer. He is an inspector appointed by CNES under section 49 of the Animal Health and Welfare (Scotland) Act 2006.
- 2) The defender is Stephanie Noble. She is the owner of the female Connemara pony, Grey Lady Too.
- 3) When the defender acquired the pony she made appropriate arrangements for its stabling in a livery. This arrangement broke down and the pony was returned to the defender who stabled it in her house on 24 December 2011.
- 4) The pursuer visited the defender at her house on 10 January 2012 when she advised the pursuer that it was her intention to find good grazing and stabling for her pony. The pursuer endeavoured to help the defender by finding alternative livery for the defender but was unable to do so.
- 5) The defender continued to advise the pursuer that she was trying to obtain other stabling for the pony including the possibility of building a stable.

- 6) The pony was not stabled in the defender's house during the summer and the defender regarded stabling the pony in her house as a temporary measure.

- 7) Visits to the defender's property were undertaken by the pursuer to monitor the welfare of the pony between January 2012 and February 2014. On 25 September 2012, the pursuer wrote to the defender saying that he would consider obtaining veterinary advice regarding the pony should the defender continue to stable the pony in her living room over the winter. He also mentioned exercising his powers as an inspector under section 32 of the Animal Health and Welfare (Scotland) Act 2006.

- 8) On 6 November 2012, the pursuer visited the defender's property accompanied by Vivien Taylor, an equine vet from AHVLA in Inverness. She expressed no concerns regarding the welfare of the pony or the conditions it was being kept in.

- 9) On 26 August 2013, the pursuer served a Care Notice on the defender under section 24 and 25 of the Animal Health and Welfare (Scotland) Act 2006, which Care Notice specified that –
 1. The grazing area was inadequate.
 2. The stabling was inadequate.
 3. The use of an electrified tape as a sole boundary was inappropriate.

The notice advised the defender of the steps which she had to take namely -

1. Pasture/paddock should be of sufficient size for horse to allow free exercise as detailed in the Code of Practice for the welfare of Equidae.

2. Stables/housing must be of the standards as detailed in the Code of Practice for the welfare of Equidae, section 21 to 26.
 3. Permanent fences should be used on boundaries as detailed in the Code of Practice for the welfare of Equidae, section 29 to 32.
- 10) The pursuer wrote to the defender on 26 August 2013 giving further information regarding the Care Notice and enclosed a copy of the Code of Practice for the welfare of Equidae. While understanding that the initial stabling and grazing arrangements had been borne out of necessity, the pursuer's concern was that they had become permanent and that the pony was likely to suffer if its circumstances did not change. He advised that the Care Notice would remain in force until 31 October 2013 which would allow the defender a reasonable period of time to make alternative and more suitable arrangements for the care of the pony. He went on to say that non-compliance with the requirements of the Care Notice was an offence under the Animal Health and Welfare (Scotland) Act 2006 and encouraged the defender to seek independent legal advice.
- 11) On 29 November 2013, the pursuer wrote to the defender saying that he intended to take veterinary advice on the current and long-term welfare of the pony and that he might have to use his powers under the Animal Health and Welfare (Scotland) Act 2006 to redress the situation.
- 12) The pursuer arranged to visit the defender at her house with a local veterinary surgeon, Hector Low MRCVS, the visit eventually taking place on 20 February 2014.

While the vet had no concerns regarding the health or physical condition of the pony he felt that the conditions under which it was being kept, namely lack of grazing and the fact that the pony was being stabled in the defender's living room, raised serious welfare concerns. He felt that it was only a matter of time before something traumatic happened to the pony.

- 13) In particular, Mr Low was concerned that the defender's front door opened inwards and they were less than 4 feet wide. The window in the defender's living room was ordinary single glass rather than Perspex or safety glass. Neither of these concerns complied with paragraph 21 of the Code of Practice for the welfare of Equidae. Further, Mr Low was extremely concerned with the floorboards in the living room. While the defender had put down rubber matting the danger of urine seeping through and the floor failing through a combination of rotting floor and the weight of the pony increased as time went on.
- 14) Mr Low issued his veterinary certificate to the pursuer on 21 February 2014.
- 15) The defender's pony, Grey Lady Too, was likely to suffer if she remained stabled in the defender's living room.
- 16) On receipt of the veterinary report from Mr Low, the pursuer decided he had no option but to remove the defender's pony. This he did on 27 February 2014 exercising his powers under section 32 of the Animal Health and Welfare (Scotland) Act 2006.

- 17) The defender's pony is presently stabled at the Uist Community Riding School in Benbecula. The cost of stabling as at August 2015 amounted to £5,009 and is borne by CNES.
- 18) The defender has not sought the return of her pony. No application for its release has been made under section 33 of the Animal Health and Welfare (Scotland) Act 2006.
- 19) Between 2012 and 2014 the defender stated to the pursuer that she would build a stable in her back garden or move to another part of the island. She also spoke of moving the pony to a friend's croft. Neither of these options mentioned ever happened.

Finds in Fact and Law

- 1) The certificate under section 32 of the Animal Health and Welfare (Scotland) Act 2006 was issued lawfully and there are no grounds for its reduction *ope exceptionis*.
- 2) The pursuer acted lawfully when he took possession of the defender's pony, Grey Lady Too.
- 3) The pursuer is entitled to raise this action in his capacity as an inspector appointed under section 49 of the Animal Health and Welfare (Scotland) Act 2006.

- 4) It is reasonable to grant the Disposal Order sought.
- 5) CNES is an appropriate person to be appointed to ensure that the Disposal Order is carried out.

NOTE

[1] This is an application for a Disposal Order under section 34 of the Animal Health and Welfare (Scotland) Act 2006. The pursuer, an inspector appointed in terms of section 49 of the 2006 Act, craves the court to order -

1. That the pony belonging to the defender be sold and disposed of in such other manner as the court considers appropriate.
2. That CNES carries out the sale or otherwise disposes of the animal in accordance with the order.
3. That the defender reimburses CNES for any expenses reasonably incurred by it in connection with carrying out the disposal of the animal.

[2] Evidence was led over an 18 month period, the extended period being due to illness of a witness, illness of the sheriff and difficulty marrying available court days with counsel's availability. I am indebted to Mr Mohammed and Mr Buchanan for the careful presentation of their clients' cases.

[3] I heard first from the pursuer, Mr Kenneth McLeod, animal inspector with CNES and appointed by them under section 49 of the 2006 Act. He spoke of visiting the defender at her house on 10 January 2012. This was in response to a complaint of the defender keeping her Connemara pony in her living room. The defender advised him that this was only a

temporary arrangement, her earlier arrangements having broken down at short notice with her pony, Grey Lady Too, being returned to her and her stabling the pony in her house on 24 December 2011. He stated that he endeavoured to help the defender trying to find her alternative grazing and livery but to no avail. He felt that he was giving her as much time as possible to find a solution to her stabling problem. The defender, for her part, continued to advise the pursuer that she was seeking alternative arrangements for her pony.

[4] The pursuer issued a Care Notice on the defender on 26 August 2013 notifying the defender of failures regarding her pony's welfare. In particular, it stated that the paddock/grazing area was not of sufficient size to allow the horse to express normal behaviour, that the stabling was not adequate and the use of an electric fence as a sole boundary was not permitted.

[5] The pony was not stabled by the defender in her house during summer months. The pursuer wrote to the defender on 25 September 2012 saying that it was now some 9 months since the problem with stabling has arisen and he felt that adequate time had been given for alternative arrangements to be put in place.

[6] Mr McLeod did concede that he could have acted sooner but had been giving the defender every opportunity to try and resolve her stabling problems. He kept in regular contact with the defender and visited on 7 November 2012 with Vivien Taylor, an equine vet from AHVLA in Inverness who did not voice any concerns regarding welfare and conditions that the horse was being kept in.

[7] Matters did not improve with the defender failing to rectify the failures noted in the Care Notice. This resulted in the pursuer writing to the defender on 29 November 2013 stating that he intended to take veterinary advice on the current long-term welfare of the pony. He visited the defender's house on 20 February 2014 with the local vet, Mr Hector

Low. On 21 February 2014, Mr Low sent the pursuer a certificate certifying that the pony was likely to suffer if its circumstances did not change and that under the Animal Health and Welfare (Scotland) Act 2006, part II, section 32(3)(b), the pony should be immediately removed from its current location and relocated to a more suitable environment. The pursuer, having considered the vet's report, wrote to the defender on 27 February 2014 saying that CNES had taken possession of the pony explaining what was to happen. He explained to the defender that should her circumstances change and she was able to make suitable and acceptable provisions for the pony then that could result in the pony being returned to her.

[8] The pony was now stabled at the Uist Community Riding School at Benbecula with CNES having paid fees of £5,009 up to August 2015. As far as the pursuer was aware the defender had not taken any steps to seek the return of her pony. He felt ownership of the pony should be transferred to CNES for them to sell or otherwise dispose of it.

[9] I also heard from Mr Hector Low, veterinary surgeon, who spoke of visiting the defender's house at the request of the pursuer. While he was at great pains to point out that the defender's pony was in good physical condition and that there had been, as far as he was aware, no incidences detrimental to its health and welfare nonetheless he had serious concerns for the welfare of the pony which was being stabled in the defender's living room. He was concerned that the door through which the pony entered the house was less than 4 foot wide, contrary to the Code of Practice with the risk of the pony becoming stuck and injuring herself. Further, he was extremely concerned regarding the flooring. Although rubber matting had been put down he was worried that the pony would fall through the floorboards which were not suitable for supporting the pony's weight with particular regard to urine and faeces being deposited on the floor. He was concerned regarding electrical

sockets which presented a risk from water and urine. Further, the glass in the window was single, normal glass as opposed to Perspex and he was concerned that the pony might injure herself if she became frightened and tried to get out via the window. Finally, he was most concerned that the defender had no ground for grazing. He felt that 4 acres were required in Lewis due to wet ground conditions. The only grazing available was the small piece of ground which the defender had fenced off with an electric fence. He sent a certificate to the pursuer on 21 February 2014 stating his concerns and certified that the pony was likely to suffer if its circumstances did not change and that the pony should be removed and placed in a more suitable place.

[10] Finally, I heard from the defender. She gave evidence of her concern for her pony and the care she gave it. She spoke of the difficulty she had faced when her original stabling arrangements had broken down unexpectedly. She maintained that the risks spoken to by the vet were not real risks as she had stabled the horse in her house for the previous two winters without incident. She had placed tape over the electric sockets and she was certain that the floor was capable of taking the weight of the pony. Her view was that she had provided satisfactory accommodation for the pony and that the Code of Practice was not mandatory. She stated that if the pony was returned to her care she would construct a field shelter for it.

Submissions for the pursuer

[11] Mr Mohammed, for the pursuer, referred me to his written submissions. In particular, he referred me to the Animal Health and Welfare (Scotland) Act 2006, section 32(3)(c) which stated that if a veterinary surgeon certifies that a protected animal is likely to suffer if its circumstances do not change, an inspector or constable may take

possession of the animal. Section 33 allows an owner whose animal has been taken into possession under section 32 to apply to the court for a Release Order. Section 34(1)(6) states that the court may, in relation to any animal taken into possession under section 32, order that the animal may be (1) destroyed; (2) sold or (3) disposed of in another manner.

Inspector is defined in section 49 of the Act.

“(2) In this part an inspector is in the context of any provision a person –

...

(b) Appointed as an inspector by a local authority for the purposes of the provision.”

[12] Mr Mohammed maintained that the pursuer is an Animal Welfare Officer appointed by CNES under section 49(2)(b). He had stressed in correspondence to the pursuer that he would have to consider using his powers under section 32 of the Act should the pony continue to be stabled in her house over the winter. The pursuer was exercising his power as an inspector under the Act.

[13] Further, the pursuer was entitled to exercise his powers at any time on receipt of a certificate from a vet under section 32. Although the pursuer had done his best for the defender between December 2011 and when the pony was seized in 2014 and might be accused of delay at no time did he indicate that he was waiving his right to exercise his powers under the Act.

[14] There is no limit placed on the court’s power as to who may be appointed under section 34(2)(a) to ensure that the order is carried out and therefore no good reason why CNES should not be appointed.

[15] Although there was no plea-in-law the defender wished to have Hector Low’s certificate reduced. No ground for reduction, *ope exceptionis*, had been made out. There is no statutory form of certificate and all that is required is that the vet certifies the matters set out in section 32(3) of the Act. There is no bar on the vet expressing an opinion as to

whether the animal should be removed immediately. Again, the assertion that Mr Low's opinion was not justified does not constitute a ground of reduction.

[16] The pursuer was asking the court whether a Disposal Order should be granted. It was not an appeal against the decision to take possession of the pony as there was no such right of appeal. The defender was entitled to petition the court under section 33 of the Act but had chosen not to do so. CNES is not in the business of stabling ponies and it was unreasonable for it to have to indefinitely pay for this. The power to seize an animal under section 32 is effectively an interim power pending final resolution of an application for disposal (or an application for return of the animal to the owner which she had chosen not to do). No good reason had been put forward why the application should be refused and accordingly the order should be granted as craved.

Submissions for defender

[17] For the defender, Mr Buchanan referred me to his written submissions. He began by querying what the pursuer wanted in the Disposal Order. The pursuer had not come to court armed with the complete package of arrangements for sale and therefore I should dismiss the case or fix a hearing on how best to manage the sale.

[18] He stated that the vet was biased and unable to inform himself independently as he had been already contacted by the SSPCA regarding an earlier complaint about the horse's welfare. He felt the vet should not have said that the pony should be removed immediately. He challenged the vet's evidence and certificate in that there was no evidence to support this opinion of risk. Regarding the flooring, Mr Buchanan maintained that as the vet was not an engineer he could not comment on the floor's safety. The vet had stated that the pony was not suffering and was well cared for. Although the vet's certificate spoke of the pony being

likely to suffer if its circumstances did not change the case was about the horse's need for a suitable environment rather than about whether the pony was well cared for.

[19] Mr Buchanan considered that the pursuer was unsure of his role. Was he an animal inspector or an employee of the council? He seemed confused as to whether he had been acting in his role as an inspector or as an employee of the council.

[20] Mr Buchanan said that the defender had cared for her pony and had followed advice from the pursuer regarding stabling arrangements. She had isolated the electrics and had established satisfactory accommodation for the pony. There was not enough evidence to conclude that the horse was at future risk of any of the events mentioned by the vet. The defender would immediately construct a field shelter if the pony was returned to her care.

Decision

[21] The pursuer craves the court to grant a Disposal Order for the defender's pony, Grey Lady Too. The pony was taken possession of by the pursuer on 27 February 2014 and has since been stabled at the Uist Community Riding School in Benbecula. The defender maintains that the pursuer's appointment as an inspector under section 49 of the Animal Health and Welfare (Scotland) Act 2006 is flawed. I disagree. The evidence of the pursuer and his warrant card produced in process shows that he was appointed by CNES to exercise duties under the terms of the Acts and Regulations referred to on the back of his card including the Animal Health and Welfare (Scotland) Act 2006. On the evidence before me I did not consider that there was any justification for the assertion that the pursuer was not validly appointed as an inspector under the Act. Equally, I am quite satisfied that while the pursuer was an employee of CNES he was exercising his powers as an inspector under the Act.

[22] The defender also pleads that the pursuer is barred by *mora, taciturnity and acquiescence* from insisting on the action. I do not consider that plea to be well founded.

While the pursuer accepted that he perhaps should have taken action sooner he explained that he was trying to help the defender and give her every opportunity to get alternative stabling. The pursuer acted promptly on receipt of the vet's certificate and I consider that all the evidence before the court contradicts the defender's assertion.

[23] Equally, I do not consider that I should reduce *ope exceptionis* the vet's certificate.

There is no plea-in-law for the proposition that even had there been I can see no grounds for it. Just because the defender disagrees with what is contained in the certificate is not grounds for reducing it. Further, the vet is perfectly entitled to give his opinion that the pony should be removed immediately. It is for the pursuer to make his mind up following on receipt of the certificate.

[24] While the evidence of the pursuer was spread over several months he was subjected to extensive cross-examination. I found him to be a fair and credible witness, mindful of his responsibilities but keen to be as helpful to the defender as he could be in the unusual circumstances.

[25] Equally I found Hector Low, veterinary surgeon, to be a truthful, reliable witness who gave his evidence in a fair and professional manner. He is a local vet, well respected, and I had no concerns regarding his impartiality. Indeed, Mr Low spoke of how well the pony was physically and how she was obviously well cared for. He also stated that as far as he was aware there had been no previous incidences detrimental to her health and welfare. What concerned him greatly was the conditions the pony was being kept in and it was his opinion that it was only a matter of time before something traumatic would occur.

[26] Regrettably, I could not accept the defender's evidence who simply did not accept the concerns of either the pursuer or indeed the vet. I have absolutely no doubt that she cared deeply for the pony and was doing her best in very difficult circumstances.

Nonetheless her evidence did not, in any way, negate the pursuer's evidence.

[27] I consider that it is appropriate to make the order as craved considering CNES being appropriate to carry out the sale or disposal. In making that order I had regard to protecting the value of the pony and avoiding increasing any expenses which might have to be reimbursed.