



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 11
P1151/17

Lord Justice Clerk
Lord Brodie
Lord Drummond Young

STATEMENT OF REASONS

issued by LADY DORRIAN, the LORD JUSTICE CLERK

in the Petition to the Nobile Officium

by

DEREK COONEY

Appellant

against

THE SHERIFF CLERK, GLASGOW and GLASGOW CITY COUNCIL

Respondents

Appellant: Party
Respondents: No Appearance

20 February 2018

[1] Prior to the hearing the petitioner objected to the Lord Justice Clerk chairing the hearing on the basis of cases in which she was allegedly involved many years ago. Having heard that submission, the Lord Justice Clerk declined to recuse herself.

[2] The petitioner is a vexatious litigant. He sought to raise proceedings in the Sheriff Court to suspend a charge for payment following upon a summary warrant obtained by Glasgow City Council in respect of alleged unpaid amounts of council tax, and diligence

thereon in the form of an earnings arrestment of his pension credits. The petitioner contends that no sums are due. On 19 October 2017 he was granted leave to bring proceedings, and lodged an initial writ on 23 October 2017 in the Sheriff Court at Glasgow. He has been given leave to present a petition to the *Nobile Officium* based on the procedure which thereafter followed.

[3] In the petition he asserts (a) that the sheriff clerk refused to warrant his writ on the basis that it would have to go before a sheriff; (b) that the writ was returned to him by the sheriff clerk by letter dated 24 October 2017, "stating that the sheriff ordered that I put up £1,000 caution". It is claimed that the sheriff had no power to do so. The appellant states that he then called at the office of the sheriff clerk asserting that the writ was in proper form, contrary to what had been stated in the letter returning it. He asked for a hearing but the sheriff refused to grant a hearing or pronounce an interlocutor. It is maintained that the sheriff's refusal to grant a hearing or pronounce an interlocutor is not competent. The appellant also raised matters relating to the underlying merits of his claim, but these were not matters to which the petition before us related and were thus irrelevant.

[4] The summary warrant upon which the diligence in question proceeded is one to which the Act of Sederunt (Summary Suspension) 1993 applies, and may thus be the subject of summary suspension. The procedure is by way of Summary Application. This is clear from the Act of Sederunt, which refers throughout to the summary nature of the procedure, and from section 3(p) of the Sheriff Court (Scotland) Act 1907 which provides that:

"Summary application' means and includes all applications of a summary nature brought under the common law jurisdiction of the sheriff principal, and all applications, whether by appeal or otherwise, brought under any Act of Parliament which provides, or, according to any practice in the sheriff court, which allows, that the same shall be disposed of in a summary manner, but which does not more particularly define in what form the same shall be heard, tried, and determined."

[5] However, before the sheriff could make any order for summary suspension, the applicant must produce caution or other sufficient security, in terms of para 3(1) of the Act of Sederunt which provides that:

“On sufficient caution being found or other security given for –

- (a) the sum charged for with interest and expenses, and
- (b) a further sum to be fixed by the Sheriff in respect of expenses to be incurred in the suspension process,

the sheriff may sist diligence, order intimation and answers, and proceed to dispose of the cause in a summary manner.”

[6] The finding of caution, or giving of other security, is therefore a necessary condition of the sisting of diligence, in the absence of which the sheriff has no discretion to do so (*Cowie v Martalo* 2011 GWD 32-676, Sheriff Principal Lockhart at paras 4 and 18, citing Macphail, Sheriff Court Practice, para 24.21; cf *Cooney v Kirkpatrick* 1989 SC 61).

[7] Whilst it may be the case that “where an ex parte application to sist diligence is made, the sheriff should appoint an early hearing thereon, however he disposes of the application” (Macphail (*supra*), para 24.21), the same does not necessarily follow in respect of the finding of caution, in circumstances where the sheriff has no option but to require caution; the amount is to an extent fixed under reference to the sum charged for with interest and expenses; and the sheriff is required to fix a further reasonable amount in respect of expenses. Otherwise, the approval of some other method of security, if it is to be offered, may be addressed in terms of OCR27.4 in the usual way. Even if it had been the case that the sheriff had made an order for caution, it would not follow that he had acted incompetently in doing so. However, the sheriff has not in this case made an order for caution. The letter sent to the appellant was an indication that the sheriff had assessed

caution in the second part at £1,000, and that further information was required to calculate what would be the appropriate final sum, but it was not an order for caution.

[8] The appellant's writ seeking a sist of diligence, was returned to him with an explanation that it was not in proper form, and with an indication of what was required to address that point. At the same time he was advised that before an order could be made, it was necessary to lodge caution, consisting of 2 parts, one relating to the sum charged for, interest and expenses; the second relating to expenses which may be incurred in the suspension process. The sheriff had fixed the sum regarding the latter at £1,000. However, he had been unable to determine the former in the absence of further information. Rather than re-submit his writ, the appellant immediately sought leave to present this petition. In these circumstances there is no application before the Sheriff Court, nor has there been an order of the sheriff requiring an interlocutor to be issued. The petitioner was correctly advised that the application requires to be in the form of a Summary Application. There has been no order for caution, and hence no requirement for an interlocutor. There is no merit in the petition which must be refused. If the petitioner wishes to proceed with his claim the solution lies in his own hands.