



SHERIFF APPEAL COURT

[2023] SAC (Civ) 16

Sheriff Principal N A Ross
Sheriff Principal S F Murphy
Appeal Sheriff R D M Fife

OPINION OF THE COURT

delivered by APPEAL SHERIFF R D M FIFE

in the appeal in the cause

UH

Pursuer and Respondent

against

ST

Defender and Appellant

**Pursuer and Respondent: Cheyne, Advocate; McDougall McQueen, Edinburgh
Defender and Appellant: Allison, Advocate; Thorley Stephenson, Edinburgh**

24 March 2023

Introduction

[1] The defender and appellant (“the appellant”) appeals against the decision of the sheriff at Edinburgh by interlocutor of 21 July 2022 making findings of contempt.

[2] The appellant appeals against three decisions of the sheriff:

1. The interlocutor of 21 July 2022;
2. The interlocutor of 17 August 2022, being the imposition of a penalty for contempt;

3. The interlocutor of 7 June 2021 insofar as it purports to impose obligations on the appellant in regulating the child's welfare.

Background

[3] The substantive proceedings (case number EDI-F378-14) concerned the respondent's crave for contact with the parties' younger child, K. By judgment dated 22 November 2018, the sheriff found the respondent entitled to contact in principle. By interlocutor of 31 January 2019, the sheriff made an order for contact. On 3 May 2019, the sheriff made no further order concluding the proceedings.

[4] In November 2019, the respondent lodged a Minute for failure to obtemper the decree granted pronounced on 31 January 2019. Progress with the contempt proceedings was delayed because of Covid restrictions. In the course of the contempt proceedings, there were ongoing efforts to facilitate contact with the child. In July 2020, parties jointly appointed Ms Foley, a child psychologist, to facilitate, guide and support the contact process. Ms Foley prepared a number of reports. In a report dated 11 November 2020, Ms Foley concluded there needed to be a shift in focus by the appellant from the past to the present and on developing an understanding of the benefits of contact.

[5] A proof fixed for 7 June 2021 was discharged and Ms Foley was re-appointed to continue with the intervention process to resume contact. The interlocutor noted the appellant was to "take active responsibility" for the child to resume contact with the respondent. In January 2022, the respondent lodged a Minute of Amendment that the appellant had failed to obtemper the interlocutor of 7 June 2021.

[6] A proof took place on 11 and 12 July 2022. By interlocutor dated 21 July 2022, the sheriff found the appellant in contempt of court in respect that:

1. She deliberately and wilfully refused to obtemper paragraph 1(a), (b) and (c) of the interlocutor of 31 January 2019; and
2. She deliberately and wilfully refused to obtemper the interlocutor of 7 June 2021 in the period between 7 June 2021 and 11 March 2022.

Interlocutors

[7] The relevant interlocutors are:

31 January 2019 (extract)

“The sheriff, having heard further submissions; makes the following order;

1. Makes an order in terms of section 11(2)(c) of the Children (Scotland) Act 1995 finding the pursuer entitled to contact with the child K... as follows;

(a) indirect contact by way of cards/letters fortnightly (and modest birthday/Christmas gifts) delivered via the child’s school.

(b) three direct contact visits facilitated by the curator ad litem, each of up to two hours, at/from the child’s school at times and on dates to be agreed with the school and the curator.

(c) thereafter, to non-residential contact each Friday during school term time, after school for a period of up to four hours, assigns a further by order hearing on 1 April 2019 at 10am to regulate said contact following further submissions from the curator ad litem after contact has taken place in terms of the foregoing paragraph (b)...”

7 June 2021 (extract)

“The sheriff, having heard from parties’ procurators, discharges today’s diet of proof and of new assigns a two day diet of proof...re-appoints Jenny Claar Foley, counselling psychologist, to resume the intervention process detailed in her report dated 20 August 2020 on the basis that Ms Claar Foley will facilitate, support and guide the contact process and the parties and the defender will take active responsibility for K resuming a relationship with the pursuer...”

Submissions

Submissions for appellant

[8] Properly understood, the interlocutor of 31 January 2019 parts 1(a), (b) and (c) imposed no specific obligations on the appellant. Contact was to be facilitated by the curator ad litem and agreed via the school. The curator ad litem had become very unwell after the first quarter of 2019 and no further attempts were made to arrange contact in the substantive proceedings which concluded in May 2019.

[9] While there may be an implied duty on the appellant in relation to the operation of contact, there would have to be specific incidents averred, namely date and location against which to measure compliance. There were no such averments to give the appellant clear and fair notice of the case against her. The sheriff was not entitled, as she had done, to rely on alleged conduct which pre-dated the alleged failures to obtemper court orders. That conduct was not relevant, being distinct and concerning a different order. It did not follow that where there had been non-compliance in the past that such conduct would continue in the future.

[10] In relation to part 1(b), the sheriff referred to the appellant not supporting Ms Foley between 31 January 2019 and 11 March 2022. In fact, Ms Foley was not instructed until July 2020, the substantive proceedings having concluded in 2019. In any event, the sheriff formed a general view of the conduct of the appellant. The sheriff did not refer to any specific acts or omissions properly characterised as wilful disobedience whether by thwarting contact or failing to obtemper orders of the court. Part 1(c) was contingent on part 1(b). The sheriff was plainly wrong.

[11] Properly understood, the interlocutor of 7 June 2021 imposed no specific obligations on the appellant. The only obligation was on Ms Foley. The phrase “take active

responsibility” was so vague and ambiguous that it could not be interpreted as placing any specific obligations on the appellant. The appeal should be allowed. In finding the appellant in contempt, the sheriff was in error of law or, alternatively, the decision was plainly wrong.

Submissions for respondent

[12] It was not appropriate for the court to interfere with the decision of the sheriff unless there was a clear misapplication of the law or misapplication of the facts, see *AW v Greater Glasgow Health Board* [2017] CSIH 58 at paras [38] and [43]. The sheriff had not erred in law.

[13] There were clear obligations on the appellant to facilitate the contact. As narrated in the Minute there was a clear refusal by the appellant to co-operate with the curator *ad litem*. The finding of contempt was uniquely for the sheriff. The only basis for interference with the sheriff’s judgment was if the sheriff was plainly wrong in reaching her finding of contempt. The appellant had provided no examples of where the sheriff could be said to have acted in a way that was plainly wrong.

[14] While there was a superficial attraction to the argument that there were no clear obligations on the appellant in terms of the interlocutor of 31 January 2019, and that any obligations were on the curator *ad litem*, one had to look and see what the appellant was doing. The sheriff was entitled to take into account matters that were relevant to found and establish contempt. There had been discussions with the court about what was expected of the appellant. If it was not clear what was expected of the appellant, then why did the sheriff allow discussions about re-instating attempts for contact in the course of the contempt proceedings.

[15] The sheriff has directed her mind to the state of knowledge of the appellant. The appellant's submissions do not directly attack that proposition. The appeal should be refused.

Decision and reasons

[16] In *Robertson & Gough v H M Advocate* 2008 JC 146 at para 29 the court stated:

“Contempt of court is constituted by conduct that denotes wilful defiance of, or disrespect towards, the court or that wilfully challenges or affronts the authority of the court...”

[17] The sheriff made a number of findings of contempt in respect of the interlocutors of 31 January 2019 and 7 June 2021. In order to determine whether or not a party has complied with an order, one must first determine what was required of them, *Sapphire 16 S.A.R.L. v Marks and Spencer plc* [2021] CSOH 103 at para [39].

Interlocutor 31 January 2019

[18] In our view, on a plain reading of paras 1(a), (b) and (c) no specific obligations were imposed on the appellant. In respect of the interlocutor of 31 January 2019, para 1(a) was an order for indirect contact by way of cards/letters delivered via the child's school. In respect of para 1(b), this was an order for three direct contact visits to be facilitated by the curator ad litem at/from the school on dates to be agreed with the school and the curator. While some obligations on the appellant to facilitate and support contact might be implied, or that the orders made proceeded on some unspecified understanding on the part of the appellant, the appellant is not referred to in either paras 1(a) or 1(b). As for the proposed arrangements for non-residential contact at para 1(c), there was a specific obligation placed on the curator ad litem to make further submissions to the court after the three contact visits had taken place

in para 1(b). Any non-residential contact arrangements in para 1(c) were contingent on the three contact visits taking place. The appellant is not referred to in para 1(c). There was no order for non-residential contact made in terms of para 1(c). There was an indication by the court of a prospective order. The appellant was not required by the court to do anything in terms of paras 1(a), (b) or (c).

Interlocutor 7 June 2021

[19] It is of note the interlocutor of 7 June 2021 was pronounced in the course of the contempt proceedings, the substantive proceedings having concluded in May 2019...

[20] The critical wording of the interlocutor is:

“...and the defender will take active responsibility for K resuming a relationship with the pursuer...”

[21] The phrase “take active responsibility” appears to have been taken from the progress report from Ms Foley dated 28 January 2021, under the heading Conclusion:

“Any future intervention would require [CS] to take active responsibility for K resuming a relationship with her father...”

[22] The sheriff stated at [76] of the judgment:

“The orders dated 31 January 2019 and 7 June 2021 are clear and enforceable....The defender knew that the ‘active responsibility’ referred to in the interlocutor of 7 June 2021 was a reference to Ms Foley’s reports. She understood what was expected of her.”

[23] In our view, on a plain reading of the interlocutor, no specific obligations were imposed on the appellant. There was a specific obligation placed on Ms Foley to facilitate, support and guide the contact process. The interlocutor proceeded on an understanding by the appellant. The appellant was not required to do anything by the court.

[24] Accordingly, in our view the sheriff erred in law in making the findings of contempt. We shall allow the appeal. The findings of contempt are quashed and the interlocutors of 21 July 2022 and 17 August 2022 are recalled. The respondent is found liable to the appellant in the expenses of the appeal, as an assisted person, with their liability modified to nil.