SHERIFF APPEAL COURT

[2018] SAC (Civ) 9
GLW-A8741-06

Sheriff Principal C D Turnbull

OPINION OF THE COURT

in the appeal in the cause

GERALDINE McWILLIAMS

Pursuer & Respondent

against

RICHARD RUSSELL

Defender & Appellant

Pursuer & Respondent: Sanders, advocate; Wright, Johnston & Mackenzie
Defender & Appellant: Party

22 March 2018

Introduction

[1] This appeal is the latest chapter in a litigation which has as its origin an incident which took place almost 12 years ago. The sheriff's decision of 4 October 2017 (see *McWilliams* v *Russell* [2017] SC GLA 64[1]) sets out a number of findings in fact. For the reasons set out at paragraphs [42] to [46] below, these were not capable of challenge in this appeal. Below, at paragraphs [2] to [33], is a summary which draws heavily from the sheriff's findings in fact and a consideration of the relevant procedural history of this most unfortunate case.

[1] see http://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2017scgla64.pdf?sfvrsn=0

Factual and Procedural Background

[2] In May 2006, one of the appellant's children told her class teacher that she had been slapped on her leg twice by the appellant. The class teacher reported this matter to the respondent, who was then the head teacher of a primary school in Glasgow (which I refer to as "the school"). On 22 May 2006, as she was required to do in terms of a management circular issued by the education authority, the respondent submitted a child protection referral form to the relevant social work department. Requests for further information were made and the respondent and class teachers compiled and, in June 2006, submitted reports to the social work department in relation to each of the appellant's children. The Scottish Children's Reporter Administration took no further action in relation to the issues raised in the referral form.

[3] The appellant repeatedly demanded details of the contents of the reports and the referral form. He attended at the school on a number of occasions. He was confrontational and aggressive with school staff and with the respondent. He accused the respondent of lying and of fabricating the content of the referral form. In a series of letters written between October 2006 and early December 2006, the appellant demanded a written apology, the respondent's resignation and the payment of compensation by the education authority. He asserted that the contents of the referral form were untrue and that the respondent was an incompetent and dangerous individual. He threatened the respondent with negative media attention if no offer of compensation was forthcoming. The appellant was asked to desist from harassing the respondent and from making defamatory comments about her. He refused to do so.

[4] No doubt as a consequence of the foregoing conduct on the part of the appellant, the respondent raised the present action. Interim interdicts were granted, *ex parte* at warranting,

on 13 December 2006. These prohibited the appellant from making, publishing or distributing by any means, false or defamatory statements about the respondent and in particular concerning the submission by the respondent of the referral form; and from molesting the respondent, by abusing her verbally, by threatening her, and by placing her in a state of fear and alarm or distress.

[5] Apparently undeterred by the interim interdicts, on 10 January 2007, the appellant spilled paint close to where the respondent's car was parked in the school grounds. The sheriff found that he did so to intimidate the respondent.

[6] On 1 February 2007 the appellant lodged a counterclaim, which was subsequently considered by an Extra Division of the Inner House in *Lord Advocate* v *B* 2012 S.L.T. 541 (to which I again refer to below). Rather than attempt to summarise the appellant's counterclaim, I gratefully adopt the description of it given by Lady Paton, delivering the opinion of the Inner House, at paragraph [12]:

> "In his counterclaim, the (appellant) sought *inter alia* payment of £800,000 in damages, and the installation and independent monitoring of closed circuit television in all classrooms, halls, and other areas in [the school] and all other Glasgow Council schools (as the appellant averred that he had received reports of maltreatment from his children). The counterclaim includes averments (statement 3, which ran to nearly 40 pages) that: "… The (respondent) … falsely, wilfully and maliciously accuses the (appellant) of following three mothers [of pupils] home after school … By falsely and maliciously accusing the (appellant) of a [serious] offence, the (respondent) and said three mothers have committed common law perjury … The (respondent) reported the (appellant) maliciously in terms with (sic) section 57 child protection procedures … The (respondent) fabricated evidence … The (respondent) has wilfully and recklessly breached … Article 8 of the Human Rights Act … The (respondent) did [a particular act] with the intent to harm and upset the (appellant) and his children … The (respondent) did this wickedly and with evil intent … with malice … to cause the (appellant) maximum injury, hurt, loss, damage and distress … in pursuit of her personal vendetta against the (appellant) and his innocent children … ."

[7] On 4 February 2007 the appellant sent a letter to the respondent's solicitor, enclosing a note addressed to the respondent. The appellant requested that the respondent's solicitor give the note to the respondent. The note was in terms that the sheriff described as threatening and menacing. It contained a threat to the respondent's life. The respondent's solicitor was alarmed by the content of the note. He contacted the respondent. The respondent was alarmed and frightened by the terms of the note. She was advised by the police to leave her home until they were able to put appropriate security measures in place.

[8] On 8 February 2007 the respondent sought and obtained a further interim interdict preventing the appellant from approaching her or attending at her place of work (and in particular from entering the school), or communicating with her.

[9] On 8 March 2007 the appellant deliberately approached the respondent in the school playground. The appellant did so to intimidate and provoke the respondent. The appellant was aware that he had been interdicted from doing so. The respondent was placed in a state of fear and alarm by the appellant's conduct. The police were called and the appellant was arrested.

[10] On 16 August 2007 the cause was sisted to enable the appellant to apply for legal aid.

[11] On 11 October 2007, after the appellant's children had moved to another primary school, the appellant added a handwritten entry to his son's homework diary which made yet more allegations of serious misconduct on the part of the respondent.

[12] On 30 November 2007 the sist was recalled for the purposes of hearing a motion by the respondent to attach a power of arrest to the interim interdict previously granted on 8 February 2007. That motion was refused and the cause sisted of new.

[13] In March 2008 the respondent left the school to become the head teacher of a school in East Ayrshire. She did so because of the appellant's conduct towards her.

[14] On 12 March 2008 the appellant was convicted of a breach of the peace, committed between 6 February and 8 March 2007, at the premises of the respondent's solicitors and at the school, in terms of which the appellant was found to have conducted himself in a disorderly manner, repeatedly harassed the respondent, threatened her by means of a letter, entered the school playground, repeatedly failed to comply with requests to retreat from the respondent and placed her in a state of fear and alarm for her safety. The appellant was fined £350. He was also made the subject of a non-harassment order for a period of 12 months, in terms of which he was prohibited from approaching, contacting or communicating with the respondent and from seeking to enter the school. The appellant's conviction was upheld on appeal.

[15] In August 2008, the appellant made an anonymous complaint to East Ayrshire Council alleging that their education authority had employed a head teacher who was a "child molester".

[16] On 7 November 2008 the sist was again recalled for the purposes of hearing a motion by the appellant to recall the interim interdicts previously granted and to grant decree of absolvitor in the principal action. That motion was refused and the cause sisted of new. It remained sisted from November 2008 until May 2014.

[17] During the period of the sist, the appellant's course of conduct towards the respondent continued. In December 2008 and January 2009, the appellant lodged complaints against the respondent with the General Teaching Council. The complaints were investigated and no further action was taken. The sheriff found that these allegations were designed to cause the respondent fear and alarm and to damage her professional reputation.

[18] In January 2009, after proof, the appellant was found in contempt of court for breaching the terms of the *interim* interdict granted on 13 December 2006. The presiding

sheriff in the contempt proceedings found that the allegations made in the homework diary entry (see paragraph [11] above) were false and malicious and designed to embarrass the respondent, to cause her fear and alarm and to damage her professional reputation.

[19] Between 10 May 2011 and 9 January 2015, the appellant operated a Twitter account on which he posted a substantial number of tweets concerning the respondent and her solicitor. He made a number of allegations against the respondent. He invited journalists, broadcasters and politicians to report his allegations. The sheriff found that appellant's tweets were designed to cause the respondent fear and alarm and to damage her reputation.

[20] On 27 March 2012, the appellant was made the subject of an order under and in terms of s.1 of the Vexatious Actions (Scotland) Act 1898 ("the 1898 Act). In determining that it was appropriate to make such an order, the Inner House made a number of references to the present action and to the appellant's counterclaim therein (see *Lord Advocate v B op.cit.*).

[21] On 16 May 2014 the presiding sheriff (who was not the sheriff who, ultimately, heard the proof in this action) refused a motion made at the bar to recall the interim interdicts and then made avizandum on a motion by the appellant to re-enrol the cause for further procedure. The sheriff issued his decision on 22 May 2014. He recalled the sist, appointed the principal action to debate and ordered that the hearing and trying of the appellant's counterclaim was to follow the conclusion of the principal action and then only with leave of a judge sitting in the Outer House on the Bills of the Court of Session.

[22] The appellant sought and obtained leave to appeal against the sheriff's interlocutor of 22 May 2014. An appeal was marked to the Court of Session, however, by July 2014 that appeal had been deemed to be abandoned.

[23] In 2014, 2015 and 2017, the appellant made allegations against the respondent to the police. The police did not consider that any of these allegations merited further

investigation. During his discussions with police in February 2015, the appellant advised the police that he knew where the respondent lived. On each occasion, the police required to advise the respondent that allegations had been made by the appellant. On each such occasion, the police reviewed the security measures in place to protect the respondent from the appellant. The appellant's conduct was designed to cause, and caused, the respondent fear and alarm.

[24] The appellant also sent a significant number of e-mails to the respondent's solicitor. In these he repeated the allegations he had made about the respondent. At the time of the proof which preceded this appeal he continued to do so. The appellant copied a number of these e-mails to a range of individuals including politicians, journalists and broadcasters. The sheriff found that the appellant's purpose in doing so was to cause the respondent fear and alarm and to damage her reputation.

[25] The debate allowed by the sheriff in his interlocutor of 22 May 2014 finally proceeded on 9 October 2015, at the conclusion of which the presiding sheriff made avizandum. The sheriff issued his judgment on 14 December 2015. The terms of that judgment are not relevant for present purposes, save insofar as they relate to the counterclaim.

[26] In his decision, put shortly, the sheriff concluded that the respondent was not entitled to seek to have the counterclaim dismissed. Standing the terms of the interlocutor of 22 May 2014, the sheriff was not prepared to entertain arguments in relation to the counterclaim.

[27] The appellant appealed to the sheriff principal against the sheriff's decision. That appeal was heard on 11 February 2016, at the conclusion of which the sheriff principal made avizandum. The sheriff principal issued his judgment following the appeal on 22 March

2016. The terms of that judgment are not relevant for present purposes, save insofar as they relate to the counterclaim.

[28] The sheriff principal's judgment of 22 March 2016, in setting out the appellant's submissions, contains the following in relation to the counterclaim:

> "The (appellant) remarked that the counterclaim would need to 'stay sisted anyway' but that it had been wrong for (the sheriff) to proceed as he did regarding the counterclaim. [(The sheriff) had ordered that 'the hearing and trying of the counterclaim should follow conclusion of the principal action and then only with leave of a judge sitting in the Outer House on the Bills in the Court of Session.')]"

Unsurprisingly, standing the appellant's position that the counterclaim would need to 'stay sisted anyway', the interlocutor of the sheriff of 22 May 2014 was not challenged in the course of that appeal.

[29] Following the sheriff principal's decision sundry procedure, including the fixing of a proof before answer, followed until 11 July 2016 when the proof before answer was discharged and the cause was, once more, sisted for the appellant to apply for legal aid.

[30] The proof before answer finally commenced on 22 June 2017 and was heard over nine days. The appellant represented himself in the proof. At the conclusion of the proof the sheriff continued the cause until 4 October 2017, at which time she gave her decision orally.

[31] The concluding findings in fact in the sheriff's judgment are telling. She found that, since the submission of the referral form in 2006, the appellant had engaged in a persistent, sustained, malicious and vengeful course of conduct designed to harass and malign the respondent and to cause her professional embarrassment, fear, alarm and anxiety. Moreover, the sheriff found that the appellant intended to continue this course of conduct. She found that the appellant had deliberately disregarded the terms of the *interim* interdicts and was satisfied that he intended to continue to do so.

[32] The sheriff found that the respondent had suffered fear, alarm and distress as a result of the appellant's conduct for a period of around 11 years; and that the appellant's words and acts since 2006 constituted a course of conduct deliberately and wilfully pursued by the appellant and calculated by him to cause the respondent fear, alarm and distress.

[33] Against that background, the sheriff concluded that perpetual interdicts and non-harassment orders were necessary to prohibit the appellant from continuing to harass and abuse the respondent; and that it was necessary to attach a power of arrest to each of the perpetual interdicts.

The Orders Granted by the Sheriff

[34] In light of the first ground of appeal argued by the appellant, it is appropriate to set out in full the terms of each of the interdicts and non-harassment orders granted by the sheriff.

[35] Firstly, decree was granted interdicting the appellant from making, publishing or distributing by any means, false or defamatory statements about the respondent and in particular concerning the submission by the respondent of a child protection referral to social services in connection with the appellant's children (or any one or more of them), in terms of the relevant council management circular concerning child protection. That interdict was granted in terms of section 8(5)(b)(i) of the Protection from Harassment Act 1997 ("the 1997 Act"). I refer to this as "Interdict 1". A power of arrest was attached to Interdict 1 for a period of three years, in terms of section 1 of the Protection from Abuse (Scotland) Act 2001 ("the 2001 Act").

[36] Secondly, the sheriff granted a non-harassment order prohibiting the appellant from approaching the respondent or writing to the respondent or telephoning her for a period of

three years. That order was granted in terms of section 8(5)(b)(ii) of the 1997 Act. I refer to this as "NHO 1"

[37] Thirdly, the sheriff granted a non-harassment order prohibiting the appellant from publishing or distributing by any means material calculated to cause alarm and distress to the respondent for a period of three years. That order was granted in terms of section 8(5)(b)(ii) of the 1997 Act. I refer to this as "NHO 2".

[38] Fourthly, decree was granted interdicting the appellant from molesting the respondent by abusing her verbally, by threatening her, by placing her in a state of fear or alarm or distress. That interdict was granted in terms of section 8(5)(b)(i) of the 1997 Act. I refer to this as "Interdict 2". A power of arrest was attached to Interdict 2 for a period of three years, in terms of section 1 of the 2001 Act.

The Appeal

[39] Following the sheriff's decision, the appellant appealed to this court. The appeal was provisionally appointed to the accelerated appeal procedure. As he was entitled to do, the appellant made representations against that provisional order. A hearing in relation to those representations proceeded before the procedural Appeal Sheriff on 16 November 2017.

[40] The procedural Appeal Sheriff confirmed the provisional procedural order previously made and appointed the appeal to the accelerated procedure. He also considered three separate motions at the instance of the appellant. In total, the three motions sought no less than twenty separate orders from the court. Only two matters are of relevance for present purposes.

[41] Firstly, the procedural Appeal Sheriff refused the appellant's motion to sist the appeal, to allow the appellant's solicitor to apply for legal aid and obtain senior counsel.

Notwithstanding that refusal, the procedural Appeal Sheriff ordered that the hearing of the appeal was not take place prior to 31 January 2018, in order to allow the appellant and his agent further time (two and a half months), if required, to seek sanction from the legal aid board and/or instruct counsel to conduct the appeal. The appellant was cautioned that no additional time would be permitted to him in this regard, given the need to make expeditious progress in determining the appeal. Before the procedural Appeal Sheriff, and subsequently, the appellant conducted the appeal proceedings personally. At no time was he represented by either solicitors or counsel.

[42] Secondly, the procedural Appeal Sheriff refused the appellant's motion to order the production of notes of evidence from the proof. The procedural Appeal Sheriff directed the appellant to Ordinary Cause Rule ("OCR") 29.18.(11) and specified that if transcription of the evidence was required this should be instructed immediately in order to progress the appeal expeditiously.

[43] By interlocutor dated 29 November 2017, the court *inter alia* ordered that an appendix (in accordance with rule 7.10 of the Act of Sederunt (Sheriff Appeal Court Rules) 2015) be lodged by the appellant by no later than 12 noon on 1 February 2018. That order was made by reason of (i) the nature of certain of the grounds of appeal advanced by the appellant, namely, those which challenged the findings in fact made by the sheriff; (ii) the discussion which had proceeded before the court on 16 November 2017 in relation to the notes of evidence; and (iii) the court's refusal of the appellant's motion, as set out in paragraph [42] above.

[44] The appellant failed to lodge the required appendix. As a consequence, parties were heard by order on 9 February 2018. At the conclusion of the by order hearing, *inter alia*, the court allowed the appeal to proceed in the absence of an appendix. Parties were provided

with a written note to the interlocutor of that date. That note made it clear to the appellant that whilst the court had allowed the appeal to proceed in the absence of an appendix, the absence of an appendix (and, in particular, the notes of evidence) would have consequences for the appellant in the hearing of the appeal.

[45] It was explained to the appellant that this court could have no basis to overturn findings in fact made by the sheriff unless the notes of evidence demonstrated that the sheriff was plainly wrong in making the findings she did (see *Thomas v Thomas* 1947 SC (HL) 45; *McGraddie* v *McGraddie* 2014 SC (UKSC) 12; and *Royal Bank of Scotland plc v Carlyle* 2015 SC (UKSC) 93). It is axiomatic that in the absence of the notes of evidence this court could not form such a conclusion.

[46] Accordingly, in the absence of the notes of evidence, the court indicated that it would preclude the appellant from taking issue at the appeal with the sheriff's findings in fact. Insofar as the appellant's note of argument (and grounds of appeal) asserted that the sheriff was not entitled to make certain of the findings she did, the appellant would not be permitted to advance such arguments. The appeal was conducted on that basis.

The Appellant's Appeal Points

[47] In light of the appellant's failure to lodge the notes of evidence, the appeal proceeded in relation to three separate points.

[48] Firstly, the appellant argued that the interdicts and non-harassment orders made by the sheriff subjected him to the same prohibitions, which was not competent standing the terms of section 8(5) of the 1997 Act. This is considered below at paragraphs [51] to [55], under the heading "The First Appeal Point".

[49] Secondly, the appellant asserted that the sheriff's decision to hear submissions from the respondent's solicitor in the absence of the appellant and her reaching a decision in the absence of submissions from the appellant were oppressive and contravened the appellant's rights under Article 6. This is considered below at paragraphs [56] to [63], under the heading "The Second Appeal Point".

[50] Thirdly, whilst not identified in his Note of Appeal, the appellant also challenged that part of the court's interlocutor of 22 May 2014 (see paragraph [21] above) which ordered that the hearing and trying of the appellant's counterclaim was to follow the conclusion of the principal action and then only with leave of a judge sitting in the Outer House on the Bills of the Court of Session. This is considered below at paragraphs [64] to [71], under the heading "The Third Appeal Point".

The First Appeal Point

[51] This turns upon the provisions of section 8(5) of the 1997 Act when viewed against the specific terms of the interdicts and non-harassment orders granted by the sheriff. Insofar as relevant, section 8(5) is in the following terms:

> "In an action of harassment the court may, without prejudice to any other remedies which it may grant—
> …
> (b) grant—
> (i) interdict or interim interdict;
> (ii) if it is satisfied that it is appropriate for it to do so in order to protect the person from further harassment, an order, to be known as a "non-harassment order", requiring the defender to refrain from such conduct in relation to the pursuer as may be specified in the order for such period (which includes an indeterminate period) as may be so specified,
>
> but a person may not be subjected to the same prohibitions in an interdict or interim interdict and a non-harassment order at the same time."

The ineluctable question, therefore, is do the interdicts and the non-harassment orders subject the appellant to the same prohibitions at the same time? The sheriff considered this question and was satisfied that they did not. In the appeal, addressing themselves to the specific terms of the interdicts and non-harassment orders granted (as set out at paragraphs [35] to [38] above), the appellant submitted that they did; the respondent submitted that they did not.

[52] Firstly, the appellant contends that Interdict 1 subjects the appellant to the same prohibitions as NHO 2. Interdict 1 prohibits the appellant from making, publishing or distributing by any means, false or defamatory statements about the respondent. The remainder of the order granted (that which relates to the child protection referral) does not add to the general prohibition. NHO 2 prohibits the appellant from publishing or distributing by any means material calculated to cause alarm and distress to the respondent.

[53] The interdict prohibits the making, publishing or distributing of false or defamatory statements. The non-harassment order is directed towards material calculated to cause alarm and distress to the respondent. That is a different prohibition to the one imposed by the interdict. For example, the non-harassment order prohibits the publication or distribution of material which is neither false nor defamatory, yet is calculated to cause alarm and distress to the respondent. I am satisfied that the sheriff was correct to hold that Interdict 1 does not subject the appellant to the same prohibitions as NHO 2.

[54] Secondly, the appellant contends that Interdict 2 subjects the appellant to the same prohibitions as NHO 1. Interdict 2 prohibits the appellant from molesting the respondent by abusing her verbally, by threatening her, by placing her in a state of fear or alarm or distress. NHO 1 prohibits the appellant from approaching the respondent or writing to the respondent or telephoning her for a period of three years. It clear that, when one carefully

considers the terms of the interdict and non-harassment order in question, they are designed to address different types of behaviour.

[55] The interdict prohibits threatening or abusive behaviour. The non-harassment order prohibits contact, whether in person or by telephone or in writing. There can be contact which is neither threatening nor abusive. Standing the history of this matter, one can readily understand that respondent's antipathy to any form of contact with the appellant, irrespective of his behaviour. I am satisfied that the sheriff was correct to hold that Interdict 2 does not subject the appellant to the same prohibitions as NHO 1.

The Second Appeal Point

[56] The circumstances which give rise to the Second Appeal Point are set out in paragraph [42] of the sheriff's judgment. That is in the following terms:

> "On the final day of the proof, the (appellant) made a series of motions, including a motion to adjourn to allow him further time to prepare his submissions and a motion to allow him to be recalled to give further evidence. He was very eager to give further evidence. I refused his motions. When I did so, he stated that he was suffering from chest pains. He again sought an adjournment. He stated that he wished to see his GP. As what the (appellant) was describing appeared to be a medical emergency, arrangements were made for the (appellant) to be seen by paramedics and taken to hospital. He was discharged later that day. I assigned a continued diet the following day for submissions and arrangements were made for the interlocutor to be served upon him. The following day, the (appellant) called the clerk of court and advised that he had seen his doctor that morning. He was advised that in the absence of a medical certificate, his attendance was necessary. No medical certificate, certifying the (appellant) as unfit to attend court was provided. I allowed the hearing to proceed in his absence."

[57] The sheriff's separate note in response to the appeal has appendices containing notes provided by the clerk of court and by the head of the civil department at Glasgow Sheriff Court. When viewed in light of the sheriff's refusal to grant the appellant's motions to

adjourn to allow him further time to prepare his submissions; and to allow him to be recalled to give further evidence, the note by the head of the civil department is particularly instructive.

[58] The note records that the appellant telephoned Glasgow Sheriff Court at around 9.45 am on 23 August 2017. The appellant spoke with the head of the civil department. Having narrated the symptoms he asserted he was suffering from, the appellant advised that he was not in a fit state to deal with his case and that he would require three to four days to recuperate. The appellant advised that he had attended his general practitioner at 9.15 am that morning and had been sent away to take medication and to return again at 10 am. The appellant confirmed that he had received a copy of the court's interlocutor of 22 August 2017 (that which assigned the hearing for 23 August 2017 at 10 am). The appellant was advised that he should make every effort to attend court on 23 August 2017. The appellant was advised that, at the very minimum, he should obtain a certificate on soul and conscience from his general practitioner. The appellant stated that his general practitioner would not provide him with such a certificate but that he would request a note from his general practitioner recording the symptoms he was then experiencing. The appellant was advised that this may not be sufficient for the court and that the sheriff may proceed with the case in his absence. In response to this the appellant responded, "I'm not bothered. I've done the damage already in this case. Don't you agree? It's in the hands of the Gods now." The head of the civil department advised the appellant that he would inform the sheriff of the terms of their conversation and notify the appellant by e-mail of the sheriff's decision. The appellant stated that the advice of his general practitioner was his priority, not this case or the sheriff.

[59] The court was provided with a letter from the appellant's general practitioner dated 23 August 2017. It is in the following terms:

> "I am writing with regard to Mr Russell who is well known to the practice. He is suffering from significant anxiety and occasional panic episodes. He was previously on medication for this regularly but now uses anxiolytics on occasion. He has also had troubling symptoms of reflux for which he takes medication."

It will immediately be noted that the appellant's general practitioner was not prepared to certify on soul and conscience that the appellant was unfit to attend court on 23 August 2017. The appellant had predicted this in advance which, in itself, is curious.

[60] The appellant's submissions in the appeal amounted to no more than an assertion that the sheriff had acted unreasonably by not continuing the case until the appellant was feeling better and so he could make submissions on the evidence. The appellant contends that, by continuing in his absence, the sheriff breached the appellant's Article 6 right to a fair hearing.

[61] The Article 6 right to which the appellant refers is that set out in the Convention for the Protection of Human Rights and Fundamental Freedoms. That is incorporated into domestic law by way of the Human Rights Act 1998. As this appeal relates to civil proceedings, it is only Article 6(1) that is of relevance. The relevant part provides that in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

[62] At its highest, the appellant's argument is that by proceeding in his absence, in the particular circumstances of this case, he was deprived of a fair hearing. The appellant did not address the sheriff's refusal of the respondent's motion for decree by default (made under OCR 16.2.(1)(c), the appellant having failed to appear at a diet); and her careful

consideration of the issues she surmised the appellant would have raised in submissions. The appellant did not identify any matter the sheriff omitted to have regard to. The sheriff's conclusion that the appellant was seeking to obstruct the proceedings and had chosen to absent himself is one she was entitled to reach. Indeed, having regard to the statements made by the appellant to the head of the civil department (see paragraph [58] above), it is difficult to see what other conclusion could properly be reached. The appellant's decision to absent himself on 23 August 2017 was a matter of his own choosing. He was not deprived of a hearing, he chose not to attend.

[63] The appellant's appeal, insofar as directed to the sheriff's decision to hear submissions from the respondent's solicitor in the absence of the appellant, and her reaching a decision in the absence of submissions from the appellant, was not oppressive and did not contravene the appellant's rights under Article 6.

The Third Appeal Point

[64] In terms of section 116(2) of the Courts Reform (Scotland) Act 2014 ("the 2014 Act"), in an appeal, all prior decisions in the proceedings (whether made at first instance or at any stage of appeal) are open to review. As noted above, whilst not enunciated in his Note of Appeal, the court permitted the appellant to advance the argument in relation to the sheriff's interlocutor of 22 May 2014, as set out in his Note of Argument. That argument can be shortly put. The present proceedings were warranted on 13 December 2006. The appellant's counterclaim was lodged on 1 February 2007. The appellant was declared a vexatious litigant by order of the Inner House dated 27 March 2012. The appellant argued that the counterclaim, which had already been lodged, was not affected by the order of the Inner

House and, to that extent, the sheriff who had pronounced the interlocutor of 22 May 2014 had erred.

[65] At the hearing of the appeal this matter was presented by both parties as one of the proper interpretation of section 1 of the now repealed Vexatious Actions (Scotland) Act 1898 ("the 1898 Act"). That section provided:

> "It shall be lawful for the Lord Advocate to apply to either Division of the Inner House of the Court of Session for an order under this Act, and if he satisfies the Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings, whether in the Court of Session or in any inferior court, and whether against the same person or against different persons, the Court may order that no legal proceedings shall be instituted by that person in the Court of Session or any other court unless he obtains the leave of a judge sitting in the Outer House on the Bills in the Court of Session, having satisfied the judge that such legal proceeding is not vexatious, and that there is prima facie ground for such proceeding."

[66] The Lord Advocate made such an application in relation to the appellant. The Inner House was satisfied that the appellant had habitually and persistently instituted vexatious legal proceedings without any reasonable ground for so doing. The decision of the Inner House is reported as *Lord Advocate* v *B op.cit.* On 27 March 2012 the Inner House made an order that no legal proceedings could be instituted by the appellant without the leave of a judge sitting in the Outer House on the Bills in the Court of Session. It was this order of the Inner House that caused the sheriff to make the order he did on 22 May 2014.

[67] In *Sheriff Court Practice* (3rd ed.) at para 4.123, the learned author suggests that an order under section 1 appears to remain in force indefinitely, but not to apply to proceedings in dependence when it is made. No authority is cited in support of that proposition. In *HM Advocate v Frost* 2007 SC 215, at 225, an Extra Division of the Inner House held, following a consideration of the relevant rule of the Court of Session (one which is in identical terms to that applicable in the sheriff court, namely, OCR 19.1.(1)), that:

> "… the lodging of a counterclaim … must be seen as equivalent to the raising of an action and hence the institution of the proceedings concerned. Thus we conclude that a person may be said to have 'instituted vexatious legal proceedings' if, in a counterclaim, that person has commenced proceedings having the quality desiderated by the section."

[68] In this case the appellant's counterclaim was lodged more than five years before the decision of the Inner House. Following *HM Advocate* v *Frost*, the appellant's counterclaim had been instituted prior to the making of the order against the appellant in terms of section 1 of the 1898 Act. Unlike the modern provisions in respect of vexatious litigants (which are to be found in sections 100 – 102 of the 2014 Act), the 1898 Act has no provisions which limit the rights of vexatious litigants in ongoing civil proceedings. Properly interpreted, an order under the 1898 Act applies only to proceedings (which term includes counterclaims) instituted after the date of such an order. An order under section 1 of the 1898 Act does not apply to proceedings which were in dependence when the order was made.

[69] At no time prior to, or during the hearing of, the appeal did either party draw to my attention the fact that the appellant had previously appealed against the interlocutor of 22 May 2014 itself and, when the case was before the sheriff principal in 2016, the appellant had a further opportunity to challenge that interlocutor, which he did not take. Accordingly, I do not have the benefit of parties' submissions on whether the court should exercise the power of review which is available to it in relation to the interlocutor of 22 May 2014 (see *McCue* v *Scottish Daily Record and Sunday Mail* 1998 SC 811).

[70] In the interlocutor of 22 May 2014 the court envisaged the counterclaim being determined after the conclusion of the principal action. The sheriff's view was that it was manifestly just and expedient that the counterclaim be considered at that time. As that stage has now been reached, the sheriff's decision on timing need not be considered. It is only that part of his interlocutor requiring the appellant to obtain the leave of a Lord Ordinary before

being permitted to proceed with his counterclaim that is subject to review. No active steps (save for the respondent's failed attempt to debate it) have been taken in relation to the counterclaim since 2014. At its highest, and as demonstrated by his submissions before the sheriff principal in 2016, the appellant's approach was one of acknowledging the effect of the court's interlocutor of 22 May 2014, without accepting it was correct.

[71] The sheriff erred in holding that the effect of the order of the Inner House under section 1 of the 1898 Act was to require the appellant to obtain leave before he was permitted to continue with his counterclaim. Standing the conclusion I have reached on the proper application of section 1 of the 1898 Act, as a matter of fairness, it would be inappropriate to deprive the appellant of the opportunity to continue with it on the basis of his prior failures to challenge the interlocutor of 22 May 2014 when the opportunity arose.

Decision

[72] I will recall that part of the interlocutor of 22 May 2014 that requires the appellant to obtain the leave of a judge sitting in the Outer House on the Bills of the Court of Session before proceeding with his counterclaim; *quoad ultra* I will refuse the appeal; and thereafter I will remit the cause to the sheriff to proceed as accords in relation to the appellant's counterclaim.

Expenses

[73] The appellant has been successful in relation to the counterclaim, albeit he had earlier opportunities to bring the terms of the court's interlocutor of 22 May 2014 under review, which he elected not to take. The respondent has been successful in relation to the first and second issues and, by reason of the appellant's failure to obtain and lodge the notes

of evidence, in relation to those grounds of appeal which the appellant was not permitted to argue.

[74] Standing the limited success of the appellant, whilst I will find the respondent entitled to the expenses of the appeal, I will restrict that liability to 90% of those expenses. The respondent expressly indicated that she did not ask the court to sanction the appeal as suitable for the employment of counsel.