

Sheriff Appeal Court**10 September 2021****Sheriff Principal Murray**

The Court, having resumed consideration of the appeal, makes the following orders:

1. finds the respondent in default in terms of Rule 3.1(b) and (c) of the Sheriff Appeal Court Rules 2015 for its failure to comply with the interlocutor of 14 July 2021 and failure to be represented at the hearing on 17 August 2021;
2. allows the appeal in terms of Rule 3.2(3)(b);
3. finds it unnecessary to answer the question in law posed by the summary sheriff;
4. recalls the summary sheriff's order dated 22 March 2021;
5. finds the respondent liable to the claimant and appellant in the expenses of the appeal procedure, as taxed; allows an account thereof to be given in and remits same, when lodged, to the Auditor of the Sheriff Appeal Court to tax and to report.

Sheriff Principal D L Murray

Sheriff

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SHERIFF APPEAL COURT

DBN-SG300-20

OPINION OF THE COURT

delivered by

SHERIFF PRINCIPAL D L MURRAY

in an appeal in the cause

MARK DORAN

Claimant/Appellant

against

SAINSBURY'S SUPERMARKETS LTD

Respondent/Respondent

Appellant: party
Respondent: no appearance

10 September 2021

[1] On 1 October 2020 following the failure of the respondent to respond to the claim an order for payment was granted by the summary sheriff ordering the respondent to pay the claimant £1500.

[2] An application for recall was submitted by the respondent on 24 February 2021 which was objected to by the appellant. Following a hearing by telephone on 22 March the

summary sheriff granted the application for recall. The appellant lodged an appeal form, which resulted in the sheriff preparing his report.

[3] The sheriff in his report explains his four reasons for allowing the application for recall. He found the application to be competent; the respondent had advanced a colourable reason for missing the response date; the respondent had advanced a reasonable justification for the timing of the application for recall and neither party would be disadvantaged or prejudiced by allowing the action to progress as they would have the opportunity to advance their claim or defence. The case papers and the appeal report were then submitted to the SAC who in turn forwarded them to me to allow the appeal to be progressed.

[4] I arranged for a letter to be sent to the respondent on 20 May which requested confirmation of who would be representing the respondent in the appeal proceedings. No response was received and a reminder was sent on 1 June. Again no reply was received.

On 14 July I issued an order in the following terms:

“The Court, having resumed consideration of the appeal, makes the following order:

1. A hearing on the appeal is to take place:
 - a. On Tuesday 17 August 2021;
 - b. At 10:00am;
 - c. Within Dumbarton Sheriff Court, Church Street, Dumbarton, G82 1QR;
2. Appoints parties to lodge written submissions in support of their argument, with the Sheriff Principal’s Office at Paisley Sheriff Court, St James Street, Paisley, PA3 2HW no later than 5pm on Tuesday 10 August 2021 together with any authorities upon which they may wish to rely;
3. Parties are to exchange copies of their written submissions with one another at the same time as lodging these with the court.”

Written submissions were timeously received from the appellant and copied to the respondent.

[5] The first contact from the respondent was made by telephone by Mr Pugh, who is designed as holding the position as head of dispute resolution for the respondent, at 17.01 on 16 August. My assistant who received the call provided me with a note of the call in the following terms:

“He advises that he has been unable to arrange representation to attend at Dumbarton in person tomorrow and the cost of someone coming up to Scotland to attend the hearing would be prohibitive.

He explained that his knowledge of the Scottish legal system is sparse but his understanding was that the decision in the appeal would be based on the appellant’s case and that there was not much that Sainsbury’s could add to that.

I explained that if they were not represented, and had not in fact put in their written submissions when requested, the decision in the appeal could be detrimental to them. I noted that no written submissions had been received from them. I said that I had tried to make numerous attempts to speak to them about this, and that I had emailed him as well as the dispute resolutions email address.

He went on to say that if the hearing had been virtual the he would have been able to take part - I said that it was not particularly helpful to be told this so late in the day, which he said he accepted, and he tendered his apologies.”

I said I would pass on a note of our telephone conversation to you, and also asked him to put something in writing to my email address by way of explanation to you, which he said he would do.”

[6] At 19.13 Mr Pugh submitted written submissions on behalf of the respondent.

Given there was no application, either within the written submissions or otherwise, from the respondent that these be received late, and there was no explanation of the basis on which Mr Pugh was entitled to submit written submissions on behalf of the respondent or an

application by him to the court for him to act as a lay representative I took no account of the submissions.

[7] I find the respondent to be in default for its failure to comply with the order of 14 July by reason of non-attendance at the hearing and by their failure to have submitted written submissions timeously. Rule 3.2(3)(b) of the Sheriff Appeal Court Rules provides that where the respondent is in default the court may allow the appeal but only if the condition set out in rule 3.2(4) is satisfied - namely that the appellant must show cause why the appeal should be allowed.

[8] I therefore invited the appellant to expand on his written submissions to seek to persuade me why the appeal should be allowed. The appellant adopted his written submissions. He was sceptical that a trainee solicitor had sole responsibility for the claim, the explanation given by the respondent for their failure to respond to the claim. He also suggested that even in these times of COVID the respondent should have had a better system to ensure that they responded to the claim. He produced a letter from Hannah's sheriff officers dated 20 November 2020 enclosing execution of service of a charge by first class recorded delivery post on the respondent at their head office on 18 November 2020. He also produced correspondence from Scott and Co sheriff officers and explained that they had attended at the respondent's Braehead Store to execute a money attachment on 24 February when they were told that the respondent through its head office would make settlement of the sum claimed in the money attachment. The sheriff officers then advised him that a minute for recall had been lodged at Dumbarton Sheriff Court which had apparently been triggered by the money attachment. He stated he had not had the

opportunity to explain this at the telephone hearing on 22 March when communications had been less than ideal. He suggested that the documents he had produced demonstrated that the failures of the respondent to deal properly with the claim had continued following service of the charge and there had been delay on the part of the respondent in seeking recall.

[9] This appeal has to be considered taking account of the principles of simple procedure in terms of the Simple Procedure Rules. I note in particular that Rule 1.2(1) provides that that cases are to be resolved as quickly as possible and Rule 1.5(7) provides that parties must follow the sheriff's orders. Rule 13.6 (4) as applies in this case requires the sheriff to arrange a discussion and gives him a discretion whether to grant the recall.

[10] The sheriff here initially fixed a discussion which as a result of the restrictions imposed by the pandemic he ordered to be by telephone. Following that discussion he exercised his discretion to grant the application for recall. It is well understood that an appellate court will only interfere with such a decision on limited grounds. It appears to me that additional information is available to this court which suggests that there are significant failings in the respondent's systems for dealing with court actions in Scotland which continued after their initial failure to respond to the claim. I accept that the appellant was unable to convey to the sheriff in the course of the telephone discussion the steps he had taken to enforce the order for payment and the lack of response by the respondent until the sheriff officers attended at the respondent's Braehead store. I accept the service of the charge and the further actions taken to enforce the debt were relevant factors for the sheriff to have considered which were not apparent to him when he considered the application for

recall by telephone conference on 22 March 2021. In the circumstances I am satisfied that there was material information which the summary sheriff was unaware of and had the sheriff been aware of these matters having regard to the underlying principles of simple procedure the sheriff would not have been as sympathetic to the failures of the respondent.

[11] In these circumstances the court would be entitled to reconsider his decision and to take account of the further information about the ongoing failure of the respondent to respond following a charge having been served and the circumstances surrounding the application for recall being made on 24 February 2021, which the respondent has not contradicted given their failure to attend the hearing. Were I required to do so I would be minded to allow the appeal on the merits the sheriff having reached his decision without information of the full background at the telephone discussion. That would result in the court answering the question in the sheriff's report in the negative, but that is superseded by the question which is to be determined, namely whether the appeal should be allowed by reason of the respondent's default.

[12] I observe that the appellant's claim is for breach of a duty of care owed by the respondent in failing to protect him from the actions of another customer in a store, who he alleges threatened him both physically and verbally, is as he accepted, novel, but I find it to be stateable even if it might not succeed if it were to proceed to a hearing on the merits.

[13] In all these circumstances given the default of the respondent in failing to comply with the order of 14 July I am satisfied that the appellant has shown cause why the appeal should be allowed in terms of Rule 3.2(4) of the Sheriff Appeal Court Rules. I shall therefore allow the appeal and recall the sheriff's order of 22 March granting recall and

reinstate the decision of the sheriff of 1 October 2020 granting the order against the respondent for payment to the appellant [the claimant] of £1500 and award the expenses of the appeal in favour of the appellant. He should prepare an account to submit to the Auditor of the Sheriff Appeal Court.

[14] For completeness I should indicate that given there is no formal execution of the money attachment and Rule 13.5(3) of the Simple Procedure Rules does not apply as the decision of the sheriff has not been fully implemented and therefore application for recall was not excluded by that rule. The interpretation of that rule and determination of what “fully implemented” means can await argument in a future case.

