**SHERIFF APPEAL COURT**

**[2017] SAC (Civ) 25**
**HAM-SD1585-16**

NOTE BY SHERIFF PRINCIPAL IAN R ABERCROMBIE QC
Vice President of the Sheriff Appeal Court

in the cause

MR DONAL A NOLAN AND MRS MELANIE COLLINS

Appellant

against

MR KENNETH PATULLO

Respondent

**Pursuer/Appellant: Party (Mrs M Collins)**
**Defender/Respondent: McCabe**

25 July 2017

[1] This is a summary cause action for recovery of heritable property raised by the Trustee on the sequestrated estate of the appellants. The appellants are partners and have lived together at Comliebank House in Newmains for over 20 years.

[2] There are three questions in the Stated Case as amended.

[3] The first question is: "having regard to my previous involvement in the case, and in the principal action, should I have recused myself from further involvement in this matter?"

[4] This question refers to two separate issues.

[5] The first is that the Sheriff, on the 13 March 2017 who granted decree for recovery of the appellants' property following upon the first and second appellant's sequestrations on

the 1 September 2015 and the 30 April 2015 respectively, had a previous involvement in the second appellant's sequestration process. That involvement amounted to him signing an interlocutor on the 14 April 2015, some two weeks after the second appellant's sequestration.

[6] The interlocutor of 14 April 2015 records that a mistake had been made in the interlocutor of 30 March 2015. The mistake in the interlocutor of 30 March 2015 was that the Accountant in Bankruptcy had been appointed as the second appellant's Trustee Mr Kenneth Pattulo had in fact on 30 March 2015 been appointed as Trustee. The mistake in the identity of the trustee occurred because the "default" position on the court computer system was to pre-populate the Interlocutor with the Accountant in Bankruptcy details. This pro forma style had not been altered, through oversight, to specify Mr Patullo's name when the interlocutor of 20 March 2015 was being prepared. On the 14 April 2015 Sheriff Millar, following correspondence from the creditor's agent, corrected this administrative error and substituted Mr Pattulo's name for the name of the Accountant in Bankruptcy.

[7] The second appellant stated that she was in court on the 30 March 2015. She was then represented by a solicitor. She has a clear recollection that the Accountant in Bankruptcy was not appointed as her Trustee.

[8] The appellants argue that "anyone independent" being aware of the Sheriff's actions on the 14 April 2015 would form the view that he was biased against the appellants when it came for him to consider this action for recovery. The appellants further argue that it is further evidence of bias the second appellant was not told that the interlocutor required to be changed.

[9] The test which the appellants invited me to consider was that specified in the House of Lords case of *Porter* v *Magill* 2001 WL 1479752. At para 103, Lord Hope of Craighead approves a slight adjustment to the test originally enunciated by the Master of the Rolls in

*Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700. The test is set out at para 103 of Lord Hope's judgement.

[10] The respondent agreed with the test set out by the appellants but argued that if that test was applied there were no grounds for suggesting that bias could arise.

[11] There is no doubt about the circumstances which caused the Sheriff to sign the interlocutor of 14 April 2015. I have referred already to these circumstances, which were accepted by both parties to the appeal.

[12] The next question is whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the court was biased.

[13] I cannot see how any fair-minded and informed observer could conclude that there was a real possibility that Sheriff Millar was biased, when granting decree in this case, because he had, two years earlier, issued an interlocutor correcting the name of the Trustee.

[14] The Accountant in Bankruptcy had not been named at the hearing on 30 March 2015 as the second appellant's Trustee. As became apparent during the hearing the second appellant was aware from at least the 24 or 25 April 2015 that Mr Patullo was her Trustee (I will return to this matter later). On the 14 April 2015 the court paperwork had by mistake recorded a different name – and the Sheriff subsequently corrected that administrative error. I cannot see that any *independent* and *fair-minded* observer, knowing these facts, could conclude that the Sheriff was therefore biased when he came to consider this action for ejection.

[15] The appellants were unable to suggest why the real possibility of bias could be said to arise. The appellants' argument was that any judge who has anything at all to do with a case involving one of the parties should not have any dealings with any subsequent case involving the same party. That is not the test to be applied.

[16] Accordingly, I answer this part of the first question in the negative. The Sheriff should not have recused himself from involvement in the present case on the basis that he signed the interlocutor of 14 April 2015.

[17] Before leaving this question I want to make two observations:

[18] In the first place nothing turns on the second appellant's apparent lack of knowledge about the correcting interlocutor. The Sheriff's interlocutor formally records what the second appellant should have been aware of already, namely that Mr Patullo was to be her Trustee. The second appellant did not go so far in her argument to suggest that Mr Patullo's name was not specified in the hearing of the 30 March 2015. She was aware that Mr Patullo was corresponding with her from about the end of April throughout May, June and July 2015. Furthermore, the correcting interlocutor would, in the normal course of events, have been intimated to the second appellant's agents who were then acting for her. When asked about this, the second appellant stated that she had not checked her former agent's papers to see if this had been done. She simply stated that she had not had sight of these papers.

[19] I should also make a second observation about the second appellant's submission that following upon her sequestration she received letters from the firm of KPMG. Why and for what reason she did not know. To support her argument in this respect she produced a letter dated 13 August 2015 from KPMG purporting to act on behalf of her Trustee. The second appellant however accepted that she had received correspondence from her Trustee, Mr Pattulo - as I have already stated - in April, May, June and July 2015. I was informed by the respondent's agent that the respondent sent his first letter to the second appellant on the 23 April 2015. Part of the ensuing correspondence was sent to her by recorded delivery. One letter had been served on her by Sheriff Officers on the 16 July 2015. The second appellant's ultimate position was that she had indeed received letters from the Mr Patullo

but she had passed these on to the first appellant. She could not explain why she did so. There was no apparent reason for her to do this, particularly as the first appellant was not sequestrated until 1 September 2015.

[20] It appears that the reason why KPMG were writing to the second appellant as late as mid-August 2015 was that it had been appointed by the Accountant in Bankruptcy to act as his agent. Both the Accountant in Bankruptcy and KPMG had not been told of the error in the interlocutor of the 30 March that year. They were only made aware that the Accountant had not been appointed as the second appellant's Trustee some time after mid- August 2015. That explains why KPMG wrote to the second appellant on 13 August 2015. Both that firm and the Accountant in Bankruptcy were at that time still labouring under the misapprehension about the correct identity of the Trustee.

[21] The second issue raised in the first question of the Stated Case relates to an action for declarator, reinstatement and damages following upon spoil being deposited on land owned by the first appellant.

[22] The first appellant raised this action in Hamilton Sheriff Court against Advance Construction (Scotland) Ltd, which I will now refer to as "Advance". Warrant for arrestment on the dependence of the action was granted.

[23] At an early stage in the action Advance enrolled a motion to remit the case to the Court of Session on the grounds that the importance and difficulty of the cause made it appropriate to remit it to the superior court. (Section 37(1)(b) of the Sheriff Court (Scotland) Act 1971 then applied.)

[24] Sheriff Millar heard the motion on the 30 September 2011. The first appellant and Advance were represented by solicitors. The first appellant (and in effect Mrs Collins who described this action as "our action") opposed the motion. Advance's position was that the

sum sued for (over £6 million) and the issues raised in the cause were of sufficient difficulty and complexity to justify it being remitted to the Court of Session. The appellants' position was that the action was not difficult or complex and that it should remain in the Sheriff Court. Both appellants were present at this hearing. They accepted that the court dealt with the motion by considering the pleadings in the case and hearing argument from both agents. The appellants further accepted that no findings or comments were made by the Sheriff in respect of the credibility and reliability of either party to the action. They also accepted that there were no findings made by the Sheriff on the merits of the action – or on the defence to it. He did not consider who was to blame for dumping the spoil. He did not make any findings nor did he express any view about any of the substantive issues referred to in Lord Woolman's judgement of 17 January 2014 in the Nolan v Advance case.

[25] The appellants' argument in this appeal was to the effect that the Sheriff should have recused himself from deciding this action for recovery of possession – because it was the first appellant's lack of success in the Court of Session action together with the second appellant being found liable in expenses as *dominus litis* which led directly to the appellants' bankruptcy. The fact that the Court of Session recalled the arrestment on the dependence after it had been granted in the Sheriff Court was indicative of the Sheriff's bias. He was only too ready to send the case to a higher court so that this recall could take place. The appellants further argued that a fair-minded and informed observer having considered the specified facts I have outlined would conclude that there was a real possibility that the Sheriff was biased.

[26] Both parties accepted that the test I have referred to earlier, enunciated by Lord Hope in the *Porter* v *Magill* case should also be applied in determining this element of the stated case. The respondent's agent argued that in all the circumstances a fair-minded observer

could not conclude that there was a real possibility that the Sheriff was biased when hearing this case on the 13 March 2017 because of his involvement in the Advance case of 2011.

[27] As the facts are not in dispute, I will now consider the test set out by Lord Hope.

[28] In my view, an *informed* and *fair-minded* observer would not be led to conclude that there was a real possibility that because the Sheriff had decided to remit the Advance case to the Court of Session, that he was biased against the appellants in *this* action. The decision he made in September 2011 related to a preliminary stage in the proceedings in the Advance case – essentially about which court was the most appropriate to deal with the case. The issues he was dealing with then were completely different from the issues in this case. As the Sheriff indicates in the Stated Case – he was not required to hear evidence about the merits or otherwise of the Advance case, nor was he required to form a view on the credibility or reliability of the parties or any witnesses. He was not required to consider who was responsible for dumping the spoil (although that was a matter which was admitted fairly early on) or decide any of the issues relating to liability or damages. While he would have to consider the pleadings and parties' submissions on the issue of the importance and complexity of the action, he had no role in determining who was right or wrong. The fact that he decided that the case was sufficiently complex and important to be remitted to and heard by a superior court, does not mean that a fair-minded observer, being informed of the material facts, would conclude that the Sheriff was biased when dealing with the present case.

[29] It is I think worth remarking that both appellants attended the 2011 hearing before Sheriff Millar, when the Sheriff had what I have categorised as a peripheral role in the Advance case. Both appellants were fully aware of the argument heard by the Sheriff and his decision on the motion to remit to the Court of Session. The second appellant was

present at, and participated, in the proceedings in this case on the 13 March 2017. No steps were taken by her to voice any concern that the Sheriff should not hear the case. Nor was the Sheriff asked to recuse himself.

[30] The appellants' submission again proceeds on the basis that *any* involvement by a Sheriff in a previous case involving one of the parties, should preclude that Sheriff from dealing with a subsequent case involving that party. That is not the legal test. The test is whether an *informed* and *fair-minded* observer, being aware of the *facts* could conclude that there was a *real* possibility that the Sheriff was biased. The word "real" is used in conjunction with the word *possibility* to give it an obvious emphasis. The word "possibility" should not be interpreted as being a fanciful or remote chance. The word *real* gives context to the *possibility*.

[31] Having decided that the action was sufficiently complex and important to warrant determination by the Superior Court, that was the end of the Sheriff's involvement in the Advance action. He had no influence on the decision reached by Lord Woolman nor did he have any role to play in making that decision. The appellants could not expand on their suggestion that he did so. Furthermore, the appellants did not appear to realise that if the action had remained in the Sheriff Court, Advance could have enrolled a motion, at any stage, to lift or restrict the arrestment originally imposed. It did not require a remit to the Court of Session for the arrestment to be lifted and it frequently happened that motions for recall of arrestment were enrolled and heard in the Sheriff Court.

[32] I therefore do not accept the argument that this case was remitted to the Court of Session with the specific intention of having the arrestment on the dependence lifted or restricted – which the appellants described as "really the start of their problems". Nor do I accept the appellants' argument that this case was specifically remitted to the Court of

Session with the specific intention of having the appellants fail. Nothing was said to support that proposition.

[33] The *result* of remitting the case to the Court of Session and what Lord Woolman decided is neither here nor there. It is completely irrelevant to the question now before the Court. What is relevant is the perception of the informed/fair-minded observer on the 13 March 2017 having been informed of the nature and extent of the Sheriff's prior involvement in the Advance case on the 30 September 2011.

[34] It follows from what I have said that this aspect of the first question must also fail.

[35] Accordingly both parts of the first question in the Stated Case must be answered in the negative.

[36] Before leaving this matter I should deal with the Sheriff's comment that at the time of pronouncing the interlocutor granting recovery of the appellants' house, he had no prior memory of hearing the motion to remit the Advance case to the Court of Session in 2013. The Sheriff's memory is neither here nor there. What is important is an objective consideration of the possible existence of bias in light of the relevant facts.

[37] I now turn to consider the second question in the Stated Case as amended. This is in two parts – A and B.

[38] Question 2A reads as follows; "Was I wrong not to sist this action given that the second appellant was about to lodge a new appeal to the Supreme Court challenging Lord Woolman's decision to find her liable for expenses in the Nolan v Advance Construction case?"

[39] Question 2B is now in the following terms: "Was I wrong not to sist this action given that the first appellant was to appeal or challenge the Supreme Court's decision to refuse leave to appeal to the Supreme Court?"

[40] The appellants' argument in respect of both parts of question 2 can be summarised as follows: the sheriff was wrong to grant decree for recovery of heritable property in the face of the appellants' statement that they were going to appeal Lord Woolman's decision in the Nolan v Advance case both on the merits and in relation to the second appellant being found liable for the defender's expenses as *dominus litis*.

[41] I was informed that leave to appeal Lord Woolman's decision to the Inner House of the Court of Session had been refused. Leave to appeal to the Supreme Court had also been refused on the basis of a letter from the Supreme Court dated the 19 July 2016 confirming that the court did not have jurisdiction. It was argued that the Supreme Court Justice refusing leave to appeal had "been involved" in the Advance case when it was in the Court of Session, prior to the proof taking place before Lord Woolman. Following "media attention", the Supreme Court decided "to reverse its decision to refuse leave to appeal" and had furthermore informed the Inner House of the Court of Session that it would be "expecting a new appeal from the appellants in respect of the merits of the Advance case and Lord Woolman's findings on expenses."

[42] At the time of their appearance before the Sheriff, the appellants had told him that the Supreme Court would be entertaining an appeal from the first appellant. The Supreme Court had, so it was argued, ignored the fact that the second appellant also had a valid appeal from Lord Woolman's decision and since the hearing before the Sheriff, the Supreme Court had allowed her to appeal as well.

[43] Regardless of whether the Sheriff knew that only one or both of the appellants had a right to appeal, the appellants now argue that Lord Woolman's decisions in the Advance case were going to be appealed to the Supreme Court where his decisions would not be upheld. At the very least there would be a very strong possibility that they would not be

upheld. Once the case was before the Supreme Court, the decision on the merits and on expenses would be overturned. When Lord Woolman's decision was overturned, the sequestration would fall as it was being driven by the appellants' inability to pay Advance's legal expenses.

[44] In these circumstances, so the appellants argued, the Sheriff should have sisted this action for recovery of heritable property or at least postponed making a decision for a period of twelve months until the appellants' Supreme Court decision had been determined. In short, the Sheriff failed to take into account that an appeal against Lord Woolman's decisions were "ongoing", or was about to be commenced and that the Supreme Court had the power to overturn those decisions.

[45] The appellants stated that the Supreme Court had indicated its intention to grant leave to appeal all aspects of Lord Woolman's decision "about 2 months ago". The appellants knew that they were required "even as party litigants" to take immediate steps to suspend or temporarily recall the awards of sequestration granted on the 30 April 2015 and the 1 September 2015 respectively. They had been aware of that requirement since at least the 30 March 2016 when the Sheriff repeatedly asked them if any steps had been taken by them to halt the bankruptcy proceedings. (See paragraphs [2] and [3] of the Stated Case). Since that time they had not taken any such steps. Furthermore, on Friday I was told that the appellants had taken legal advice and that immediate steps would be taken in respect of the bankruptcy proceedings by Monday. I continued the case over the weekend. Today, Tuesday, the appellants stated that nothing had yet been done in this respect.

[46] The respondent argued that no proceedings were pending before the Supreme Court in respect of the Advance case. Nothing had been produced to vouch or support the appellants' assertions. The Registry Office of the Supreme Court had, at the respondent's

agent's request, undertaken a search as recently as 14 July 2017 which confirmed that "nothing was in the system" relating to the appellants. In any event the Sheriff was fully justified not to halt these proceedings because no steps had been taken by the appellants to suspend the bankruptcy proceedings.

[47] In my view the respondent's arguments are persuasive. No correspondence or any vouching of the appellants' assertions regarding any new appeal to the Supreme Court were produced to the Sheriff or for that matter to me. The fact that the appellants were fully aware of the necessity to halt the sequestration proceedings, had since at least March to do so and did not avail themselves of that opportunity speaks volumes. The appellants' assertions about what may or may not happen even if leave is granted to appeal to the Supreme Court and what may or may not happen in any appeal, are speculative.

[48] It is clear from the stated case that a factor uppermost in the Sheriff's mind was that no action had been taken by the appellants to recall or suspend the sequestrations given that there were, allegedly, ongoing appeal proceedings in the Advance case. It cannot be said, that the Sheriff erred in law in this approach. Furthermore nothing has changed or altered since the Sheriff heard this case- despite the appellants having ample time to take appropriate measures to stop the bankruptcy proceedings.

[49] For the reasons I have given both parts of the second questions in the Stated Case also fall to be answered in the negative.

[50] The third and final question in the Stated Case, as amended, was to this effect; "Was I wrong to pronounce decree of removing because the appellants would have to leave the home they had enjoyed together for many years in breach of Article 8 of the Human Rights convention?"

[51] The appellants argued that it was only the heritable creditor who could ask them to leave the property as the property was vested in it, not the respondent. The respondent did not have any right to remove them. He was a public authority in terms of Article 8 and there had to be no interference by any such authority with the appellants' right to respect for the home in which they had lived for many years.

[52] The appellants advanced a subsidiary argument that, in any event, the heritable creditor (the Clydesdale Bank) would be the only person to gain from the sale of their property there being insufficient value in it to satisfy any other creditor.

[53] The respondent argued that the purpose of the Convention was to protect individuals from the state/public authority. It could not be used by the appellants in this case. Miss McCabe referred to the case of *McDonald* v *McDonald* and others 2016 UKSC 28. She argued that this case and the cases referred to in it were authority for the proposition that the court could not be considered a public authority, it merely being the forum for the determination of the civil right dispute between the parties. (See Lord Millet in *Harrow London Borough Council* v *Qazi* [2004] 1 AC 983 at paragraphs 108-109). The Trustee was also not a public authority or quasi-public authority. In any event in this case the Trustee was seeking to recover property which was vested in him by virtue of the awards of sequestration. The appellants had no longer any right to occupy the property. It was not open to the appellants to contend that Article 8 operated to prevent the Trustee acting by virtue of an award of sequestration from seeking recovery of the property. The property vested in him, not the appellants nor the bank. The appellants no longer had any right or title to reside in the property by virtue of their sequestration.

[54] The appellants' argument proceeds on a misunderstanding of the law. The property is no longer vested in their bank as their heritable creditor or mortgage holder. Once the

respondent was appointed as Trustee, the property vested in him. He is the owner of it. The bank, of course, still has an interest in the property that interest being the recovery of the funds borrowed from it by the appellants. However that does not prevent the respondent from seeking recovery of the appellants' home and selling it. I do not consider that the appellants' Article 8 rights can be read in such a way to prevent the Trustee on their sequestrated estate from ejecting them and selling the property in order to pay the appellants' debts on the basis that they would no longer be able to enjoy living in their home. I agree with the respondent's argument that neither the court nor the respondent can be considered a "public authority" in terms of Article 8.2 of the Convention.

[55] It would not make economic sense – and it certainly would not be in the economic wellbeing of the country - if creditors and trustees in sequestration were prevented from recovering the assets over which they had advanced money on the basis that debtors would have to leave the home they had enjoyed living in. That is not what the Convention rights are about.

[56] The appellants' assertion that only the bank will gain from the sale of their property is irrelevant. The Trustee has a duty to ingather all the appellants' assets and distribute them – regardless of the sale value of any particular asset. The fact that any sale of the property would result in nothing or very little being left over is neither here nor there.

[57] For these reasons the third question must also be answered in the negative.