

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

[2019] SC ABE 90

ABE-B459-18

NOTE BY SHERIFF PHILIP MANN

in the cause

EWA JAWOROWSKA-DZIEWIRZ

Minuter

against

ANDRZEJ WOJCIECHOWSKI

Respondent

Aberdeen, 12 November 2019

[1] In this summary application, commenced in June 2018, the minuter sought a warrant in terms of section 4 of the Civil Imprisonment (Scotland) Act 1882 committing the respondent to prison for wilful failure to pay within the days of charge a sum of aliment in respect of the parties' child.

[2] The minuter is a Polish national resident in Poland. The respondent is a Polish national resident in Scotland within the jurisdiction of this court.

[3] The minuter holds an order of a Polish court requiring the respondent to pay maintenance in respect of the parties' child, resident in Poland with the minuter. That order was registered here on 29 September 2017 in terms of the Maintenance Orders (Reciprocal Enforcement) Act 1972.

[4] Section 4 of the 1882 Act is in the following terms:

“4. Power to imprison for wilful failure to obey decree for alimentary debt.

Subject to the provisions herein-after contained, any sheriff principal or sheriff may commit to prison for a period not exceeding six weeks, or until payment of the sum or sums of aliment, and expenses of process decerned for, or such instalment or instalments thereof as the sheriff principal or sheriff may appoint, or until the creditor is otherwise satisfied, any person who wilfully fails to pay within the days of charge any sum or sums of aliment, together with the expenses of process, for which decree has been pronounced against him by any competent court;

Provided -

- (1) That the warrant to commit to prison may be applied for by the creditor in the sum or sums decerned for without any concurrence:
- (2) That the application shall be disposed of summarily, and without any written pleadings:
- (3) That the failure to pay shall be presumed to have been wilful until the contrary is proved by the debtor; but that a warrant of imprisonment shall not be granted if it is proved to the satisfaction of the sheriff principal or sheriff that the debtor has not, since the commencement of the action in which the decree was pronounced, possessed or been able to earn the means of paying the sum or sums in respect of which he has made default, or such instalment or instalments thereof as the sheriff principal or sheriff shall consider reasonable:
- (4) That a warrant of imprisonment may be granted of new, subject to the same provisions and conditions, at intervals of not less than six months, against the same person in respect of failure to pay the same sum or sums of aliment and expenses of process, if or in so far as still remaining due, or such instalment or instalments thereof as the sheriff principal or sheriff shall consider reasonable, or any sums afterwards accruing due under the decree, or such instalment or instalments thereof as the sheriff or sheriff substitute shall consider reasonable:
- (5) That the imprisonment shall not to any extent operate as a satisfaction or extinction of the debt, or interfere with the creditor's other rights and remedies for its recovery:
- (6) That the creditor, upon whose application the warrant of imprisonment is granted, shall not be liable to aliment or to contribute to the aliment of the debtor while incarcerated under such warrant; but that the incarcerated debtor shall be subject to the enactments and rules as to maintenance, work, discipline, and otherwise applicable to the class of prisoners committed for contempt of court.”

[5] I am satisfied that the Polish order for maintenance is equivalent to a decree for aliment of a child pronounced by a Scottish court. I am also satisfied that the aliment is to be treated as “aliment for which decree has been pronounced against [the respondent] by any

competent court” in terms of section 4 of the 1882 Act. This results from section 8(1) of the 1972 Act which provides:

“Subject to subsection (2) below, a registered order may be enforced in the United Kingdom as if it had been made by the registering court and as if that court had had jurisdiction to make it; and proceedings for or with respect to the enforcement of any such order may be taken accordingly.”

[6] When the application first called, it was continued on two occasions to enable an interpreter to be present to assist the respondent. On 11 October 2018 the respondent was present with an interpreter. On that date it was continued to allow the respondent to seek money advice and to discuss a payment plan with the agents for the minuter. On 22 November 2018 it was further continued to monitor payment of ongoing maintenance payments together with an amount towards arrears and for the respondent to lodge vouching of his income and expenditure. On 17 January 2019 it was again continued for the respondent to commence payments and to lodge vouching. On 14 March 2019 it was again continued with the respondent being ordained to attend the next hearing and to produce to the court a sum of money in cash together with vouching. On 11 April 2019, the respondent not having made payment in cash that day, it was again continued for payment of the sum in cash to be made, the respondent was ordained to lodge answers with parties thereafter being allowed to adjust their pleadings and a proof was fixed for 5 July 2019 with a pre-proof hearing fixed for 13 June 2019.

[7] I was one of four sheriffs who had thus far been involved with the case, having presided on 17 January 2019. None of us had been addressed by the minuter’s agent as to the appropriate procedure to be followed. Nor could we have expected to be addressed on the matter by the respondent who was a party litigant with no command of the English language. None of us, it would appear, had noticed the terms of section 4(2) of 1882 Act

which provides that an application such as this shall be disposed of summarily, and without any written pleadings.

[8] By the time of the pre-proof hearing I had noticed the terms of section 4(2) of the 1882 Act. On that date, I excused the respondent's failure to lodge answers and his failure to produce the sum of money previously required. This latter was on the basis that the respondent was entitled to the opportunity to prove, in terms of section 4(3) of the 1882 Act, that his failure to pay within the days of charge had not been wilful. As research subsequently disclosed, that could also have been on the basis, having regard to the cases of *M, Petitioner* 2013 SLT 951 and *Hay v Lefelier-Lebos*, 1989 SLT (Sh Ct) 55, that the order to bring money to court amounted to an order ordaining the respondent to obtemper an order for payment and was thus superfluous and incompetent. I continued the application to the proof diet previously fixed.

[9] By the time of the proof I had become aware of the case of *Cain v McColm* (1892) 19 R 813 in which it was held, in an action of suspension and interdict in respect of a warrant for imprisonment under section 4 of the 1882 Act, that it was incompetent to grant continuations in an application such as this for most of the reasons of a kind above narrated. I raised this issue with parties at the commencement of the diet of proof on 5 July 2019. Mr Leiper, solicitor for the minuter, moved for discharge of the diet to enable him to fully consider the law in the matter. This was unopposed by the respondent. I granted the minuter's motion and continued the application to a new proof diet on 12 November 2019 to allow parties to consider matters and for the respondent to seek legal representation.

[10] When the application called again for proof today Mr Leiper again appeared for the minuter. The respondent remained unrepresented but he was assisted by an interpreter. Mr Leiper moved that the proof be discharged and that the application be dismissed with no

expenses due to or by either party. This motion was unopposed by the respondent and was granted.

[11] It is right that I should record the view that I had formed as regards the proper procedure to be adopted in applications of this kind under the 1882 Act. This view was discussed with parties at the proof diet. The respondent, being unrepresented still, was unable to say anything about it but I understood the minuter's agent to concur in my view for he intimated that it was for the reasons expressed by me that he had concluded that the only proper course was to seek dismissal of the application.

[12] The instruction in section 4(2) of the 1882 Act that there should be no written pleadings does not square with the modern practice of requiring parties to focus their respective cases in a written record whenever there is a need for proof. However, when one considers the function of the court in an application under section 4 of the 1882 Act it can be seen that there is no point, or advantage, in delaying matters to allow for that to be done. All that the court is required to do is to decide whether or not to exercise its discretion to grant a warrant for imprisonment against the respondent for failure to pay the sum of aliment within the days of charge. The court is considering a very short period of 14 days. All that the court needs to know is that arrears of aliment under a court order exist, that a charge for payment has been served against the respondent and that the respondent has failed to pay within the days of charge. Thereafter it is for the respondent to satisfy the court as to the matters set out in section 4(3) of the 1882 Act.

[13] None of the foregoing is so complex or extensive that it requires written pleading, apart from the initial writ required in terms of rule 2.4 of the Summary Applications etc Rules. It could perhaps be argued that even an initial writ is not required given that rule 2.4 requires such "unless otherwise prescribed by any other enactment" and that section 4(2) of

the 1882 Act provides that there shall be no written pleadings. But, I can think of no other proper means of bringing the matter into court and so the instruction given in section 4(2) is only capable of applying to answers and adjustment of pleadings.

[14] In the case of *Strain v Strain* (1886) 13 R. 1029, which held that appeal against a refusal by the sheriff to grant a warrant for imprisonment was incompetent, the procedure was described thus by the Lord President:

“Now, that provision that the debtor is to prove something to the satisfaction of the Sheriff or Sheriff-substitute taken in connection with the provision which says that the proceedings shall be summary, and that there shall be no written pleadings, makes it quite obvious that the statute did not contemplate that there should be any regular proof taken, but that the Sheriff should simply satisfy himself, by calling the parties before him, whether the debtor could pay, or whether he was wilfully in default. In such a proceeding it is clear that the statute did not intend that the Sheriff should pronounce a regular judgment, or give a decree capable of being extracted. He is simply to grant or to refuse a warrant for imprisonment. Just as in criminal proceedings where the procedure is to apply to the Sheriff for a warrant to apprehend, he simply grants or refuses the warrant, so here he does the same thing. There is a considerable resemblance between the two procedures, for the imprisonment contemplated in this statute is intended to be *in pœnam*.”

So, the matters which the court needs to know can be ascertained from parties at the first hearing without the expenditure of any great amount of time but if anything is in dispute it will, of course, be appropriate to hear proof in the matter. Given the pressure on court time in this modern era, that will necessitate fixing a proof diet on a future date. I do not see that as being repugnant to the terms of the 1882 Act.

[15] Section 50 of the Sheriff Courts (Scotland) Act 1907 provides:

“In summary applications (where a hearing is necessary) the sheriff principal shall appoint the application to be heard at a diet to be fixed by him, and at that or any subsequent diet (without record of evidence unless the sheriff principal shall order a record) shall summarily dispose of the matter and give his judgment in writing.”

Clearly, a subsequent diet will be required if proof is to be heard. The fixing of a proof diet does not disable the sheriff from summarily disposing of the matter. It will also be appropriate and thus competent for further diets to be fixed for such purposes as to allow the respondent to apply for legal aid or for an interpreter to be present. But, given that the court is interested only in whether or not there has been a wilful failure to pay a sum due in respect of aliment within the days of charge – and not whether or not the respondent is subsequently, or will be at some time in the future, able to pay arrears of aliment – there is no need, and no competent reason, to continue the application to afford the respondent the opportunity to clear the arrears.

[16] *Cain v McColm* remains good law, notwithstanding comments made by Temporary Sheriff Principal C G McKay in the case of *Child Maintenance and Enforcement Commission v O* 2011 SLT (Sh Ct) 84, a case concerning section 39A of the Child Support Act 1991 for civil imprisonment in respect of a liability order, which might be taken to suggest the contrary. In that case the Temporary Sheriff Principal, in a comparison between the procedure under the 1882 Act and the procedure under the 1991 Act, said at paragraph [71]:

“A further difference is the extent to which written pleadings are now used. The 1882 Act specifically directed that the application was to be disposed of summarily and without written pleadings. A glance at the sheriff’s text on summary applications [that is, the text book *Summary Applications and Suspensions* written by that very sheriff, George Jamieson, before his elevation to the bench], Ch.30, well demonstrates that that is no longer the case. In addition the 1907 Act requires a written judgment. The summary application is to be commenced by an initial writ. It is no longer incompetent for the sheriff to order answers since the instruction in s.4 of the 1882 Act no longer applies.”

But here, I think, it is clear that the Temporary Sheriff Principal is not saying that the instruction in section 4 of the 1882 Act no longer applies to applications under that Act. He is saying that the instruction in section 4 no longer applies to applications under the 1991

Act, as it formerly did. He is taking account of the fact that the 1991 Act was amended with effect from 2 April 2001 so as to change the former procedure whereby applications for civil imprisonment under the 1991 Act were made in terms of the 1882 Act by the statutory device (subsections (13) and (14) of section 40 of the 1991 Act) of declaring that sums due under a liability order were equivalent to decrees for payment of aliment and, as such, the Secretary of State was to be regarded as a creditor for the purposes of section 4 of the 1882 Act. If I am wrong as to what he meant by his remarks then I take a different view from the Temporary Sheriff Principal whose decision is not binding on me. Sheriff Jamieson at paragraph 30-22 of his text book, written in 2000 before the 1991 Act was amended, records that it was then incompetent to order answers in applications in respect of aliment or child support maintenance. There is no reason to suppose that the amendment of the 1991 Act in any way affected applications in respect of aliment which continue to be competent under the 1882 Act.

[17] Of course, none of the above is to say that parties cannot agree to settle matters extra judicially and for the application to be dismissed on the basis of an agreed repayment plan.

[18] In the circumstances of this case and even if I had been required to come to the point of determining that there had been a wilful failure to pay during the days of charge I would not have exercised my discretion to grant a warrant for imprisonment. I would have felt that to be unjust given that the respondent had had the threat of imprisonment hanging over his head for well over a year. Parties are well aware, of course, that the applicant could at any time bring a fresh application under the 1882 Act following upon a fresh charge, given the terms of section 4(4) of that Act.

[19] It was also correct for there to be no award of expenses in favour of either party – Sheriff George Jamieson *Summary Applications and Suspensions* paragraph 37-04 and Dobie *Sheriff Court Practice* page 282 and the cases cited therein.