SHERIFFDOM OF LOTHIAN AND BORDERS AT LIVINGSTON

[2021] SC LIV 39

LIV-SG555-20

JUDGMENT OF SHERIFF DOUGLAS A KINLOCH, Advocate

in the cause

CABOT FINANCIAL UK LIMITED

Claimants

against

KEVIN DONNELLY

Respondent

7 June 2021

[1] The issue in this case, which may be of some considerable practical importance, is whether in a Simple Procedure Case where the claimant is seeking a decree in absence, it is sufficient for the claimant merely to show that the claim form was posted to the respondent, or whether it has to be proved that the respondent has actually received it.

Background

[2] The background to this case is that the claimants raised a Simple Procedure action for payment against the respondent in respect of an unpaid overdraft. The claimants' solicitors served the claim form on him by means of the Royal Mail's "Signed For" postal service. The respondent did not defend the action, and did not lodge any response form. The claimants applied to the court for a decision against the respondent, and lodged Form 6C with the court, that is, the Simple Procedure Confirmation of Service form. The Sheriff Clerk's office,

however, carried out a "Track and Trace" check in relation to service of the claim form to try and ascertain whether the claim form had actually been delivered to the respondent. The Track and Trace check stated that the claim form had "been posted at a post office" and that "the next update you'll see is after we've attempted to deliver to the recipient". No update to the Track and Trace entry was ever forthcoming, and the envelope in which the claim form was served was not returned by the Royal Mail. It was, accordingly, not possible to tell whether the claim form had ever been received by the respondent. The Sheriff Clerk's Office were unsure as to whether to grant decree without confirmation from Track and Trace that the claim from had been delivered, and the case was put out for a hearing before me in order that the solicitors for the claimants could address me as to whether or not there had been valid service.

Simple Procedure Rules

[3] The Simple Procedure Rules provide different rules for serving different documents. Some documents only have to be "sent" to someone, whereas others require the more formal step of being "formally served". As the description suggests, the rules for "formal service" of a document are more stringent than the rules for merely sending someone a document. It is clear from Rule 6.11 that the claim form, as might be expected in relation to such an important document, has to be formally served on the respondent. When the rules require a document to be formally served, then that may only be done by certain people, namely sheriff officers, Sheriff Clerks and solicitors, and may only be done in certain ways.
Rule 6.11 further provides that where the claimant is not a company or a partnership, and is not legally represented (in other words is an unrepresented individual) then the Sheriff Clerk may formally serve the claim form on the respondent. The practice, at least at

Livingston Sheriff Court, is that where a claimant is unrepresented, as is often the case, then the Sheriff Clerk will undertake service of the claim form on their behalf. However, where, as here, the claimants are legally represented then the practice is that their solicitors have to serve the claim form. Service has to be undertaken in accordance with the terms of part 18 of the rules.

[4] Rule 18.2 provides that when the Simple Procedure Rules require a document to be formally served, the first attempt at service must be made by a "next day postal service which records delivery". Paragraph 3.1 of the Act of Sederunt (Simple Procedure) 2016 defines such a service as follows:

> "next day postal service which records delivery, means a postal service which –
>
> (a) seeks to deliver documents or other things by post no later than the next working day in all or the majority of cases; and
>
> (b) provides for the delivery of documents or other things by post to be recorded."

The Royal Mail's postal service which records delivery is the "Signed For" service. This is still generally, indeed I think almost universally, referred to as "Recorded Delivery".

[5] Rule 18.2 also provides that the envelope which contains the claim form must have a label on it stating that "… if delivery cannot be made, the letter must be returned to the Sheriff Clerk at …"

[6] Rule 18.2(4) is perhaps the crucial Rule in relation to the question which has arisen. It states that: "After formally serving a document, a "Confirmation of Formal Service must be completed and <u>any evidence of delivery attached to it</u>".

[7] Rule 18.3 provides that it is only when delivery by post "has not worked" that service by the more expensive method of using a sheriff officer may be undertaken.

Scheme for service of claim from

[8] It can thus be seen that the scheme for service of the claim form is that it is to be effected in the first place, no doubt for reasons of economy, by using the Royal Mail's Recorded Delivery Service. The claim form must be in an envelope which is designed to ensure that it is returned to the Sheriff Clerk if it has not been delivered. Where the claim form has been successfully delivered, the person who served the form has to lodge a form confirming that they have posted the claim form, and in addition they are asked to attach "any evidence of delivery". The evidence of delivery provided by the Signed For postal service would be a copy of the "Track and Trace" entry showing that the envelope was delivered and signed for.

[9] Under these rules, no difficulties arise where service is effected by post and the Track and Trace service confirms that the letter has been delivered, and signed for. Where delivery has been successful the online Track and Trace system will usually show an image of the signature of the recipient which records the fact that the respondent has received the envelope containing the claim form. Equally, there is no difficulty if the Track and Trace system confirms, definitely, that delivery has *not* been possible, or if the envelope is returned to the Sheriff Clerk showing that it has *not* been delivered. Where the citation envelope has not been delivered the Royal Mail usually returns the envelope to the Sheriff Clerk with the reason for non-delivery marked on it, e.g. "Addressee gone away", or "Not known at this address", or "Not called for". Where delivery has failed, then depending on the reason for this, a second attempt at postal service will usually be made, and if that is again not successful, then service by sheriff officers will be the next step.

[10] The question is what is required under the rules where, as in the present case, the Track and Trace system is inconclusive as to whether or not the claim form has actually been delivered, and where the envelope has not been returned to the Sheriff Clerk.

Do the Rules require confirmation of delivery?

[11] Simple Procedure cases are a modern form of court action, and it is possible to read the rules as requiring confirmation by modern technology of the fact that delivery has been made, namely confirmation by means of the online Track and Trace service. As I understand it, at least some courts or Sheriffs are reading the rules in that way. This interpretation results from the fact that the Simple Procedure Rules require service by using a postal service which "records delivery", and also require "any evidence of delivery" to be supplied

[12] The agents for the claimants have very considerable experience of Simple Procedure cases, dealing, as I understand it with a high volume of such cases. The question as to whether they are required in every case to lodge a Track and Trace report confirming that the claim form has been received by the respondent is a matter of considerable importance to them. Their submissions were therefore put forward on their behalf by Counsel instructed by them (Kenneth Forrest, Advocate), although his submissions were based in part on written submissions previously lodged by a senior solicitor with Nolans Solicitors, namely Simon Nolan.

Submissions for the claimants

[13] In the submissions put forward on behalf of the claimants, it was accepted without hesitation that if the envelope is returned to the Sheriff Clerk's office then they would have

no hesitation in re-serving the action. It was accepted also that where postal service has apparently been successful, in that the citation envelope has not been returned to the court, re-service will nevertheless be required where the Track and Trace system confirms that postal service was *not* in fact successful. They accepted that it might be appropriate, and sometimes useful, for the Sheriff Clerk's office to carry out their own check of the Track and Trace system if this had not been supplied to the court in order to check to see whether service had been successful, as this might sometimes reveal that apparently good service has not been successful.

[14] It was submitted, however, that the correct interpretation of the rules did not lead to a requirement for evidence of receipt of the claim form (by way of Track and Trace) to be lodged in every case. It was submitted that the rules do not say that "evidence of delivery" has to be attached, only that "any" evidence of delivery has to be attached. It was submitted that the correct reading of the rules was that evidence of delivery has to be attached *if it is available*, but otherwise it is not required as an essential part of the confirmation of service form. There were, it was submitted, various reasons for this approach. First, it was said that the Track and Trace system was operated by "a private company" and that it was not subject to any proper court regulation or scrutiny. It was submitted that the 2016 Simple Procedure Rules did not rely on Track and Trace for proof of service, but relied primarily on the Royal Mail returning citations, and on a presumption of delivery.

[15] It was submitted that this followed from a long standing presumption in Scots law that the "recorded delivery certificate" and solicitor's execution of service, amounted to proper evidence of delivery. Thus, the provision by the solicitors for a claimant of a Confirmation of Formal Service form together with the recorded delivery sheet (ie a sheet showing that they had posted the envelope) was sufficient evidence of service.

[16] It was further submitted that the Track and Trace system was not referred to at all within the 2016 rules and it was suggested that this was a deliberate omission, as the Track and Trace system was in operation when the rules were promulgated. It was said that the solicitors for the claimants could say, from their own extensive experience, that the Track and Trace system, while useful, was very unreliable, and was often simply wrong.

[17] It was said that the claimant's solicitors raise approximately four thousand five hundred Simple Procedure actions each year. They recently carried out a check on approximately seven hundred to one thousand cases to try and ascertain the accuracy of the Track and Trace system. The results of the survey were that Track and Trace records showed that approximately thirty four per cent of claim forms were not successfully served; that approximately sixty per cent were successfully served, and in relation to the remaining six percent Track and Trace gave no information on service at all. In all the cases where Track and Trace stated that service was unsuccessful, the agents were aware (from other information) that approximately eighteen per cent of these cases were in fact successfully served, and that the Track and Trace information was incorrect. A requirement to re-serve in all cases which Track and Trace show as not having been successful would have incurred unnecessary costs for the claimants, which costs would then very probably have to be borne by the respondents. Ironically, it was said that the agents for the claimants were also aware that in approximately twenty per cent of cases where Track and Trace recorded that service had been successful, service was actually unsuccessful. It was accepted that usually in these cases the citation envelope was returned to the court, and re-service had been carried out, but all of this showed that the Track and Trace system was far from infallible. If there was a necessity to provide proof of successful delivery by Track and Trace, then there would be an approximate increase of about twenty per cent in costs which would ultimately have to be

borne by the respondents. Respondents would incur an unnecessary sheriff officer's fee of approximately one hundred pounds which would be added to their debt.

[18] It was submitted that for the court to insist on confirmation by Track and Trace that service had been successful would cause unnecessary expense to claimants, and would not be in the public interest. Moreover the Track and Trace system did not adhere to the timescales for service within the 2016 rules, and therefore should not form part of the service procedure. It was submitted that the right to seek to recall of any decree which was open to a respondent prevented any material prejudice to respondents.

[19] It was stated that for many years the agents for the claimants has corresponded with the Civil Justice Committee (formerly The Rules Council) over concerns relating to the Track and Trace system and it was said that the agents had consistently spoken against the rules laying down any requirement for Track and Trace to be used. The rules did not require any "proof" of delivery, through Track and Trace or otherwise, and it was important to note that when the 2016 rules came into force the Track and Trace system was in operation. It was submitted that the fact that the rules did not refer to the Track and Trace system was deliberate, and had the Civil Justice Committee considered it necessary for solicitors acting for claimants to produce evidence by way of Track and Trace of successful delivery then this would have been specifically incorporated in the rules.

[20] It was submitted that all of this was in accordance with longstanding rules of Scots law. For example, reference was made to McBryde, *The Law of Contract in Scotland*, Third Edition, para 6.116 where it was said that "there is a presumption that a letter which is posted is received". Authority for this statement could be found in *Chaplin* v *Caledonian Land Properties Limited* 1997 SLT 384; *Tullis Russell and Co Ltd* v *Eadie Industries Limited* 2001

GWD 28-1122; and reference was made to Walker & Walker, *Evidence*, Second Edition (2000) para 3.6.6.

[21] It was accepted that the presumption of delivery could of course be rebutted. The return of the citation envelope to the court or to the serving solicitor, for instance, would rebut the presumption. However, unless the presumption was rebutted it remained in place and the Confirmation of Formal Service form taken together with the recorded delivery certificate were sufficient evidence of service.

[22] It was submitted on behalf of the claimants that there was no prejudice to respondents in a decree passing on the basis of a Confirmation of Service and recorded delivery slip, in that a decision which has not been implemented in full could be recalled under the Simple Procedure Rules. In this connection I would mention that although the respondent has a right to seek to have a decree recalled, rules 13.5 – 13.7 seem to provide that the sheriff has a discretion as to whether or not to recall the decree. However, it would be almost unheard of for a court to refuse to recall a decree in absence where the respondent has any form of explanation for failing to lodge a notice of response and has at least a stateable defence (see Macphail at 7.34).

[23] It was also argued that it was possible that where postal service had in fact been successful, but Track and Trace showed that it was unsuccessful and sheriff officers had accordingly re-served, the respondent could conceivably argue against an award of expenses which included the expenses of sheriff officers. If the court refused to award expenses which included sheriff officer's fees then this would be an unnecessary expense which would have to be borne by the claimants.

[24] Finally, Counsel for the claimants very helpfully provided me with some information as to the method of service in England under the English Civil Procedure Rules, which as I

understand it, apply to their equivalent of our Simple Procedure cases. From information given by an English Solicitor to Mr Simon Nolan, the position in England is that the claim is normally served by first class Royal Mail. There is no requirement for recorded delivery service in England, although the rules impose certain obligations on a plaintiff to be certain about the correct address.

[25] All of the points made in these submissions, in my view, are quite powerful arguments which I find persuasive.

Other points

[26] There are, however, other points which, although not founded upon in the submissions made on behalf of the claimants, seem to me to strengthen the already persuasive arguments. The first is that to interpret the rules as requiring confirmation of postal service by Track and Trace in every case would turn postal service into an exceptional form of service, subject to more stringent rules than other forms of service. For example, Rule 18.3 provides that if service by post has not worked then a sheriff officer may formally serve a document in one of three ways: namely (i) by delivering it personally, (ii) by leaving it in the hands of a resident at the persons home, and (iii) by leaving it in the hands of an employee at the persons place of business. It is to be noted that the second and third of these methods of service do not guarantee that the respondent will actually receive the claim form, however likely that may be. The Rule goes on to provide that if none of those methods of service have worked, the sheriff officer can formally serve the document in one of two other ways, namely: (i) by depositing it in the person's home or place of business by means of a letterbox, or (ii) by leaving it at the person's home or place of business in such a way that it is likely to come to the attention of that person. When a claim form or document

is put through someone's letterbox it will not be known whether he or she has actually received that claim form. The respondent could, for example, be temporarily absent from his house for a long enough period for decree in absence to be granted. There is therefore even less guarantee that service by either of these two methods will result in the claim form actually being received by the respondent, even if again it is likely that the respondent will do so.

[27] The second point is that insisting on proof of delivery by Track and Trace would also mean that the requirements as to service would be more stringent in relation to Simple Procedure actions than in relation to other actions, such as Ordinary Cause actions, where proof of posting is sufficient. Thus Macphail in *Sheriff Court Practice*, Third Edition, states at paragraph 6.20 the following:

> "Where the letter is posted and not returned, the posting constitutes a legal and valid citation, unless the defender proves that the letter was not left or tendered at his known residence or place of business, or at his last known address if it continues to be his legal domicile or proper place of citation".

Given that far greater sums of money can be involved in Ordinary Cause actions I think it would be strange Simple Procedure actions had stricter requirements as to service than Ordinary Cause actions.

Citation Amendment (Scotland) Act 1882

[28] However, I think the matter is put beyond doubt by section 3 of the Citation Amendment (Scotland) Act 1882. Although this act is now of some vintage, it remains in force for Sheriff Court actions (although it has been disapplied for Court of Session actions, and for other forms of action which have their own procedures, such as sequestrations). It provides as follows:

> "In any civil action … any summons or warrant of citation of a person … or warrant of service or judicial intimation, may be executed in Scotland by an officer of the court … or by an enrolled law agent, by sending to the known residence or place of business of the person upon whom such summons, warrant, or judicial intimation is to be served, or to his last known address … a registered letter by post containing the copy of the summons, warrant or judicial intimation ... and such posting shall constitute a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business …"

A Simple Procedure action is a "civil action" and therefore the 1882 Act appears to apply to actions raised under that procedure. A claim form, in my view, is a "warrant of service or judicial intimation", and therefore in terms of the Act posting by "a registered letter" constitutes valid citation. Although, so far as I am aware, the Royal Mail no longer offers a service which is known as a registered letter or registered post, terms which I think have fallen out of popular use, the Postal Services Act 2000, provides a definition of "registered post service" for the purposes of that Act. Section 125 defines registered post service as meaning "a postal service which provides for the registration of postal packets in connection with their transmission by post and for the payment of compensation for any loss or damage". The Royal Mail's current Signed For service falls within that definition, and therefore I think can properly be seen as being a form of registered letter postal service. Even though Simple Procedure actions did not come into existence until about one hundred and thirty years after the 1882 Act was passed, the Act in my view appears to provide a complete answer to the question of whether posting by using the Signed For service creates a presumption of valid legal service.

[29] Moreover, the Simple Procedure Rules do not, as I read them, directly contradict the 1882 Act. Rather, the Rules seem to me to provide a scheme for service of the claim form which is consistent with the provisions of the Act. While the terminology may be different, in that the Act requires service by "registered letter" whereas the Rules require service by a

next day postal service which "records delivery", overall the requirements under the Act and under the Rules are very similar. Even if the Rules were read as contradicting the Act, it would surely be the case that the Act of Parliament would prevail. Where there is any conflict between primary and subordinate legislation, the former must prevail (see, eg *Public Law Project* v *The Lord Chancellor* [2016] 3 WLR 387, para 23).

Legislative Reform (Scotland) Act 2010

[30] There is another legislative provision which may be relevant. The Interpretation and Legislative Reform (Scotland) Act 2010 deals with the service of documents. Section 26(1) states that this section applies: "where an Act of the Scottish Parliament or a Scottish Instrument authorises or requires a document to be served on a person (whether the expression "serve", "give", "send" or any other expression is used)." The Simple Procedure Rules being contained in an Act of Sederunt are therefore promulgated under a Scottish Instrument. Subsection (2) of Section 26 of the Act goes on to provide as follows:

> "The document may be served on the person –
>
> (a) by being delivered personally to the person,
> (b) by being sent to the proper address of the person –
>
> (i) by a registered post service (as defined in Section 125(1) of the Postal Services Act 2000 (c.26)), or
>
> (ii) by a postal service which provides for the delivery of the document to be recorded …"

Subsection (5) provides that where a document is served as mentioned in subsection (2)(b) on an address in the United Kingdom it is to be taken to have been received forty eight hours after it is sent unless the contrary is shown. So the 2010 Act again creates a presumption of proper service where service is made by post.

[31] The 2010 Act of the Scottish Parliament did not repeal the 1882 Act. It therefore, it seems to me, has to be read together with the 1882 Act. I think that the 2010 Act was mainly designed to deal with something less than formal service of a court document, but nevertheless it is essentially to the same effect as the 1882 Act, and the two provisions read together seem to me to create a presumption of effective service where a registered post service, which includes the "Signed For" service, is used. The Simple Procedure Rules therefore, in my view, create a form of postal service which is consistent in every way with both the 1882 Act and the 2010 Act.

Conclusion

[32] I have therefore come to the conclusion that the correct reading of the Simple Procedure Rules is that they do not *require* confirmation of service to be produced, only that it *may* be produced if available. It seems to me that there is, as with Ordinary Cause actions, a presumption that posting constitutes a legal and valid citation. That presumption can, of course, be rebutted if Track and Trace shows that service was not affected, or if the citation envelope is returned to the court as undelivered. But where neither of these things have happened, then even where Track and Trace is inconclusive, it seems to me that it has to be presumed that there has been a legal and valid citation where proof of service is produced.

[33] I take the view, for all the reasons set out above, that the drafters of the 2016 Simple Procedure Rules did not intend to alter the long-standing Rule that posting of a judicial citation in a registered letter, or its modern equivalent, constitutes a legal and valid citation. The conduct of business in the courts would be seriously hampered if proof of delivery have to be provided in every undefended case.

[34] I am reassured in that conclusion by the fact that another Sheriff (Sheriff Martin-Brown) has reached the same conclusion in a case which raised the same issue, namely *Cabot Financial UK Ltd* v *Finnegan*, Forfar Sheriff Court, 28 April 2021, [2021] SC DUN 34. Some further, albeit slight, reassurance is given to me by the fact that the rules which apply in equivalent English forms of procedure appear to reach the same result.

[35] That being the case I will grant decree in absence as sought in the present case.