SHERIFF APPEAL COURT

[2022] SAC (Civ) 31
FAL-SG392-21

Sheriff Principal M W Lewis
Sheriff Principal C D Turnbull
Sheriff Principal D C W Pyle

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal in the cause

CABOT FINANCIAL (UK) LIMITED

Claimant and Appellant

against

RYAN BELL

Respondent

Claimant and Appellant: Forrest, advocate; Nolans
Respondent: no appearance
Amicus Curiae: Blockley, advocate

24 October 2022

Introduction

[1] In this case, the claimant and appellant (hereinafter referred to as "the appellant") appeals against the decisions of the then summary sheriff, at Falkirk (reported as *Cabot Financial (UK) Ltd* v *Bell* 2022 SLT (Sh. Ct.) 154), first, determining that evidence by way of a Royal Mail Track and Trace receipt or other evidence of receipt was necessary and required

with any execution of postal service in simple procedure actions: and, second, in the absence of such evidence, dismissing the action.

[2] The respondent neither entered appearance in the proceedings nor participated in the appeal. In these circumstances, and having regard to the decisions reached by sheriffs in *Cabot Financial (UK) Ltd* v *Finnegan* 2021 SLT (Sh. Ct.) 237 (hereinafter referred to as "*Finnegan*") and *Cabot Financial (UK) Ltd* v *Donnelly* 2022 SLT (Sh. Ct.) 147 (hereinafter referred to as "*Donnelly*"), an *amicus curiae* was appointed. The function of an *amicus curiae* was explained by this court in *Hamilton* v *Glasgow Community and Safety Services* 2016 SC (SAC) 5. It is to assist the court by presenting a neutral appraisal of the issues which require to be decided and by raising considerations that might not otherwise come to the court's attention.

[3] The facts of the case are in brief compass, but are not readily apparent from the summary sheriff's decision. On 19 July 2021, Falkirk Sheriff Court authorised the appellant to raise proceedings against the respondent. The last day for a response was 6 September 2021. The appellant served proceedings on 23 July 2021. A Confirmation of Formal Service (Form 6C) was lodged by the appellant on 23 July 2021. The appellant's agents applied for decree on 9 September 2021. The summary sheriff declined to grant decree in the absence of a Royal Mail Track and Trace receipt or other evidence of receipt. Having heard the solicitor for the appellant, the summary sheriff determined that such evidence was necessary and required where there had been postal service in a simple procedure action. The summary sheriff subsequently, in the absence of such evidence, dismissed the action. The appellant appeals to this court.

Questions for the Sheriff Appeal Court

[4] In his appeal report, the summary sheriff sets out the legal questions for this court to answer in the appeal. These are as follows:

1. Is the correct interpretation of rule 18.2(4) of the Simple Procedure Rules 2016 ("the 2016 Rules") that evidence of delivery requires to be lodged?
2. *Esto* that is not mandatory is the sheriff entitled to seek evidence of delivery if not satisfied it has been made?
3. Is the presumption in Scots Law that "...a letter which is posted is received … " outlined in (the summary sheriff's) judgment "...of no consequence unless or until a party has lodged what is required by the (2016) Rules"?
4. In the event that the answer question 3 is in the negative, and in the circumstances outlined in (the summary sheriff's) judgment, were there any circumstances in this individual case which rebutted the presumption or can the presumption be rebutted generally?
5. In the event that the answers to (questions) 3 and 4 are negative, did the Form 6C along with the Post Office stamped proof of posting sheet constitute evidence of delivery as required by rule 18.2(4) of the 2016 Rules?

Rule 18.2

[5] Rule 18 of the 2016 Rules is in the following terms:

> **"18.2 How can you formally serve a document on someone who lives in Scotland?**
>
> (1) When these Rules require a document to be formally served, the first attempt must be by a next-day postal service which records delivery.
>
> (2) That may only be done by one of three persons:
>
> (a) the party's solicitor,

(b) a sheriff officer instructed by the party,

(c) the sheriff clerk (where provided for by rule 6.11(2)).

(3) The envelope which contains the document must have the following label written or printed on it:

> **THIS ENVELOPE CONTAINS A [NAME OF DOCUMENT] FROM**
>
> **[NAME OF SHERIFF COURT]**
>
> **IF DELIVERY CANNOT BE MADE, THE LETTER MUST BE RETURNED TO THE SHERIFF CLERK AT [FULL ADDRESS OF SHERIFF COURT]**

(4) After formally serving a document, a Confirmation of Formal Service must be completed and any evidence of delivery attached to it.

(5) Where a solicitor or sheriff officer has formally served the document, then the Confirmation of Formal Service must be sent to the sheriff court within one week of service taking place."

Submissions for the appellant

[6] The appellant argued that rule 18.2(4) did not require a claimant to lodge evidence that proceedings had been received. The correct interpretation of the rule does not require this; and the presumption of delivery is applicable. Rule 18.2(4) sets out two requirements - first, lodging a Confirmation of Formal Service (Form 6C); and, second, lodging any evidence of delivery. The rule says nothing about "receiving". The summary sheriff erred in concluding (see paragraph [49] of his decision) that evidence of receipt was required. Although the first requirement is mandatory, the second is not, or if it is the obligation requires the lodging of "any" evidence of delivery, not any particular form of evidence (such

as "Track and Trace"). Evidence of posting – in the form of a receipt stamped by the Post Office - amounts to evidence of delivery.

[7] If it is established that a document was sent, it is presumed to have been received within 48 hours after sending - see section 26(5) of the Interpretation and Legislative Reform (Scotland) Act 2010 ("the 2010 Act"). The presumption is rebuttable. The summary sheriff erred in concluding (see paragraph [44] of his decision) that there was an obligation on a claimant to lodge evidence which is reasonably accessible. This is not what the rule says. The sheriffs in *Donnelly* (see paragraph [30]) and *Finnegan* (see paragraph [12]) reached different conclusions. The appellant also made submissions in respect of current practice. They argued that experience of how rules operate can never be irrelevant. The appellant also made submissions in respect of changes to the 2016 Rules that will come into effect on 28 November 2022 in relation to rule 18.2(4) (see Act of Sederunt (Simple Procedure Amendment) (Miscellaneous) 2022).

[8] The appellant invited the court to allow the appeal and to grant decree against the respondent, which failing to remit to the sheriff to proceed as accords.

Submissions for the *Amicus Curiae*

[9] The *amicus curiae* submitted that the correct interpretation of rule 18.2(4) is that evidence of delivery requires to be lodged. The rule imposes a requirement that "Confirmation of Formal Service must be completed, and any evidence of delivery attached to it." The operative word is "must" and it applies to the Confirmation as well as to evidence of delivery. The words "any evidence of delivery" may be taken to mean "any evidence in whatever form that takes". This is in contrast to the Confirmation of Formal Service, which is a standard document. Alternatively, the words "any evidence" may be interpreted to

mean "any evidence that might exist and be reasonably obtained". If so, then logically, as the requirement is for it to be sent by registered post, the letter is tracked and a delivery receipt does exist. It would be obtainable easily and cheaply.

[10] In relation to the second question posed in the appeal report, the sheriff would have a general responsibility to ensure that the court acts in the interests of justice. This is its overriding function. Reference was made to rule 1.4(2) of the 2016 Rules, which requires the sheriff to ensure that parties who are not represented, or parties who do not have legal representation, are not unfairly disadvantaged. In cases where there are questions about the validity of service, and a party has not entered process, the sheriff is entitled to be satisfied that service has been effected and to seek evidence of delivery. Once satisfied that the document has been delivered, then the presumption is that the addressee has received it and chosen not to enter the process. The availability of an application for recall ought not to be a reason to overlook proper service in the first place.

[11] In relation to the third question posed, the starting point is that there is a rebuttable presumption that a document which is sent in accordance with section 26(2)(b) of the 2010 Act is received 48 hours after it is sent (see section 26(5) of the 2010 Act). The issue of the presumption was considered in *Finnegan* at paragraphs [5] and [13]. However, the sheriff in that case did not appear to consider that the presumption is now expressed in statute, in slightly different terms. Section 26 of the 2010 Act has two stages: (i) the document is posted to the correct address; and (ii) the delivery is capable of being recorded. If (i) and (ii) are satisfied then the presumption is that the document is received by the addressee.

[12] The 2016 Rules were drafted at a time when the 2010 Act was already in force. The rule requires a claimant to show that the requirements of service have actually been

complied with and the document has been delivered. This in turn will engage the presumption that the addressee has received the document. The 2016 Rules provide that any evidence of delivery must be provided. If that cannot be done, then the claimant cannot demonstrate that service has been effected and, equally, cannot rely on the presumption created by section 26 of the 2010 Act that the document has been received by the addressee.

[13] In relation to the fourth question posed, were there any circumstances in this case or as a matter of generality which rebutted the presumption the *amicus curiae* submitted that if the court decides that evidence of delivery is not required, and the presumption is created simply by posting via tracked mail, then there are no circumstances in this case that rebut the presumption. However, there is an argument that the presumption does not apply because the circumstances required to create the presumption have not been evidenced - the Track and Trace receipt has not been provided.

[14] In relation to the fifth question posed, the *amicus curiae* submitted that the Form 6C along with the Post Office stamped proof of posting sheet did not constitute evidence of delivery as required by rule 18.2(4). At best, this was evidence of posting, but not evidence of delivery.

[15] The *amicus curiae* was invited by the court to make submissions as to the proper approach the court should take in terms of Part 18 of the 2016 Rules in cases where delivery of a document which requires to be served on a party has been effected through recorded delivery post and the other party fails or refuses to produce a Track and Trace receipt. The *amicus curiae* submitted that if the court held that "any evidence of delivery" is taken to mean "any evidence in whatever form that takes" then the onus is on the claimant to comply with the 2016 Rules and to produce evidence that the document has been delivered, in whatever format this is generated by the postal service. Service of documents is an essential

first step in the process. If it is not done correctly then the action cannot properly continue. In these circumstances, the sheriff would be entitled to exercise their case management powers either to require a party to produce evidence of delivery or to require re-service of the document.

Finnegan

[16] *Finnegan* is the first of two reported cases in which the present appellant made an unopposed application for a decision on whether rule 18.2(4) required the claimant to lodge a delivery receipt or whether the Form 6C, together with evidence of recorded delivery posting, was sufficient to effect service. At paragraph [12], the sheriff concluded that whilst a delivery receipt, such as that available via Royal Mail's Track and Trace service, *may* be lodged in process as evidence of delivery, there was no requirement to do so in terms of the 2016 Rules. Rule 18.2(4) makes no reference to a particular form of evidence of delivery and simply provides that any evidence of delivery should be attached to the Confirmation of Formal Service. In the event that a party is in possession of a delivery receipt, such as that available via Royal Mail's Track and Trace service, then that ought to be lodged in process as evidence of delivery. However, the sheriff held that the absence of a delivery receipt is not fatal according to the 2016 Rules.

[17] Having referred to presumptions at common law and statute (see paragraph [13]), the sheriff reached the conclusion that completion of the Form 6C, together with proof of recorded delivery posting, created a rebuttable presumption that formal service had been effected, without the need for a delivery receipt. That presumption could be rebutted by the return of the document to the sheriff clerk. If a claimant was in possession of a delivery receipt then that ought to be lodged in process as evidence of delivery. However, the

absence of a delivery receipt was not fatal, provided a completed Form 6C has been lodged, together with proof of recorded delivery posting. The sheriff granted an order against the respondent for payment of the sum claimed, together with expenses.

Donnelly

[18] *Donnelly* is the second reported case in which the present appellant, where the respondent did not defend the action and did not lodge any response form, applied to the court for decree in absence. The sheriff reached the conclusion that the correct reading of the 2016 Rules is that they do not require confirmation of service to be produced; only that it may be produced if available. He formed the view that, as with Ordinary Cause actions, there was a presumption that posting constitutes a legal and valid citation. That presumption could be rebutted if Track and Trace shows that service was not effected, 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, the sheriff concluded that it has to be presumed that there has been a legal and valid citation where proof of service is produced. The sheriff granted decree in absence.

Decision

[19] Section 26 of the 2010 Act applies where a Scottish instrument (such as the 2016 Rules) requires a document to be served on a person. The document may be served on the person by being sent to their proper address by a postal service which provides for the delivery of the document to be recorded (see subsection 2(b)). Where a document is served in that manner (provided it is made to an address in the United Kingdom) it is to be taken to have been received 48 hours after it is sent unless the contrary is shown (see subsection 5).

As set out above (see paragraph [5]), rule 18.2(1) requires that when a document (such as a Claim Form) requires to be formally served, the first attempt must be by a next-day postal service which records delivery.

[20] The term "next-day postal service which records delivery" is defined (for the purposes of the 2016 Rules) in paragraph 3(1) of the Act of Sederunt (Simple Procedure) 2016 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"

[21] The terms of the Confirmation of Formal Service (Form 6C) are of significance. In part C3 the question is posed "How did you formally serve it?" (i.e. in this case, the Claim Form and Forms specified in response to the question posed in part C2 (i.e. "What did you formally serve?")). The Form 6C provides six options. In the present case, those acting for the appellant have selected "By a next-day postal service which records delivery". That wording is consistent with the wording to be found in rule 18.2(1). It is one which provides for the delivery by post to be recorded. That record is evidence of delivery.

[22] In the present case, the appellant's solicitor has certified that service was effected by a next-day postal service which records delivery. Whilst nothing turns on this for the purpose of the present case, the use of the word "any" in rule 18.2(4) reflects the fact that there will not be separate evidence of delivery in certain cases. If service by post has not worked, a sheriff officer may formally serve a document in one of the ways set out in rule 18.3(1). In such circumstances, the Confirmation of Formal Service completed by the sheriff officer would confirm the method of formal service used. There would not be

separate evidence where service was made, for example, by delivering it personally to the respondent.

[23] In this case the appellant's solicitor certified (by way of the Form 6C) that service of the Claim Form (and associated forms) had been effected by a next-day postal service which recorded delivery and yet did not to provide the evidence of delivery (contrary to the requirements of rule 18.2(4)). Where service is effected by a next-day postal service which records delivery, that record is evidence of delivery. That evidence of delivery requires to be attached to, and thus forms part of, the Confirmation of Formal Service (Form 6C), in accordance with rule 18.2(4). The Confirmation of Formal Service (including the evidence of delivery) must be lodged with the sheriff court (see rule 18.2(5)). A claimant cannot circumvent the requirements of the rule by way of electing not to obtain the evidence of delivery. Absent evidence of delivery, the presumption in section 26(5) of the 2010 Act is not engaged.

[24] For the reasons we have given, it follows that the conclusion reached on this issue by the sheriff in *Finnegan* was erroneous. The question considered by the sheriff in *Donnelly* was somewhat different (see paragraph [10). However, the conclusion he reached was the same and was also erroneous.

Disposal

[25] In the circumstances of the present case, namely, where service is effected by a next-day postal service which records delivery, we shall answer question 1 in the appeal report in the affirmative. It is unnecessary to answer question 2. Question 3 is somewhat unfortunately worded. The presumption in question is distinct from the requirements of the 2016 Rules. We shall decline to answer question 3 and also question 4. We shall answer

question 5 in the negative - the Form 6C along with the Post Office stamped proof of posting sheet do not constitute evidence of delivery as required by rule 18.2(4). We shall find no expenses due to or by either party in relation to the appeal.