

**SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY AT  
DUMFRIES**

**[2019] SC DUM 41**

DUM-SD23-19

NOTE No 4 BY SHERIFF GEORGE JAMIESON

in the cause

JAMES TAYLOR REID and ROBERT KIRKLAND REID

Pursuers

against

SIAN REDFERN (Assisted Person)

Defender

**Act: Shields**

**Alt: Latham**

**Decree of removing**

[1] Having decided that the court had jurisdiction in respect of the present section 23 action of removing, and not the First-Tier Tribunal for the reasons given in my second and third Notes in this case, I invited parties' agents to address me on the orders sought by the parties in the case.

[2] In this Note, "the 2007 Act" refers to the Bankruptcy and Diligence (Scotland) Act 2007; the "SCR" are the Summary Cause Rules 2002; and "the Convention" is the United Nations Convention on the Rights of the Child 1989.

**Pursuers' motion for decree and submissions in support thereof**

[3] The pursuers moved for decree for:

- a) The “summary removing” of the defender from the farmhouse in terms of Rule 8.3(3)(c) of the SCR.
- b) An order for earlier extract of decree in terms of Rule 23.6(1) of the SCR.
- c) An order in terms of section 216(4) of the 2007 Act to reduce or dispense with the 14 day period for the charge for removing.

[4] She submitted that the defender had been given notice to leave the farmhouse as far back as November 2018, and was now a hindrance to the pursuers’ farming business. Further, she was effectively occupying the farmhouse rent free, and the pursuers were incurring utility bills for her use of the farmhouse; she ought therefore to be liable to be removed within as short a timescale as possible, and the orders sought should be granted to facilitate that outcome.

**The SCR referred to by the pursuers’ agent in her submissions**

[5] Rule 8.3(3)(c) of the SCR provides that, if at the hearing of the summary cause (that is, the first calling or any continuation thereof), it appears that any defence to the claim is not soundly based in law in whole or in part, the sheriff shall: “Hear parties forthwith on that matter and may grant decree in favour of any party”.

[6] Rule 23.6(1) of the SCR provides that an extract decree may only be issued by the sheriff clerk: “After the lapse of 14 days from the granting of the decree unless the sheriff on application orders earlier extract”.

**Parties' applications under section 216(4) of the 2007 Act**

[7] Section 216(4) Act provides: "Where the decree or order for removing from heritable property is granted by a court or the First-Tier Tribunal, the court or the First-Tier Tribunal may, on cause shown, dispense with or vary the period of charge".

**Article 3.1 of the Convention**

[8] Article 3.1 of the Convention provides:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

**The defender's reply to the pursuers' submissions**

[9] The defender's agent accepted there was no defence to the action, and that I was therefore obliged forthwith to grant decree in terms of Rule 8.3(3)(c) of the SCR, the issues concerning the court's jurisdiction now having been fully resolved.

[10] However, she moved that I supersede extract at common law (as to which power, see *Dobie, Sheriff Court Practice*, pages 253 and 254), or alternatively that I *extend* the period of charge on cause shown under section 216(4) of the 2007 Act, to give the defender, and the children, sufficient time to find alternative accommodation.

[11] She suggested that the most appropriate removal date was 19 August 2019 as this coincided with the date of the oldest child's return to school after the school holidays.

### **Decisions - Decree of Removing**

[12] I granted decree of removing in terms of Rule 8.3(3)(c) of the SCR as parties were agreed that there was no defence to the action, but I did so under deletion of the word “summarily”.

[13] Leaving aside some statutory specialties not relevant to this case, a decree of summary ejection applies to a person such as a squatter, who never had any right to occupy the subjects, while a decree of removing applies to persons in the defender’s position, who originally possessed of right (Dobie, *Sheriff Court Styles*, pages 136 and 416(d)).

[14] It was therefore inappropriate in my opinion for me to grant decree for the defender’s “summary removing” from the farmhouse.

[15] (However, though I think I granted the correct type of decree, the form of decree in a summary cause for removing is probably not material in a question as to the validity of the removal process - see Rule 30.3 of the SCR).

### **Extract Decree**

[16] I ordered early extract of the decree as this would allow a sheriff officer to serve the charge for removing and the notice of the date of removal on the defender in early course (this would not be possible if I superseded extract to as close to the removal date as possible); she would then have official paperwork to present to the local authority in support of any application she might wish to make to it for homeless accommodation, in the event she could not find suitable private rented accommodation in the area.

**Period of Charge for Removing**

[17] I extended the period of the charge to 10 weeks under section 216(4) of the 2007 Act so that, by my calculation, the earliest date for removal that sheriff officers could fix was 12 July 2019 for the following reasons.

[18] While the pursuers were entitled to recovery of the farmhouse in pursuance of their legitimate business interests, the defender had, as yet, been unable to find suitable alternative private accommodation in the area.

[19] As the children's interests were a primary consideration for the court under article 3.1 of the Convention, I had to balance their interests with those of the parties to reach what I considered an equitable result overall.

[20] I was of the view it would not be right to order the immediate removal of the children from their established abode and that a period of 10 weeks should be sufficient to allow the defender to obtain homeless accommodation for herself and the children if she was unable to find suitable private rented accommodation for them within that period.

[21] Rather, however, than wait until the day the oldest child resumed her school term after the summer break, I thought it would be better for the children to have a month between the earliest removal date and the school starting date, so as to settle into their new home before the oldest child returned to school; hence I determined on 12 July at the earliest as the most appropriate date for removal in all the circumstances of the case.

**Expenses of process**

[22] Although the pursuers moved for an award of expenses against the defender, I was of the view:

- a) There had been mixed success - the pursuers had obtained their decree, but not the summary removal they had desired.
- b) While the parties had been put to the time and expense of debating jurisdiction, the litigation had involved consideration of novel and important questions of public law, which it had been in the public interest to clarify.
- c) Neither party had acted unreasonably so as to merit, in my opinion, an award of expenses against the other.

[23] I therefore found no expenses due to or by either party.