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SM v CM

Citation for published version:
Black, G 2017, 'Contact Hearings and Contempt of Court: SM v CM', *Edinburgh Law Review*, vol. 21, no. 2, pp. 275-281. https://doi.org/10.3366/elr.2017.0420

Digital Object Identifier (DOI):
10.3366/elr.2017.0420

Link:
Link to publication record in Edinburgh Research Explorer

Document Version:
Peer reviewed version

Published In:
Edinburgh Law Review

Publisher Rights Statement:
This article has been accepted for publication by Edinburgh University Press in the Edinburgh Law Review, and can be accessed at http://www.euppublishing.com/doi/abs/10.3366/elr.2017.0420

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Download date: 11. Dec. 2024

Contact Hearings and Contempt of Court: *SM v CM*

A. INTRODUCTION

Where parents separate, a child welfare hearing may determine the appropriate residence and contact arrangements for their child, if they are otherwise unable to reach a workable agreement. In the context of an already litigious parenting relationship, however, problems may well arise such that one parent declines to comply with the contact order. This is a perennially difficult issue. If contact with one parent is obstructed by the other, what means of enforcement can be adopted by the court? The challenges of dealing with an ongoing contact action and parallel contempt proceedings were at the heart of the Inner House decision in *SM v CM*.[1] The decision of the court provides unambiguous direction about the correct handling of a contempt claim in a contact dispute, and the merits of a custodial sentence where a finding of contempt arises from breach of the contact order.

B. THE FACTS

This dispute over contact was between the parents of a child, C, born in January 2009. The parents separated prior to C's birth and, since birth, C had lived with his mother, the defender.[2] In the first 12 months, C had some non-residential contact with his father, the pursuer, who then raised an action in the Sheriff Court for orders for parental responsibilities and rights, and for more extensive contact with C.[3] Attempts at mediation failed, and the consequent litigation became a lengthy affair. While the detailed procedural history of the contact dispute, and missed contact sessions, is set out in paragraphs 7-14 of the Inner House judgment, the key point is that in January 2013, the parties called before a visiting sheriff[4] for a proof. At this point, it became apparent that further time would be required for the proof, and four days was reckoned to be sufficient. In March 2013, the continuation of the proof was set for July 2013, but even before the proof resumed in July, both parties sought further

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[1] [2017] CSIH 1.

[2] Para 4.

[3] Para 5.

[4] A fact which, the Inner House noted, no doubt exacerbated the delays in this case, since the visiting sheriff's availability was limited, and the hearings had to be scheduled around that limited availability: para 15.

days.[5] Further, the pursuer complained that the defender had failed or refused to facilitate contact on specified days and that this was in breach of the sheriff's most recent interlocutor regarding contact.[6] Accordingly, in addition to the contact action, there were now contempt proceedings, in terms of which the defender, the mother, was allegedly in contempt of court for failing to facilitate the judicially ordered contact.[7]

Seemingly in order to expedite the process of both actions, and to best manage the progress of the cases, the sheriff agreed with both agents in chambers that "the evidence to be led [in the July 2013 proof] would be evidence in respect of the principal contact action and in respect of the contempt minute".[8] Moreover, both agents were encouraged to reach a Joint Minute of Admissions, and the defender's agent apparently sought to agree in this Minute the various dates on which contact had not taken place.[9]

The proof recommenced for the allotted four days in July 2013 and then continued in August, at which point the defender's agent objected to having the contact dispute and the contempt minute heard together, and made a motion that it was incompetent to conjoin them.[10] The sheriff refused the motion and noted that the cases were not in fact conjoined: they were simply being heard together. Any difficulties arising from a conjoined process could be avoided if the sheriff "were to issue two distinct judgments, making findings in fact relevant to each separate process and applying the appropriate standard of proof to each".[11] As regards the "potential anomaly" of the defender wishing to give evidence as regards the

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[5] Paras 15 and 16.
[6] Paras 17 and 18.
[7] Contempt of court has been defined as "conduct which challenges or affronts the authority of the court or the supremacy of the law itself": Sir Gerald Gordon, *Criminal Law in Scotland Vol II*, 4th edn, by J Chalmers and F Leverick (2016) para 58.01, citing *HM Advocate v Airs* 1975 JC 64 at 69. There is no doubt that failure to obtemper an order of the court constitutes contempt of that court: ibid, para 58.09. Despite imprisonment being a possible consequence of contempt, it is not, strictly speaking, a criminal offence, but sui generis: and where it occurs in a civil action, is treated as a civil matter, despite the possibility of a custodial sentence. See also Rosalind McInnes, *Contempt of Court in Scotland* (CLT, 2000).
[8] Para 19.
[9] Para 19. The defender's agent's decision to agree dates of missed contact followed her by advice to the defender not to give evidence in the proof as to why, was one aspect of potentially defective representation which was brought before the court. There was also a reference to errors of law and judgment made by the agent throughout the proof in July/August 2013. The Inner House, however, was able to reach its conclusion without making a determination as regards the defective representation (para 57), which was also at the time of judgment still the subject of an ongoing disciplinary action (para 29).
[10] Para 20.
[11] Para 20.

contact dispute but not the contempt proceedings, the sheriff "took the view that any potential prejudice to the defender could be avoided if she were to indicate whether she elected to give evidence in respect of the contact action only or in respect also of the contempt proceedings".[12]

Accordingly, the sheriff heard both issues together and issued two judgments in October 2013. The judgment in the contact action was not at issue in this appeal. In terms of the contempt proceedings, the sheriff found that the defender had, on five occasions, failed to facilitate contact and that this failure was "wilful, inexcusably careless or [constituted] a flagrant disregard for the authority of the Court".[13] She found the defender in contempt of court, not least since, in giving evidence in the proof, the defender had failed to give any explanation for the missed contact.[14] The defender appeared again before the sheriff in November to discover her punishment, but the sentencing was adjourned for a criminal justice social work report. Once this was available in December 2013, the sheriff again deferred sentencing until June 2014, to allow the defender "to obtemper the Court's interlocutor of 24 October 2013 [re contact] and to be of good behaviour".[15] In June, sentencing was deferred for a further six months, against a background of failed contact in the period up until June. In December, sentence was yet again deferred, until April 2015, and deferred again at that point to allow a supplementary criminal justice social work report to be prepared. [16] In May 2015, this report was available, together with evidence of further non-compliance in respect of contact, and other non-compliance with the court's order of October 2013. The sheriff therefore imposed a custodial sentence "with reluctance, as a last resort and after repeated warnings to the [defender] of the consequences of her conduct".[17] The serious nature of the contempt was found to merit the maximum sentence of three months.[18] The defender served 15 days of her sentence before interim liberation was granted by the Inner House, in June 2015.[19]

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[12] Para 20.
[13] Para 24.
[14] Para 24. This was apparently on the advice of her agent: there was evidence that the defender did have explanations to offer (para 34).
[15] Para 25.
[16] Paras 26 and 27.
[17] Para 27.
[18] Para 27.
[19] Para 70. The Inner House also expressed considerable concern about the fact that the sentencing process had all the hallmarks of a criminal sentence, with procurator fiscal references and the defender referred to as the accused – all of which was described by the Inner House as "entirely inappropriate for a case where a person is being sentenced to imprisonment

C. THE APPEAL

The Extra Division of the Inner House comprised Lady Paton, Lord Malcolm, and Lord Glennie, and the judgment focused on two specific issues: the simultaneous hearing of both the contact and the contempt proceedings, and the sentencing. In delivering the opinion of the court, Lord Glennie started by setting out the very different objectives of contact hearings and contempt hearings. In the case of contempt "all that needs to be proved … is that the court made an order for contact, that contact did not take place in accordance with that order and, put shortly, and without intending to redefine the requisite *mens rea*, that that failure resulted from wilful disobedience".[20] Of these three elements, two will be easily ascertainable matters of fact: that the court made an order, and that contact did not take place. The standard of proof will, of course, be that of beyond reasonable doubt. In the contact hearing, however, the focus will switch to what is in the best interests of the child. This inquiry will "no doubt involve hearing evidence from the parents and, possibly, social workers and experts, but it will seldom be of relevance to go into the history of what contacts have been missed and why they were missed".[21] The proof required will be on the balance of probabilities, and the court will "seldom be interested in attributing blame for particular incidents as opposed to making an overall assessment of what contact arrangements are in the best interests of the child".[22] The focus of the two inquiries is thus quite different: one forward looking, as to what will be in the best interests of the child as regards future contact, and one backward looking, as to what contacts were missed and why. There is therefore an "undoubted difficulty" in hearing the two proceedings together: "the issues are different, there are different standards of proof, there are different rules as to compellability… and there are different outcomes, both extremely serious".[23] As this makes abundantly clear, there seems little to be gained from a

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for civil contempt". More worryingly, the practical consequence of this was that "when she was taken to prison, the defender was placed in the Hall for convicted prisoners rather than in the remand Hall where those sentenced for civil contempt should be placed". The court thus recommended that "To prevent this problem recurring, steps should be taken to ensure that all sentences resulting from the findings of civil contempt are dealt with by an interlocutor in the proceedings begun by the Minute". All para 70.

[20] Para 44. It should be noted that "There is no reported authority on mens rea in contempt of court": Sir Gerald Gordon, *Criminal Law in Scotland Vol II*, 4th edn, by J Chalmers and F Leverick (2016) para 58.15.

[21] Para 45.

[22] Para 45.

[23] Para 55.

single hearing on both aspects, and a considerable risk of injustice to all parties: most critically the defender (who risks losing liberty), but also the child, and the parent seeking contact.

Having reviewed these critical distinctions, the Inner House concluded "it should never be necessary, and will seldom be appropriate, for the issue of contempt to be dealt with in the substantive action to which the alleged contempt is ancillary".[24] Such a course of action risks prolonging the proceedings, delaying the contact resolution, and causing confusion and uncertainty as to the two processes being heard.[25] That said, neither counsel for the defender in the appeal, nor the Inner House, went so far as to class the sheriff's procedure as incompetent. The appeal proceeded on the basis that it was instead "unsatisfactory and, in [counsel's] words, 'afforded an opportunity for substantial injustice to be done'. We consider that there is force in this argument".[26] While conceding that the protections put in place by the sheriff – of not conjoining the hearings, but rather issuing separate judgments, and of allowing the defender to give evidence as regards contact but not the contempt hearing – appeared to protect the defender, the Inner House noted that this was only "in a purely technical sense".[27] Instead, the reality was likely to be quite different. The defender (or anyone in her position) would be anxious about giving evidence on matters for one proceeding but not the other, and there was a concern that

> it will be almost impossible for the sheriff to make some findings according to one standard of proof and some according to the other, and very difficult for the sheriff not to allow her impressions of the witnesses and evidence on some matters to infect her thinking on others.[28]

The court therefore allowed the appeal as regards the finding of contempt.

It would have been open to the Inner House to remit the case back to the sheriff to hear the appropriate evidence and witnesses on the point of contempt, but they decided against this course of action because they also set aside the sentence of imprisonment.[29] In reviewing the sheriff's actions regarding sentencing, the Inner House expressed concern in the strongest possible terms for the repeated delays – which were "inimical to the interests of

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[24] Para 46.
[25] Para 46.
[26] Para 55.
[27] Para 55.
[28] Para 55.
[29] Para 58.

justice"[30] – and the consequent stress caused to the defender, whereby she endured 18 months of deferrals and delay, only then to receive the maximum sentence of three months. As the court noted, this was a kind of "sword of Damocles"[31] which was "to our minds, wholly inappropriate".[32] Of equally serious concern was that it appeared that the defender had been found in contempt of court for one set of facts in October 2013, but sentenced according to conduct subsequent to the original finding, including that in the period up to May 2015 in relation to social workers and her failure to obtemper other aspects of court orders, not just those relating to contact. As the Inner House noted critically: "[n]one of this is relevant to the question of sentencing".[33] The mother had therefore been sentenced for historic contempt according to current behaviour.

In a postscript, the court concluded by once again emphasising the importance of a rapid determination of contact hearings, referring to previous cases where the need for proactive and firm case management, and a speedy resolution, had been made clear.[34] They noted that disputes about child abduction have to be resolved within six weeks, in terms of the Child Abduction and Custody Act 1985 – typically against a background of foreign proceedings, of which evidence must be brought. While not going so far as to suggest a six week timetable for contact cases, they noted that a similar regime could be made to apply: "The issues are seldom complicated, albeit that the decision will often be an anxious and difficult one…. [but] all that is required is evidence going to the question of what is in the best interests of the child".[35] Whether or not these decisions are indeed straightforward, it is imperative that sufficient time is taken to ensure the best outcome for the child, yet unnecessary delays will run counter to those best interests.

D. CONCLUDING COMMENT

The unequivocal conclusion reached by the Inner House as to the unsatisfactory nature of attempting to run contact hearings alongside contempt proceedings is to be welcomed. In light of this, there can be little basis for future contact hearings to attempt to incorporate a

[30] Para 60.
[31] Para 61.
[32] Para 60.
[33] Para 61.
[34] Paras 65-68, citing *NJDB* v *JEG* [2012] UKSC 21, *ANS* v *ML* [2012] UKSC 30, and the ECtHR's decision in *Malec* v *Poland* 2016 ECHR 588.
[35] Para 66.

contempt minute. The court's guidance as to sentencing, especially the need to avoid delay and stress to the defender and to ensure the sentence reflects only the conduct in the contempt minute, rather than any subsequent behaviour, is also unambiguous and valuable. However, it is the court's message as to the (lack of) merit of imprisonment at all in such cases which is of particular importance:

> It is not uncommon for disputes between former partners involving contact with children to be both acrimonious and emotional. A failure on the part of one parent to comply with court orders for contact, even where deliberate, may be an instinctive shying away from the immediate prospect of contact rather than some calculated or pre-planned refusal to comply with the order of the court. Ultimately, the court must enforce its orders, but in many cases the contempt proceedings themselves will provide a salutary reminder to the defaulting party of the need to comply. A custodial sentence, particularly on a mother with whom the children live, should only be imposed with reluctance and as a last resort. [36]

It is hoped that this message will be taken seriously, and indeed taken further, so that imprisonment is never an option in such cases, in light of the impact on the child. It can never be in the best interests of the child to remove an otherwise loving and competent primary carer[37] on the basis of a failure to comply with a court order *which is specifically about the best interests of that child*. This is the paradox at the heart of the contact/ contempt situation. By imposing an order for contact for a stated period and frequency with the non-resident parent, the court should regard the welfare of the child as its paramount concern.[38] Thus, any contact ordered has been determined to be in the best interests of the child. The other side of this determination is of course that it is in the best interests of the child to reside with the other parent for the rest of the time – which, almost inevitably, will be the majority of the child's time. In imprisoning the resident parent, the court is therefore specifically acting against the previous determination as to what is in the best interests of the child, by removing the parent with whom the child spends the majority of time. A further practical concern is

[36] Para 62. The reference to "an instinctive shying away" from contact may well be at the heart of the matter, especially in cases where there is a history of domestic abuse.

[37] In some circumstances, it will of course be necessary to remove a primary carer either because (i) it is not in the best interests of the child to remain with that primary carer; or (ii) the primary carer has committed a criminal offence and a custodial sentence is merited. As noted above, contempt of court is sui generis: where it occurs in a civil action, it is treated as a civil matter rather than a crime.

[38] In terms of section 11(7)(a) of the Children (Scotland) Act 1995.

that, if relations between the parents are already so acrimonious that one is prepared to flout court ordered contact, a period of imprisonment is unlikely to improve matters. It may undermine the parenting relationship and may also damage relations between the child and other parent, if viewed by the child as responsible for the primary carer's sentence.[39] While the Inner House's position that contact and contempt hearings should be kept separate is fundamental, the fact that there is a contact order will still be at the heart of the contempt proceedings. As Lord Glennie observed, the court must enforce its orders, and contact orders must be taken seriously. How best this can be achieved may not always be clear, but a custodial sentence for the primary carer certainly does not seem to constitute a constructive solution, nor one which promotes meaningful contact in future.

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[39] Worse still, the child may (misplaced) guilt at being the cause of the imprisonment.