
SCOTLAND / JUDGMENT

Bennett v. Bennett [2007] ScotSC 1 (15 January 2007)

[2007] ScotSC 1

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SHERIFFDOM OF GRAMPIAN HIGHLAND AND
ISLANDS

AT

ABERDEEN

F33/03

JUDGEMENT

of SHERIFF PRINCIPAL SIR STEPHEN S T YOUNG Bt QC in the cause ROBERT ANDERSON BENNETT Pursuer and Appellant against MRS MONA ISSA BENNETT Defender and Respondent
Act: Party Alt: Mrs Thomson, solicitor, Gray & Connachie, Aberdeen Aberdeen : th January 2007
The sheriff principal, having resumed consideration of the cause, refuses the appeal and adheres to the interlocutors of the sheriff dated 26 July and 4 September 2006 ; reserves meantime the question of the expenses of the appeal and appoints parties to be heard thereon at Aberdeen Sheriff Court on Wednesday 17 th January 2007 at 10.00 am . Note [1] For the earlier history of this case I would refer to the note which I appended to my interlocutor dated 18 January 2005 and the judgement of the Extra Division of the Court of Session dated 12 August 2005 in terms of which the pursuer's appeal against my interlocutor of 18 January was refused. [2] Following this refusal, the cause was remitted back to this court and after sundry proceedings by interlocutor dated 19 June 2006 Sheriff McLernan, on the motion of the defender, opened the record and allowed it to be amended in terms of her minute of amendment, no. 23 of process, and the pursuer's answers thereto, no. 24 of process. He then closed the record of new and assigned 7 July 2006 as a diet of debate. For present purposes the most important point about the defender's minute of amendment was that it had the effect of deleting her existing first, second, third, fifth, sixth and seventh pleas-in-law and substituting in its place a new first plea-in-law in the following terms: 1. This court being forum non conveniens in relation to orders under section 11 of the Children (Scotland) Act 1995 in respect of the child, the pursuer's second and third craves should be dismissed. [3] In terms of his crave 2 the pursuer sought a residence order to the effect that the parties' child should live with him. Failing this, in terms of his crave 3 he sought an order providing for the child to have direct contact with him at certain specified times. The defender's existing fourth plea-in-law was the only one to survive the amendment process. It was re-numbered as her second plea-in-law and reads: 2. It not being in the best interests of the said child to reside with the pursuer, decree should not be granted as second craved. [4] The debate on 7 July 2006 was heard by Sheriff Cowan. On July 2006 she issued an interlocutor in terms of which she sustained the defender's new first plea-in-law, found this court to be forum non

conveniens in respect of the pursuer's craves for orders under section 11 of the Children (Scotland) Act 1995 and accordingly dismissed the pursuer's craves 2 and 3. She fixed a hearing on the expenses of the debate on 4 September 2006, and by interlocutor of that date she found the pursuer liable to the defender in the taxed expenses of the debate on July 2006. [5] The sheriff appended to her interlocutor dated 26 July 2006 a note explaining her decision. This speaks for itself and it is unnecessary that I should set it out in full here. In the penultimate paragraph she wrote: I am in no doubt that the High Court in London is now the appropriate forum in which residence and contact should be decided. [6] On September 2006 the pursuer lodged a note of appeal to myself on the following grounds: 1. Sheriff Cowan knowingly and deliberately ignored the material facts of the case despite having painstakingly pointed out the facts repeatedly. 2. Sheriff Cowan denied equality of arms and gave undue advantage to the defendant solicitors compared to a litigant-in-person.

3. Sheriff Cowan relied on fraudulent judgements from England for which there was no grounds since my daughter was abducted from Scotland illegally and the English Judiciary had no locus standing to make such an order.
4. Sheriff Cowan gave little or no weight to the fact that due to procedural errors and irregularities his child was illegally abducted and this was given legal blessings by the English Courts. [7] In due course I heard parties on the appeal on 7 December 2006. [8] Opening the appeal the pursuer submitted that Sheriff Cowan had taken into account evidence that she should have ignored and had ignored evidence that she should have taken into account. There were in her judgement, so he maintained, consistent inaccuracies. She had been fully aware of the fact that he had done everything in his power to challenge the illegal residence order which had been made by District Judge Morris at Willesden County Court on November 2000. He had painstakingly brought to the sheriff's attention the contents of his answers, no. 24 of process, and the seventeen productions in the inventory of productions which, according to him, had accompanied these answers. (At the outset of the appeal there was no sign of these productions in the process. But copies of most of them were handed to me during the hearing of the appeal, and these have now been placed in no. 26 of process). [9] The pursuer referred to the first item in this inventory of productions which is a copy of advice dated 2 February 2005 from counsel in England to the effect that there were good prospects of establishing that there had been a breach of retainer or negligence by the solicitors in London whom the pursuer had consulted in August 2001. The pursuer insisted that there should be no misunderstanding about the actions which he had taken in the first year after his child had been taken from Scotland, and he submitted that the courts in Scotland should take into account these actions which had been spelled out very clearly in the advice given by counsel. He (the pursuer) did not accept that he had not challenged the residence order made by Judge Morris. On the contrary he had done everything in his power to do so and there was nothing more that he could have done in this respect. [10] The pursuer then referred to an interlocutor of the First Division of the Court of Session dated 9 February 2005 which is in the following terms: Edinburgh 9 February 2005 The Lords, having considered the Appeal and having heard the pursuer and appellant

personally thereon, there being no appearance by or on behalf of the defender and respondent, Allow the Appeal and recall the interlocutor of the Sheriff dated 2 November 2004 and the Interlocutor of the Sheriff Principal dated 29 November 2004; grant Interdict against the defender, her agents or representatives or anyone acting on her behalf or with her authority from removing out with Scotland the child Rachel Issa Bennett born 5 August 1997 without either the prior written consent of the pursuer or an order of this Court; make no order in respect of the expenses of the Appeal. [11] This interlocutor was pronounced in a separate action which had been raised in this court by the pursuer against the defender (A1927/04) in which he appeared to be seeking, albeit not in proper form, an interdict to prevent the defender from removing the child from the United Kingdom and an order to the effect that she should be returned to his care for her own safety pending the outcome of the present action. After the sheriff had granted decree of dismissal in the action A1927/04 the pursuer appealed to myself and on 29 November 2004 I issued my judgement, incorporating an interlocutor and note, refusing the appeal. A copy of this judgement was lodged in the present action as no. 20 of process. It is possible that I was informed that the pursuer had appealed to the Court of Session against my interlocutor of November 2004 . But I do not recall this, so it came as something as a surprise to me when a copy of the First Division's interlocutor of 9 February 2005 was handed to me during the appeal. It appears that no written opinion was issued in support of this interlocutor, and at first blush it is not readily apparent why the Division should have thought it appropriate to interdict the defender from removing the child outwith Scotland given that by that time the child and the defender had already been residing in London for almost four and a half years. When I queried this, the pursuer explained that the interdict had been granted after he had posed the question to the First Division what would happen if the defender brought the child to Scotland and then sought to remove her from the United Kingdom . Here it will be recalled that in his judgement dated 21 December 2004 Roderic Wood J had continued the order previously made by Ryder J on 20 October 2004 prohibiting the defender from removing the child from the jurisdiction of England and Wales . As I understand the position, the pursuer's concern when he appeared before the First Division on 9 February 2005 was that the defender would, in breach of the order made by Roderic Wood J, bring the child to Scotland and then seek to remove her from the United Kingdom, and it was to prevent this happening that the interlocutor of 9 February 2005 was pronounced by the First Division. [12] The pursuer explained that he had applied to have the interlocutor dated February 2005 registered in England . This application had been refused by a District Judge and he (the pursuer) had appealed against this decision. In addition the defender on 24 July 2006 had made an application asking the court in England to discharge a prohibited steps order and to make a specific issue order directing that the Passport Office should grant her a passport for the child. The pursuer has made a counter-application to vary or discharge the residence order originally made by Judge Morris on 29 November 2000 . All these matters had been considered by the President of the Family Division at a hearing on 17 November 2006 when he had adjourned the proceedings to 12 December 2006 and had ordered the pursuer to take certain steps, some of which he was refusing to do. He had appealed against the President's

decision, but it appeared that the hearing fixed for 12 December 2006 would still be proceeding. [13] The pursuer further explained that he had appealed for the second time against the judgement of Roderic Wood J, and that this appeal was still pending. Although he did not specifically mention the point, it appears that his first application for permission to appeal against Roderic Wood J's judgement was refused by Wall LJ at a hearing before him on 23 May 2005, and a copy of his judgement of the same date can be found as item 9 in the pursuer's inventory of productions which has been placed in no. 26 of process. [14] The pursuer submitted that the court which was dealing with divorce between the parents of a child should be the primary court in which issues relating to the residence of the child should be considered. He maintained that the sheriff had erred in ignoring this principle and in suggesting, as she had, on page 2 of her note that he had departed from his application for residence in the proceedings in England . In fact, so he said, he had never made such an application at all. He claimed that the sheriff had not listened to him and that he had done everything in his power to bring the child back to Scotland in the first year after she had been taken by the defender to London , and the fact that he had not succeeded in this should not now be held against him. [15] The pursuer further submitted that the sheriff had erred in stating that residence and contact orders had been made in England after inquiry into the child's circumstances. He referred to a letter from the defender's then solicitors dated 8 December 2000 , and also two further letters dated 11 December 2000 and 25 April 2001 which indicated that there was no record of the defender or the child living in the London Borough of Lewisham. [16] The pursuer proceeded to refer to a variety of further errors which he said had been made by the sheriff. She had relied on fraudulent judgements from England for which there had been no grounds since his child had been abducted illegally from Scotland , and had given little or no weight to the fact of this abduction having occurred due to procedural errors and irregularities in England . She had shown that she was partial and biased having stated that it would be more inconvenient for the defender to attend the court here in Aberdeen , and he suggested that the courts had been applying double standards in expecting him to go to the English courts while the courts in Scotland had allowed her to do what she wished. All the witnesses to the child's removal from Scotland were here in Aberdeen . The sheriff had erred in suggesting that he would be eligible to receive public funding to defend the action raised by the defender, and here he referred to a letter dated 15 July 2004 which he had received from his former solicitors in London to the effect that no funding would be available. Just as the English courts had done, so too the sheriff and all the other judges and sheriffs who had been involved in the case were simply trying to avoid the history of what had happened. It was his legal right to challenge any order or to make any applications, and it was further his right for these applications to be dealt with by a court of law. Injustices had been perpetrated against his child and himself. His previous solicitor had admitted negligence and the Court of Appeal in England had acknowledged that the District Judge had had no power to make the orders made by him in 2000. [17] Finally the pursuer referred to a number of authorities, none of which seemed to me to offer him any assistance in support of his appeal. For the record these cases were *Lazarus Estates Limited v Beasley* 1956 1 All ER 341, *Nuutinen v Finland*

2000 ECHR, *Margareta and Roger Andersson v Sweden* 62/1990/252/323, *Kruslin Judgment Series A No. 176A*, *Nielsen v Clearsprings (Management) Limited* (Court of Appeal - 5 October 2006), *Cannon v Cannon , C (A child)*, *Chorley v Chorley* (Thorpe LJ - 18 January 2005) and *P & J Children* (High Court of Justice - 25/26 May 2006). (It will be seen that, with one exception, the references to these cases are incomplete. I have recorded them as they were given to me by the pursuer). The pursuer also referred to section 42 of the Family Law Act 1986, articles 22 and 23 of the Brussels II Convention and article 27 of the Civil Jurisdiction and Judgments Act 1982. (I assume that what was meant here was article 27 in Schedule 1 to the Act). [18] In response the defender's solicitor pointed out that the child had now been residing with the defender in England since 2000. There was no dispute that the original order which had been granted by Judge Morris on 29 November 2000 had been granted in error and without jurisdiction. But six years had elapsed since then and the child was now aged 9. The defender had stated recently that she would be willing to discuss with the pursuer the question of his having contact with the child. As far as she (the defender's solicitor) was aware, the defender's position on this remained the same. A contact order had been granted in favour of the pursuer on November 2002 . But this had not been given effect as the pursuer had failed to meet the conditions which had been made as part of the order. The case had now been considered at length by the courts in England. The judgement of the sheriff had been based on a sound appreciation of the facts and her decision should be upheld. [19] In a brief reply the pursuer explained that the contact order to which reference had been made had been subject to certain conditions which he had unable to meet as he had not been in possession of the child's passport. He had not seen the child since she had been removed from Scotland by the defender on 18 September 2000. [20] The only question which arises in this appeal is whether or not the sheriff was in error in sustaining the defender's first plea-in-law and dismissing the pursuer's craves 2 and 3 accordingly. When the sheriff issued her judgement on 26 July 2006 the child had been residing with the defender in London for almost six years. She has now been there for a period not far short of six and a half years. I last heard the pursuer some two years ago and since then no new facts of significance have been said by him to have emerged, nor has he advanced any new arguments of substance, which would support the proposition that this court would after all be a more convenient forum than the courts in London in which to determine what orders should be made for the welfare of his child. In these circumstances I see no reason to alter the views which I expressed in paragraph [17] of my judgement dated 18 January 2005. To adapt the language which I then used, it is true of course that many of the witnesses to the events surrounding the removal of the child and the defender from Aberdeen to London in September 1990 are likely to be based in or near Aberdeen. Likewise, other members of the pursuer's family are, I dare say, based in or near Aberdeen (as of course is the pursuer himself). But the evidence of witnesses to what happened over six years ago when the child and the defender left Aberdeen for London and of witnesses who have not seen the child since she left Aberdeen would be likely to be of little or no assistance to a court in determining what arrangements should be made for her care now. What would be of much more value to a court would be the evidence of witnesses who could speak to the child's

present situation and the arrangements that might be made for her care in the future. Given that the child and the defender have now been residing in the London area for over six years, it is I think plain that the majority of these witnesses are likely to be in the London area and that the courts there are better placed than this court to conduct such enquiries as are necessary and make whatever orders are thought appropriate in the interests of the child. This in essence was the conclusion reached by the sheriff when she sustained the defender's first plea-in-law, and I am quite unable to hold that she was in error in reaching this conclusion. This appeal is therefore refused. [21] For the sake of completeness, I should mention that since the appeal hearing on 7 December 2006 I have received a copy of the judgement of the President of the Family Division in London dated 12 December 2006. Lest there be any doubt about the matter, I should make it clear that I had already decided to refuse this appeal before I received the copy of this judgement. So it has not influenced my decision. [22] I was not addressed on the question of the expenses of this appeal so I have fixed a further hearing for this purpose. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotSC/2007/1.html>

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