OUTER HOUSE, COURT OF SESSION

[2025] CSOH 6

A333/23

OPINION OF LORD CUBIE

In the cause

LINDA BJORK HAFTHORSDOTIR

Pursuer

against

BJARNI THOR EYVINDSSON

Defender

Pursuer: Deans; TC Young LLP
Defender: Sanders; DAC Beachcroft Scotland LLP

16 January 2025

Background

[1] The parties were married in Reykjavík in 1998. They separated on 18 September 2018. They were divorced at Dunfermline Sheriff Court on 16 November 2021. The divorce was granted by way of decree in absence. Ms Hafthorsdotir who pursues this action did not wish to be divorced. I will refer to the parties as respectively the wife and the husband as each has been the pursuer and defender in the different actions.

[2] The wife says that there is an explanation as to why she did not enter appearance in the divorce proceedings. She seeks decree of reduction of the decree of divorce to allow her to resolve the financial loose ends which arose as a result of the parties' separation. The

husband opposes the action. He regards the financial matters as having been resolved. He has remarried since the divorce.

[3] I am grateful to counsel for the comprehensive joint minute lodged in process.

Evidence

[4] I heard firstly from the wife. She had given instructions to Mr Colin Simpson to act as her solicitor. She wished to regulate the issues of contact and finance after the separation. There were a number of matters either unresolved or unaddressed. She expected to hear about how the divorce action was to proceed. She found about the decree through social media. She told her solicitor.

[5] The joint minute disclosed *inter alia* that at the date of separation the wife had a pension with a cash equivalent transfer value (CETV) of £4822.72; she had debts of £87,464.50 relating to her Icelandic student loan, and £8976.03 relating to a personal loan with the Royal Bank of Scotland. The husband had a pension with a CETV of £177,079.20. I proceed on the basis that all assets and liabilities for which values are agreed are referable to the period of the marriage.

[6] I heard next from Mr Simpson. He had been in correspondence with the husband's solicitors for some time, certainly since 4 September 2020. He said that very little information had been received. He confirmed that he had instructions to enter appearance in the divorce on behalf of the wife. He intended to; he thought he had done so. He had accepted service of the writ by docketing the writ. He had returned the initial writ to the husband's solicitor. He had dictated a letter sending the notice of intention to defend (NID). The NID had been completed. He sent the NID to the sheriff clerk. He expected a response from the court.

[7] He accepted that he did not intimate the NID to the husband's solicitor despite the terms of Sheriff Court Ordinary Cause Rule (OCR) 33.34(2)(a). He accepted that he did not chase up the timetable generated by the court once the NID is received. There appeared to be no diary chase up system. He appeared to have been relaxed about the procedural matters because he knew that there were unresolved matters and that parties' solicitors had been in correspondence. He had focused on the legal aid application. It was suggested to him that he had not in fact sent the appropriate document. He denied that. His position was that the husband knew that the divorce was being defended. On the wife's behalf Mr Simpson was seeking to defend on the merits as well as counterclaim for a capital sum. He had tried to contact the husband's agents; there had been almost no information provided. He wrote on 4 November 2021 on the wife's behalf explaining her position. He heard nothing. He chased that up on 17 November 2021. He heard nothing from the husband's solicitor until an email dated 28 November 2021 which said:

> "Colin. Hello. I refer to your recent message and e-mail. This is simply to advise that I am no longer instructed on behalf of Bjarni Eyvindsson in connection with this matter. Kind regards. Craig"

[8] He then heard from his client that divorce had been granted. By the time they realised that decree in absence had been granted, it was too late to appeal. It was not put to him that he had been negligent in his actions nor was it put to him that he had been dilatory in responding to the husband's solicitor.

The husband's case

[9] The husband gave evidence. He was gratuitously critical of Mr Simpson who had not been cross-examined in relation to any such failings or criticisms. His position was that he wanted to be divorced; he had instructed his solicitor to proceed to minute for decree

accordingly. He thought that his wife was no longer seeking financial provision. The debts and assets had been split. He had remarried on 10 December 2023.

[10] Mr Craig Bennet had been the husband's solicitor. He was now retired. He considered that his responsibility was to his client, the husband who wanted to be divorced. He took from the lack of formal response that the action was not defended and minuted for decree. He had not contacted the wife's solicitor to find out where the NID was. He took instructions, which were to the effect that the husband wanted the divorcee to proceed. He contacted the sheriff clerk's office numerous time to check on the NID. But he refrained from contacting the wife's solicitor to make enquiries; he elected not to respond to communication from the wife's solicitors until the email of 28 November (which, I observe, was 12 days after decree had been granted).

The wife's submissions

[11] Counsel for the wife invited me to grant decree of reduction. The wife had established that decree should not have been granted; there was a reasonable explanation as to why she did not enter the proceedings and the whole circumstances of the case justified reduction on the basis that there was no other identified or identifiable remedy for her, and the consequences were significant. Whatever the explanation for the procedural mishap that prevented the NID being lodged, the wife was not herself responsible for that. Although the husband had married again, that was done in the full knowledge of the challenge being made to the decree and cannot be regarded as decisive.

[12] He addressed the authorities referred to by the counsel for the husband, *Kelly & Ors* v *Stoddart Sekers International Plc* [2004] CSOH 258 and *Drouet & Ors* v *Milligan* [2024] CSOH 32. He submitted that they had no real application given that they dealt with the test

in terms of section 19A of the Prescription and Limitation (Scotland) Act 1973 and there was no obvious read across to the equitable jurisdiction to be exercised in actions of reduction. Each case dealt with the availability of an action of professional negligence against agents as a component in considering an equitable remedy. There were no pleadings nor evidence about the potential strength of a case in negligence which the wife may have against Mr Simpson. Essentially the husband and his solicitor knew full well the action was to be defended, that there were outstanding matters, and had taken advantage of the procedural mishap to obtain a decree of divorce when the husband was aware of the unresolved issues between the parties.

The husband's submissions

[13] Counsel for the husband invited me to grant decree of absolvitor. He recognised that the wife intended to defend the divorce action and had instructed her solicitor to do so. Her solicitor had failed to do so. That potentially gave rise to a claim of negligence. That was a factor to be considered in looking at the whole circumstances of the case. When that factor was allied with the remarriage of the husband, the scales were tipped in favour of the decree of absolvitor; that allowed the husband's status to remain unchanged and gave the wife the opportunity to pursue a remedy against her then solicitor. The husband through his solicitor had been entitled to apply for decree of divorce on an undefended basis.

[14] Counsel made reference to the cases of *Kelly* and *Drouet*; he drew two things from these cases. Firstly that in the context of section 19A, there was no obligation on a defender to intimate to a pursuer that the time bar was approaching. Accordingly there could be no suggestion of any failure by Mr Bennet in not contacting Mr Simpson. He was entitled to proceed on the instructions of his client. And secondly, the equitable considerations

included the possibility of a case for professional negligence. He recognised that there were no pleadings or evidence about whether Mr Simpson had acted in the way that no reasonably competent solicitor of ordinary skill and care would have acted; the husband did not have enough information to know that, but from the evidence the court could reach a view about that being a potential remedy and take that into account in considering the whole circumstances of the case.

Assessment of the evidence

[15] I accepted that all the witnesses attempted to give a truthful account, but could not rely fully on the accounts given. The passage of time since the events had caused a degree of rationalisation about what had been done, and why, which I address in the following paragraphs. I was urged by counsel for the husband not to accept the wife's evidence but I accepted that she had wanted to enter appearance in the divorce and seek a capital sum.

[16] Mr Simpson was insouciant to the point of complacency about the procedural requirement for lodging the NID; but I am satisfied that the position was clear; there were financial matters to resolve. There was still at April 2021 substantial information outstanding. Mr Simpson considered that it was perfectly clear to the husband and his solicitor that the divorce was to be defended. He had written to the husband's solicitor in detail on 4 November 2021 to confirm that legal aid had been granted to the wife and suggesting a way forward. He had not anticipated that any steps would be taken to minute for decree given the outstanding matters. His approach was intelligible, if not professionally impressive.

[17] The husband was determined to criticise Mr Simpson, although none of the criticisms were put to Mr Simpson directly in cross-examination. The husband blamed

Mr Simpson for failing to progress financial discussions, from which it can be inferred that the husband knew that there were outstanding financial matters. His purported belief that matters were "resolved" was unconvincing.

[18] Mr Bennet was at pains to protect his own professional actings. He did not satisfactorily explain why his only communication with Mr Simpson between raising proceedings and obtaining decree was the email of 28 November intimating withdrawal from an agency which was already *functus* in relation to the divorce (it having been granted on 16 November). He did not intimate that he had sought decree. I consider that the husband had acted opportunistically, with no real belief that all outstanding matters had been resolved, and Mr Bennet knew this. Mr Bennet said that he had reached the view that the action was deliberately undefended; that seemed disingenuous given the 19 months of correspondence, the more so when he indicated in evidence that he recognised that what had happened might provide a source of professional embarrassment to Mr Simpson.

Decision

[19] The approach to be taken by the court to the reduction of a decree in absence was agreed between parties in a joint statement of legal propositions:

> "1. As per the decision of Lord Woolman in *Jandoo* v. *Jandoo* [2018] SLT 531:
>
> a. A court decree is not to be lightly set aside;
>
> b. there is no precise test; and
>
> c. the pursuer must show that (a) the decree ought not to have been granted on the merits; (b) there is a reasonable explanation why he did not enter the proceedings; and (c) the whole circumstances of the case justify reduction.
>
> 2. As per the decision of the Inner House in *Robertson's Executor* v. *Robertson* [1995] SC 23, the pursuer is not required to prove exceptional circumstances."

Application of law to the facts

[20] I consider that the wife has shown that the decree ought not to been granted on the merits; from the material before me there seems to have been an imbalance, perhaps even a gross imbalance, in the division of the matrimonial property in terms of the matrimonial assets and liabilities. The decree should not have been granted on the merits given the obvious outstanding financial matters to be resolved of which the husband was aware. The wife's claim has not appeared out of the ether but was the subject of correspondence for months without much apparent progress being made in relation to determining the nature, extent and value of the matrimonial property. The affidavits did not contain any material that was untrue, but, on one view, they omitted material information known to the husband about the financial consequences of the divorce.

[21] I accept that this is not the forum for resolving all such matters (and there may be other information additional to the material before the court) but, at this stage, and to borrow again from Lord Woolman in *Jandoo*, I must consider whether there is a "colourable" case for financial provision; there plainly is.

[22] Next, I consider that that there is a reasonable explanation why the wife did not enter the proceedings (I proceed on the basis that the NID was sent by the wife's' solicitor to the sheriff clerk's office, but whether there was a failure to lodge the NID or a failure to action it by the sheriff clerk, neither matter can be her responsibility); the wife in her evidence was clear that she wished to defend the divorce action on its merits and counterclaim for financial orders being aware of the nature of the husband's pension, although not the value of that pension at the time the divorce action was raised. She had instructed her solicitor to accept service and to defend the action. She was surprised when the decree of divorce was granted. She cannot be held responsible for the failure to lodge the NID.

[23] These conclusions lead to the third aspect, which is whether the "whole circumstances" of the individual case justify reduction. That can include a failure by the wife to avail herself of other remedies which takes me back to the submissions made by the husband about the possibility of an action against her solicitor, Mr Simpson.

[24] The husband argued that in considering the equitable aspect, the availability of another remedy to the pursuer was relevant. This was identified, in the context of the cases referred to, as a possible claim against the wife's then solicitor. But that possibility was not, as counsel for the wife observed, referred to in the pleadings. Counsel for the husband had accepted that he did not have a report which addressed the test for professional negligence in terms of a *Hunter* v *Hanley* 1955 SC 200 type of failure, but raised it as part of the overall context within which to consider the equities of the situation.

[25] I think that there is force in the wife's complaint that the matter is not even mentioned in the pleadings far less comprehensively pled. Any such consideration would require to be the subject of evidence as it was in *Kelly* and *Drouet*, where the court was able to make an informed analysis about the existence of an alternative remedy.

[26] I acknowledge that the courts have recognised that such matters can proceed absent a report – see Lord Sandison in *Cockburn* v *Cockburn's Judicial Factor* 2024 SCLR 518 where he said at paragraph 18:

> "In very many cases, it will be quite impossible for the court to determine that the test has been met without an expert witness (normally speaking to a report lodged in process) providing the evidential material necessary to inform such a conclusion. That is particularly the case where the profession in question is concerned with a specialist scientific or technical discipline outwith the knowledge and understanding to be expected of the court. However, questions of professional negligence may arise in a very wide variety of circumstances and in some of them, particularly those not concerning the deployment of any specialist field of knowledge, but rather involving questions of decision-making in more mundane settings, the question thrown up for decision may be one in relation to which the court can be expected to understand the

> relevant background and not to require further assistance in order to determine the issue."

But in this case there was insufficient focus in the pleadings, far less the evidence, for me to be able to reach even a preliminary conclusion about whether a case sound in negligence could be brought by the wife against Mr Simpson. At best, the facts might justify the instruction of an expert report to obtain an opinion as to whether Mr Simpson had acted negligently. That plainly distinguishes this case from the type of negligence which was described as "quite clear" (*Kelly* at para 11) or "straightforward" (*Drouet* at para 66).

[27] The other equitable consideration said to be in the husband's favour is that he has remarried. But this was done in the full knowledge that the decree of divorce had been granted in circumstances where the wife proposed to make a financial claim. This action of reduction was raised in early 2022. The husband remarried on 10 December 2023. The husband went into the marriage with his eyes open. He cannot complain that this challenge has materialised out of nowhere particularly given the information about the respective financial positions of the party; steps were taken immediately by the wife, on learning that decree had been granted, to address matters. The husband knew that the provenance of the divorce decree was being challenged. He entered into the marriage knowing that the reduction of the decree was a possibility. His subsequent marriage is not a decisive factor in his favour.

[28] I recognise that a decree should not be set aside lightly but standing my findings, I consider that this is a case where the wife has established that the decree of divorce should be reduced.

Disposal

[29] Having indicated that I am satisfied that the pursuer has established her right to have the decree reduced, I have fixed a By Order hearing for four months hence for parties to consider the best way of resolving the issues between them. I recognise of course that the Inner House has discouraged By Order hearings after proof or debate (*McCluskey* v *Scott Wilson Scotland Ltd* 2024 SLT 863; 2024 SCLR 618) and I recognise the risk of further unnecessary procedure and expense. I have proceeded in this way in order that an opportunity is afforded parties to reach an accommodation which would avoid the necessity of granting decree with the consequences which that would have for the husband's marriage. It is only after having considered my judgment in relation to reduction that the parties will be able to address potential routes for resolution. I consider that the circumstances of this case distinguish it from those in *McCluskey* and am fortified in my approach by Lord Woolman's similar action in *Jandoo*. I will deal with the question of expenses which have still to be addressed.

Postscript

[30] While at *avizandum* I came across a judgment of R. David Proctor, Chief United States District Judge in the Northern District of Alabama (*McCullers* v *Koch Foods of Alabama, LLC,* 2024 U.S. Dist. LEXIS 218902, 2024 WL 4907226 (N.D. Ala. Nov. 26, 2024). The decision was noteworthy for ordering counsel on each side to go to lunch together to discuss how to act professionally through the case. In the course of the judgment he said: "The Golden Rule – do unto others as you would have them do unto you – is not just a good rule of thumb for everyday life. It is a critical component of legal professionalism." I agree.

A simple phone call between agents would potentially have avoided the delay, cost, and stress occasioned by this action.