SHERIFF APPEAL COURT

[2018] SAC (Civ) 4
ABE-F327-14

Sheriff Principal C D Turnbull
Sheriff W H Holligan
Sheriff H K Small

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal in the cause

GAIL GRANT

Pursuer and Respondent

against

WILLIAM GRANT

Defender and Appellant

Pursuer & Respondent: Aitken, advocate; Burnett & Reid LLP
Defender & Appellant: Shewan, advocate; Gray & Gray LLP

15 February 2018

Introduction and background

[1] The issue in this appeal is whether or not certain property, which comprises a plot of land and the house built thereon, located in Aberdeenshire, can form matrimonial property, having regard to the terms of the Family Law (Scotland) Act 1985 ("the 1985 Act").

[2] The respondent commenced proceedings against the appellant in Aberdeen Sheriff Court for divorce and payment of a capital sum. After sundry procedure, a debate proceeded before the sheriff. Having resumed consideration of the cause, the sheriff

sustained the first plea in law for the appellant, to the extent of excluding from probation certain averments relative to the property, and allowed a proof before answer. The effect of the sheriff's interlocutor was to find that the land on which the house had been built was not matrimonial property, whereas, what the sheriff described as, "the building materials that came to represent the physical embodiment of the house" were.

[3] The appellant appeals against that decision. There is also a cross-appeal at the instance of the respondent. Neither party supported the sheriff's conclusion**.** Either the house and the land upon which it is erected is matrimonial property; or it is not. The factual background against which the sheriff reached his decision (namely, that advanced by the respondent) is as follows.

[4] The plot of land upon which the house was built (which we refer to as "the land") was acquired by the appellant in 1994, before he and the respondent were in an established relationship. That relationship initially commenced in April 1994 and continued until March 1995. After a brief hiatus, the parties' relationship recommenced in December 1995. The parties commenced living together in February 1996, initially in a flat in Aberdeen and thereafter, from July 1996, in a mobile home situated on the land. In September 1996 the parties purchased a new mobile home which they situated upon the land and in which they resided together. In about September 1996 the respondent engaged the services of an architect, on behalf of the parties, for the purpose of securing planning permission to build a house upon the land. Outline planning permission was granted in January 1997. At that time the parties engaged the services of a builder to erect a kit home upon the land. The parties together chose the design of the kit home and engaged in the planning of the design of the home. Thereafter, they applied for detailed planning permission in respect of their chosen design of the house. That was granted in June 1997, as was a building warrant in

respect of the house. Building work commenced in July 1997 and was completed in October 1997.

[5] At the time the house was completed, the parties had resided together for more than a year. At that time, the parties intended to continue to live together as a family. They resided together in the house from its completion in October 1997. The parties subsequently had two children together, born in June 1998 and April 2001 respectively. They married on 20 June 2003. They lived together in the house until 28 January 2008, when they separated. It is against the foregoing that the relevancy of the respondent's averments must be tested.

Submissions

[6] The appellant submits that the house and the land are not matrimonial property. The appellant contends that as the land was acquired by the appellant prior to the commencement of the parties' relationship (and some 6 years prior to the parties' marriage), it is not matrimonial property. When the house was built upon the land, the house acceded to the land. The result of accession is that the accessory, namely, the house, became part of the principal, namely, the land. The appellant relies upon *Brand's Trustees* v *Brand's Trustees* (1876) 3 R (HL) 16 at 20 and Volume 18 of "*The Laws of Scotland - Stair Memorial Encyclopaedia*", at chapter 12, paragraph 574. The appellant's contention is that as the land was not matrimonial property, and as the house became part of the land when it acceded to it, the house is also not matrimonial property.

[7] The respondent's position is that both the land and the house are matrimonial property. The submissions made by the appellant in relation to the law of accession are uncontroversial, however, the respondent maintains that whilst that provides an answer as to who owns the house built upon the land, it does not determine whether the house and the

land are matrimonial property for the purposes of the 1985 Act. The respondent contends that, on a proper interpretation of the 1985 Act, the land and the house are matrimonial property.

Discussion

[8] In terms of the 1985 Act, in an action for divorce, either party to the marriage may apply to the court for an order for financial provision (see section 8). Any such order must be both justified by the principles set out in section 9; and be reasonable having regard to the resources of the parties (see section 8(2)). In terms of section 9(1)(a), the net value of the matrimonial property should be shared fairly between the parties. It should be noted that it is the "value" of the matrimonial property that is to be shared. In terms of section 10(1), in applying the principle set out in section 9(1)(a) of the 1985 Act, the net value of the matrimonial property shall be taken to be shared fairly between the parties to the marriage when it is shared equally or in such other proportions as are justified by special circumstances.

[9] Having regard to the foregoing provisions of the 1985 Act, it will be seen that an essential step in any action in which an order for financial provision is sought is the ascertainment of the extent of matrimonial property. The term "matrimonial property" is not one derived from property law. It is a creation of the 1985 Act which exists to give effect to those parts of that Act which deal with financial provision.

[10] This appeal turns on the proper application of section 10 of the 1985 Act. Insofar as relevant, section 10 provides:

> (1) In applying the principle set out in section 9(1)(a) of this Act, the net value of the matrimonial property or partnership property shall be taken to be shared fairly

between persons when it is shared equally or in such other proportions as are justified by special circumstances.

(2) Subject to subsection (3A) below, the net value of the property shall be the value of the property at the relevant date after deduction of any debts incurred by one or both of the parties to the marriage or as the case may be of the partners

(a) before the marriage so far as they relate to the matrimonial property or before the registration of the partnership so far as they relate to the partnership property, and

(b) during the marriage or partnership, which are outstanding at that date.

(3) In this section "the relevant date" means whichever is the earlier of—

(a) subject to subsection (7) below, the date on which the persons ceased to cohabit;

(b) the date of service of the summons in the action for divorce or for dissolution of the civil partnership.

…

(4) Subject to subsections (5) and (5A) below, in this section and in section 11 of this Act, "the matrimonial property" means all the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party)—

(a) before the marriage for use by them as a family home or as furniture or plenishings for such home; or

(b) during the marriage but before the relevant date.

[11] Having regard to the position set out at paragraph [4] above and to the correct application of the law of accession, the property in issue belonged to the appellant at the relevant date. It was not acquired by the appellant during the marriage but before the relevant date. For the property to constitute matrimonial property, in the circumstances of this case, it would require to have been acquired by the appellant before the marriage for use by the parties as a family home (see section 10(4)(a) of the 1985 Act).

[12] The first question to address is what, in fact, constitutes the property in question. Only by addressing that question can one then move to the second question which is when was that property acquired.

[13] The property in question comprises both the house and the land upon which it is erected. It is a single item of property not, as the sheriff determined, property which falls in to two separate classes, namely, the land itself on the one hand; and the constituent elements of the house built upon it on the other. That single item of property belonged to the appellant at the relevant date.

[14] Moving therefore to the second question, the single item of property in issue can only have been "acquired" as and when the house was completed. The appellant seeks to approach the matter as one of property law. It is not. The property was, on the respondent's averments, acquired by the appellant before the marriage for use by the parties as a family home. The law of accession regulates ownership of the property in question; it does not affect whether or not that property is matrimonial property for the purposes of the 1985 Act.

[15] The third question is whether the property was acquired for use as a family home. It is clear from the Scottish Law Commission Report no 86, "*Report on Matrimonial Property*", and Clive "*The Law of Husband and Wife in Scotland*" (4th ed), paragraphs 24.025 – 24.026 that Parliament has provided a limited category of what may be described as pre-marriage property which may be capable of constituting matrimonial property. The paradigm case is the purchase by a couple intending to marry of a home in which to live. The facts of this case do not fit easily into that paradigm. Whether the terms of section 10(4)(b) are satisfied requires factual inquiry which includes evidence of the parties' intentions. In the unusual factual circumstances of the present case, in our opinion, the pursuer has averred sufficient

to warrant inquiry as to whether the disputed property is matrimonial property. It should be borne in mind that the identification of matrimonial property is but one step in determining what orders for financial provision should be made. The 1985 Act gives to the sheriff certain discretionary powers to ensure a division that is equitable to both parties.

[16] In conclusion, if the facts averred by the respondent were to be established after proof, the property comprising the house and the land upon which it is erected is matrimonial property.

Decision

[17] We agree with parties that the sheriff has fallen into error and that this court should recall his interlocutor. Quoad ultra we will refuse the appeal and allow the cross-appeal; repel the first plea-in-law for the defender and allow parties a proof of their respective averments. The action will be remitted back to the sheriff at Aberdeen to proceed accordingly.

[18] We were invited by parties to reserve the question of expenses. We shall do so and leave it to parties to discuss matters and to enrol the appropriate motion.