



SHERIFF APPEAL COURT

**[2019] SAC (CIV) 12
DUN-F316-16**

Sheriff Principal D L Murray
Appeal Sheriff W Holligan
Appeal Sheriff A M Cubie

OPINION OF THE COURT

delivered by APPEAL SHERIFF ANDREW M CUBIE

in an appeal in the cause

ALANA TRUSTY

Pursuer and Respondent

against

RAYMOND TRUSTY

Defender and Appellant

Pursuer and Respondent: Mr Fraser; Muir Myles Laverty Solicitors

Defender and Appellant: Party

26 March 2019

Background

[1] The parties were married on 6 October 2003 and separated on 5 October 2015. Divorce proceedings were raised by the respondent. The case went to proof on 8 December 2017. It was adjourned for further evidence. The appellant's solicitors then withdrew from acting. Other solicitors were appointed but they too withdrew. After callings on 11 January, 27 February and 19 March 2018, the second day of evidence eventually proceeded on 23 April 2018. The appellant represented himself, briefly cross examined the respondent,

and elected to neither give nor lead evidence. There was a further continuation to allow for written submissions before the judgement was issued on 3 August 2018. Expenses were dealt with by interlocutor of 24 August.

Sheriff's decision

[2] The sheriff granted an order transferring the former matrimonial home into the sole name of the respondent, with a balancing payment of £36,000 to be paid to the appellant as representing a fair division of the matrimonial property. The sheriff found the appellant liable to the respondent in the expenses of the action from 12th January 2018 until the conclusion of the cause, making payment of these expenses a condition precedent to payment of the capital sum to the appellant, and also regulating the mechanics of the transfer.

Appeal

[3] The appellant challenges the judgment and the finding on expenses.

Appellant's submissions

[4] The appellant's initial point was that the sheriff had erred in granting a transfer order because he had not referred to the "appropriate valuation date" as required by the Family Law (Scotland) Act 1985 (the Act). The 1985 Act, which regulates the division of matrimonial property on divorce, provides as follows:-

"8.— Orders for financial provision.

(1) In an action for divorce, either party to the marriage ... may apply to the court for one or more of the following orders—

(aa) an order for the transfer of property to him by the other party to the action ;

...

10.— Sharing of value of matrimonial property ...

(1) In applying the principle set out in section 9(1)(a) of this Act, the net value of the matrimonial 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 ...

(3A) In its application to property transferred by virtue of an order under section 8(1)(aa) of this Act this section shall have effect as if—

(a) in subsection (2) above, for “relevant date” there were substituted “appropriate valuation date”;

(b) after that subsection there were inserted—

“(2A) Subject to subsection (2B), in this section the “appropriate valuation date” means—

(a) where the parties to the marriage or, as the case may be, the partners agree on a date, that date;

(b) where there is no such agreement, the date of the making of the order under section 8(1)(aa).

(2B) If the court considers that, because of the exceptional circumstances of the case, subsection (2A)(b) should not apply, the appropriate valuation date shall be such other date (being a date as near as may be to the date referred to in subsection (2A)(b)) as the court may determine.”

[5] So, matrimonial property transferred in furtherance of a fair division under the Act must be valued at an “appropriate valuation date”. The rationale is the avoidance of any potential windfall accruing to the party who receives the transfer of the property arising from any increase in value between the relevant date and the transfer.

[6] This court pointed out to the appellant that the provisions of the joint minute include the following paragraph:

“6. As at the relevant date of 5th October the matrimonial property included the following

i. the jointly owned matrimonial home at [Address] valued at £255,000 as at May 2017”

[7] On the valuation date of the property as May 2017 being put to him, he accepted that the only purpose of a valuation later than the relevant date of 5 October 2015 was in relation to the potential transfer; there was no other basis for that discrete valuation date. That accorded with the respondent’s position.

[8] Although the sheriff has not in terms referred to the statutory framework, parties were in fact agreed that the “appropriate valuation date” was May 2017. We proceed on that basis.

[9] That led to the appellant’s next point – in the event that the May 2017 date was the appropriate valuation date, the sheriff had erred in relation to the division of property. Neither the note of appeal nor the note of argument elaborated further. Despite being afforded a number of opportunities, the appellant was unwilling or unable to identify what impact, if any, that the May 2017 date would have had on any final division, nor the nature and extent of the sheriff’s purported error.

[10] The appellant, after further consideration, accepted that he was not challenging the scheme of division of the assets as unfair, but rather he was challenging the sheriff’s finding about the value attributed to his pension. By electing an inflated value, he argued, the sheriff had in error reduced the sum appropriately payable to him to reflect fair sharing.

[11] This issue of the pension valuation is briefly referred to in the note of appeal but not addressed in the note of argument. Given the appellant’s status as a party litigant, we were

prepared to allow the submission to be developed. It crystallised into a motion to remit the matter to another sheriff in Dundee to hear further evidence about the valuation of the pension; effectively to re-open the proof. He submitted that he had not had the opportunity to address the matter in the context of the proof which had taken place. He was still investigating the proper valuation of the pension. He submitted that a proper assessment of the value of the matrimonial property was essential to assessing the correctness of the balancing payment to be made to him. He wanted time to investigate the position and thereafter proposed to lodge a minute of amendment and lead further evidence.

[12] In relation to the order for expenses, the appellant submitted that the sheriff had proceeded on the basis of some discrepancies. He recognised the wide discretion which the sheriff had as well as the “normal practice” in relation to family actions.

[13] He referred to paragraphs 4-16 of his note of argument. He submitted that the sheriff had been wrong to consider that there had been a delay and to have attributed that delay to him. He had done nothing to prolong the case. He had reacted to the withdrawal of two sets of solicitors. He had been aware of “deficiencies” in his case. He had addressed the court on the respondent’s credibility even if he had “been unable to cure the deficiencies in his own case” (paragraph 14 of the note of argument). He had not caused delay or been intransigent.

[14] After an initial (understandable) confusion between his obligation to pay the court fees relating to the appeal and the expenses occasioned, the appellant accepted that the expenses of the appeal should follow success.

Respondent's submission

[15] In a brief address, the respondent argued that the sheriff's division of the matrimonial property was justified and reasonable having regard to the provisions of the Act. May 2017 was the "appropriate valuation date" for the transferred property. The valuation of the pension was explained in the sheriff's note. He submitted that the notes prepared by the sheriff attached to the interlocutors of 8 December 2017, 11 January and 27 February explained and justified the decision to find the appellant liable in part of the expenses of the action. The appeal should be refused with expenses to the respondent. Payment of these expenses should be a condition precedent to the payment of the capital sum in the same way as provided for by the sheriff in the interlocutor of 24 August 2018.

Decision

[16] We proceed on the basis that the "appropriate valuation date" is the parties' agreed date of May 2017 in terms of section 10(2A)(a) of the Act. The Shorter Oxford Dictionary defines date as: "the day of the month, the month or the year of an event"; although the joint minute was inelegantly framed, and the sheriff did not in terms make reference to the statutory provisions, we are satisfied that the sheriff was able to select May 2017 as the "appropriate valuation date." That provision (6.i) of the joint minute has no obvious meaning otherwise. We do observe that it is desirable where parties agree an appropriate valuation date, that they specify a particular day. This will assist if any account requires to be taken of mortgage payments or the like. There was no motion to amend any statement of fact, but we are content that the sheriff's order for transfer of property was properly made in accordance with the statutory provisions.

Division of matrimonial property

[17] The appellant now accepts that the scheme of division was fair. His initial position was that there was an error but, as we have reflected, he could not identify the nature and extent of any error or what impact such purported error had on the scheme of division. He cannot point to a vacuum and then expect this court to fill it. If he is not in a position to assert what the outcome should have been, it is not for this court to embark on some kind of “join the dots” exercise to complete the picture which the appellant wants to present. There was no error identified in the scheme of division proposed.

Pension valuation

[18] This was the matter which exercised the appellant the most. He asserted that the sheriff had selected a far higher value than was justified.

[19] The proof proceeded over two days but over four months apart; the matter of the pension valuation was an issue from the outset as was clear from the sheriff’s note attached to the interlocutor of 8 December. The appellant had known for some time about the discrepancy in the valuations. Nothing had been done; he had elected to give no evidence and to call no witnesses even after the sheriff afforded him an opportunity to consider his position.

[20] As this court said in *SY v FA or Y* [2019] SAC (Civ) 5

“[12] ... the proof is not part of an ongoing process which can be revisited by the introduction at a later stage of evidence or submissions not before the sheriff at proof; it is rather the culmination of the procedure leading to a degree of finality... The sheriff does not have an investigatory role. The sheriff considers matters on the basis of the material which the parties select...”

[21] In a case such as this, the date at which assets are to be valued is known well in advance. Ample time and opportunity was afforded to the parties to carry out investigation.

The appellant has failed to carry out these investigations. The appellant cannot re-open the proof. He was not denied an opportunity to effectively participate in the proof; indeed a protracted period after the first day afforded a specific opportunity to consider the pension position. The sheriff heard evidence about the pension valuation which he scrutinised carefully and at length, and ultimately accepted. There is no basis for interfering with the sheriff's decision.

[22] So far as expenses are concerned, appeals against expenses are not encouraged; see for example *Ahmed v QBE Insurance (Europe) Limited* [2017] SAC (Civ) 22:

“[1] It is well understood that questions of liability for expenses are for the discretion of the court (see Macphail Sheriff Court Practice 3rd edition at 19.03). An appellate court will only interfere with a discretionary decision in certain defined classes of case (see Macphail op. cit. at 18.111). The consequence of the relationship between these two well established principles is that appeals on questions of expenses only are severely discouraged and are only entertained in limited circumstances...”

[23] This court can only interfere if the first instance court has taken an irrelevant factor into account or left out of account a relevant factor, or otherwise gone plainly wrong. In this case the sheriff was discriminating in the award, restricting the award to the period from 12 January 2018. He has explained the reasons for imposing the order. The issue of the pension was identified. The appellant did not lead evidence or present any material despite the time afforded to him, a time extended by the change of agency. The sheriff was entitled to find that, in the period selected, the proceedings were protracted and that the appellant had done nothing within that period to advance matters. The sheriff did not take into account anything irrelevant, or discount an irrelevant factor and his decision cannot be categorised as plainly wrong.

[24] The appellant has accordingly failed in the appeal. We will adhere to the interlocutors of the sheriff of 3 and 24 August 2018.

Expenses of the appeal

[25] Parties were agreed that expenses should follow success. The respondent sought an order that payment of the expenses be a condition precedent of the transfer of the property, as the sheriff had done. The appellant did not oppose that motion. We so order.