

SHERIFFDOM OF GRAMPIAN, HIGHLANDS AND ISLANDS AT ABERDEEN

[2019] SC ABE 86

ABE-A17-18

NOTE OF SHERIFF PHILIP MANN

in the cause

LOUISE MCELHATTON, 64 Blenheim Place, Aberdeen, AB25 2DY

Pursuer

against

GRANT MONAGHAN, having a place of business at Beach One Building, 6th Floor,
Office 609, PO Box 418: 418, PC: 118, Sarooj, Muscat, Sultanate of Oman

Defender

Pursuer: Wilson

Defender: Absent

The sheriff, having resumed consideration of the pursuer's minute for decree number 12 of process, the court being *functus*, refuses to grant same; Refuses the pursuer's motion for an award of expenses.

Note

Introduction

[1] The pursuer's minute for decree number 12 of process relates to an action for division and sale of a dwellinghouse in Aberdeen of which the parties were equal *pro indiviso* proprietors. The action was precipitated by the breakdown of the parties' relationship.

The Initial Writ

[2] The initial writ contains the usual craves to be found in an action of this kind but those which are relevant to the minute for decree and this note are craves 5, 8 and 9.

[3] Crave 5 is in the following terms:

“to ordain [the selling agents appointed by the court] to consign the net proceeds of sale under deduction of all debts and burdens affecting the same and all reasonable fees and outlays incurred by the said selling agents in the hands of the sheriff clerk in Aberdeen.”

[4] Crave 8 is in the following terms:

“to find and declare that the price of the subjects after deduction of any debts or burdens affecting the same, and the expenses of this action which should be paid to the pursuer and all other expenses attending the sale, including the fees due to the said selling agents as same may be agreed or taxed, should be divided between the pursuer and defender as follows:

- (i) to find the pursuer entitled to one half of the balance of free proceeds of sale;
- (ii) the pursuer to receive such sum as she may be due from the defender in terms of crave 9 hereof;
- (iii) the pursuer to receive the expenses of the court action;
- (iv) thereafter the balance of the free proceeds to be paid to the defender.”

[5] Crave 9 is in the following terms:

“to grant an order under Section 2(4)(b) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 finding the defender liable, as between the parties, for payment of one-half of the mortgage payments due to Royal Bank of Scotland plc, and the relative Council Tax, buildings and contents insurances over the property from 1st December, 2017 until the date of settlement of the sale of the property; and to grant such order *ad interim*.”

Procedure in the Cause

[6] The action has never been defended.

[7] By interlocutor dated 18 January 2019 the pursuer obtained, *inter alia*, an award of expenses as taxed against the defender in respect of the proceedings up to the date of the interlocutor.

[8] By interlocutor dated 9 April 2019 the pursuer obtained, *inter alia*, an order precisely in the terms set out in crave 9. That order is not stated to be an interim order. It is thus a final order.

[9] Following the usual sundry procedure in an action of this kind in terms of the pursuer's other craves the dwellinghouse was sold and the net proceeds of sale, calculated in terms of crave 5, were consigned in court.

[10] By interlocutor dated 14 August 2019 the pursuer was awarded one half of the consigned funds (described in the interlocutor as "the net proceeds of sale") together with the balance of the consigned funds as part payment towards the defender's "crave 9" liability. Accordingly, the consigned funds were fully distributed in terms of crave 8 although, clearly, it was not possible to implement crave 8 in full. The interlocutor of 14 August 2019 also included an award of taxed expenses against the defender in favour of the pursuer for the period from the date of the interlocutor of 18 January 2019 to date.

[11] Against that background the pursuer lodged her minute for decree number 12 of process. The minute is in 6 parts. The first seeks decree for a balance of money said to be owed to the pursuer in respect of her crave 9. The second, third and fourth parts seek decree for one half of certain costs said to have been wholly met by the pursuer to facilitate the sale of the property. The fifth part seeks an award of expenses against the defender in respect of the minute for decree, as taxed. The sixth part seeks immediate extract.

The Hearing on the Minute for Decree

[12] A hearing on the minute for decree was set down for 9 October 2019. On that date Miss Wilson, solicitor, appeared for the pursuer and addressed me.

[13] Miss Wilson argued that since what was sought by the pursuer related to the sale of the property and since that sale had been ordered and sanctioned by the court the pursuer was entitled to recover the various costs set out in the several parts of the minute for decree.

[14] I pointed out to Miss Wilson that the pursuer had no craves upon which decree for the various sums of money sought could follow. She sought leave to amend the initial writ so as to add relevant craves and relative pleas in law. She maintained that since there were issues relating to the sale of the property which remained outstanding the action had not been finally disposed of and that it was thus competent to amend.

[15] On the assumption that amendment be allowed Miss Wilson also moved that intimation upon the defender of the amended initial writ and the minute for decree be dispensed with and that decree be granted there and then in terms of the various craves added by amendment. Miss Wilson also moved for an award of expenses.

Discussion and Decision

[16] I have a degree of sympathy for the pursuer but the long and the short of it is that the craves in the initial writ did not anticipate a situation in which there would be insufficient net proceeds of sale to cover all of the outlays incurred by the pursuer in connection with the sale of the property. That being the case, she has no craves which justify the orders which she seeks in her minute for decree.

[17] The pursuer's motion to amend comes too late. I say that because the interlocutor of 9 April 2019 granted the order which she sought in terms of crave 9 whilst the interlocutor of

14 August 2019, granted after sundry other procedure, brought the action to a conclusion by granting decree in terms of crave 8 in so far as it was possible to do so. The interlocutors of 18 January 2019 and 14 August 2019, taken together, disposed of the question of expenses for the whole cause. The interlocutor of 14 August 2019 constitutes final judgment as defined in section 136(1) of the Courts Reform (Scotland) Act 2014. Furthermore, that interlocutor (so I have discovered during avizandum) was extracted on 14 August 2019 on the pursuer's motion for immediate extract. In terms of ordinary cause rule 18.2(1) the sheriff is not empowered to allow amendment unless before final judgment.

[18] In these circumstances, the court is *functus*. That being the case, it is not open to me to allow amendment or any further procedure in this process. If the pursuer wishes to pursue the matters referred to in her minute for decree she will have to do so by way of new and separate proceedings.

[19] Even if it were open to me to allow the initial writ to be amended and to allow further procedure thereon, I would not dispense with intimation on the defender. It would be unfair and contrary to the principles of natural justice to do so.

Expenses

[20] The pursuer is not entitled to an award of expenses relating to the minute for decree. It can hardly be said that the defender is in any way to blame for the deficiencies in the initial writ which have transpired in the unfolding circumstances of this case.