SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS AT LERWICK

[2022] SC LER 36

LER-F48-11

NOTE

by

SHERIFF IAN HAY CRUICKSHANK

in the cause

RM

Pursuer

against

JG

Defender

Pursuer: Jones KC, instructed by Brodies LLP, Solicitors, Aberdeen
Defender: Logan, instructed by McIntosh Family Law, Solicitors, Aberdeen

Lerwick, 31 October 2022

The sheriff, having resumed consideration of the cause, Refuses defender's motion 7/1 of process; Reserves the question of expenses occasioned by the motion procedure and directs the Sheriff Clerk to assign a hearing to be addressed on the question of expenses together with any other matter arising from refusal of the said motion.

Sheriff Ian Hay Cruickshank

NOTE:

Introduction

[1] The background circumstances to this opposed motion hearing are unusual, if not unique. It raises the question whether lengthy delay in seeking taxation of an award of expenses could justify dismissal of an action.

[2] An action was raised in 2011. The pursuer sought a contact order in relation to his child. Thereafter, Minute procedure was instigated in relation to alleged contempt of court on the part of the defender for failing to obtemper court orders in relation to contact. Both matters proceeded to proof. Final orders were made in relation to the principal action in July 2015. The pursuer was successful and was awarded expenses against the defender as taxed. Ultimately, the defender was found guilty of contempt. In June 2016, Minute procedure concluded and the pursuer was awarded expenses against the defender as taxed.

[3] For 7 years the pursuer did nothing to pursue the issue of expenses. Over that period neither party approached the other in relation to the question of expenses.

[4] On 3 August 2015 the defender's grandfather transferred title to a property in Scalloway into the name of the defender's sister. On 16 July 2020 the defender's sister transferred title to the defender. It is stated by the defender, although not accepted by the pursuer, that there was a condition of transfer to the effect that if the defender were to leave Shetland then title would require to be transferred back to her sister. Having made a decision to move to Mainland Scotland the defender transferred title to the Scalloway property back to her sister on 2 June 2022. The defender contends this was before she knew of the pursuer's intentions to pursue the 2015 and 2016 awards of expenses.

[5] In May 2022, the pursuer lodged an account for taxation. Sanction for the employment of Counsel had been granted in relation to this process. The pursuer's account, covering both the principal action and minute procedure, extends to 242 pages and the expenses claimed, including Counsel's fees, outlays and VAT, amounts in total to £223,926.72.

[6] Prior to taxation proceeding, the defender lodged the motion now under consideration. In terms of that motion the defender moves the court to dismiss the action in terms of Ordinary Cause Rule 15.7 on the basis of inordinate and inexcusable delay by the pursuer or the pursuer's agent in progressing the action resulting in unfairness.

[7] On the motion being opposed, by agreement, the parties postponed the diet of taxation to allow the motion to be heard. A hearing was assigned for 30 September 2022. Parties were ordained to lodge written submissions in advance of that hearing. Parties' representatives then provided supplementary oral submissions at the hearing. On conclusion of the hearing I reserved judgement on the motion.

Defender's submissions

[8] In addition to written submissions there was lodged on behalf of the defender her affidavit together with affidavits from her sister and grandfather. Copies of the Land Certificate to the property in Scalloway to support dates as to change of ownership were also lodged.

[9] Mr Logan advanced three legal propositions as to why the action should be dismissed at this time. First, Mr Logan submitted that, despite final judgments having been given in 2015 and 2016, the court could properly use the powers provided by Ordinary

Cause Rule 15.7 and dismiss the action. Alternatively, in the event that the court could not use its powers under the said Ordinary Cause Rule then, secondly, the pursuer's right to lodge an account for taxation had prescribed. Thirdly, in the event that the claim had not prescribed, I was invited to refuse to allow any further procedure by sustaining a plea of mora, taciturnity and acquiescence.

[10] Background facts advanced on behalf of the defender included the following. The pursuer's agents wrote to Balfour and Manson regarding the account on or around mid-May 2022. Balfour and Manson returned the letter on the grounds that the defender was not their client. The defender was entirely unaware of this exchange. On 31 May 2022 the pursuer's agent wrote to the defender, as did the Auditor of Court, in relation to a diet of taxation. The letter from the Auditor indicated a deadline of 23 June to raise points of objection. The defender did not receive the account until mid-June as she was no longer living at the address where it had been sent to. The solicitor who had represented the defender in 2016 had since dissolved the partnership he had operated at that time, had moved to a new firm in 2018 and had retired from practice in 2020. The defender's current solicitor had been in partnership with the now retired solicitor in 2016 but had had no involvement in the defender's case and had insufficient knowledge of the case to analyse the account now lodged for taxation. Further the defender had had little or no assets in 2016. In 2020 she had taken title to the family property but had transferred this given her intention to leave Shetland and had done so without any knowledge of the account being lodged for taxation. She would never have agreed to take title to the property had she known of the pursuer's intention to pursue the awards of expenses. Put short, if expenses were taxed and decree

extracted bankruptcy would follow and the heritable transfer to her sister would be challenged on the basis of it being a gratuitous alienation.

[11] Mr Logan readily accepted that reliance on Ordinary Cause Rule 15.7, at this stage of proceedings, was unusual. He submitted that the action remained in dependence before the court notwithstanding that final orders had been made. In a case such as the present, which related to section 11 Orders for children, an action would remain in dependence for so long as it was competent to lodge a minute seeking variation of those orders. The tests for an application under the Ordinary Cause Rule had been met. In particular, there had been an inordinate and inexcusable delay in progressing the action to its final conclusion. The law on the equivalent Court of Session Rule had been considered in *John Abram* v *British International Helicopters Ltd* 2015 SCLR 95 which, in turn, had been considered for Sheriff Court purposes in *Sultana* v *General Accident Fire and Life Assurance Corporation Plc* [2016] SC Edin 40.

[12] Whilst accepting that the current Ordinary Cause Rule relating to lodging expenses, being Rule 32.1A, was not relevant in this case, the reasoning behind the rule, as currently framed, was based, in part, on Article 6 of the European Convention on Human Rights. The case of *Anderson* v *UK* [2010] ECHR 145 was referred to. With reference to the court as a public body in this case there were two duties imposed – first, to require the determination of liability within a reasonable time and, secondly, consider whether a fair trial had been prejudiced. It was submitted that allowing the account to be taxed at this point was incompatible with these duties. Given that expenses claimed went back 11 years, and difficulties the defender’s current agent would experience at taxation, there was at least a substantial risk that justice could not be done and a fair trial would not be achieved if

proceedings were allowed to be continued. No criticism should be made of the defender for doing nothing to ascertain the intentions of the pursuer regarding expenses as there was no duty on her to do so.

[13] Mr Logan's second line of argument was to the effect that the pursuer's opportunity to lodge an account for taxation had prescribed in terms of section 6 of the Prescription and Limitation (Scotland) Act 1973. In particular the five year period for prescription under that section could be relied upon as this was an obligation of accounting other than accounting for trust funds (paragraph 1(f) of Schedule 1 of the 1973 Act). There had been no relevant claim, and no relevant acknowledgement within that period. Whilst it was acknowledged that paragraph 2(a) of Schedule 1 excluded any obligation to recognise or obtemper a decree of court this did not aid the pursuer. The interlocutors for expenses did not oblige the defender to do anything but gave an opportunity to the pursuer which he had not taken advantage of during the prescriptive period. As such they did not fall into the exception provided for. Mr Logan did concede that the meaning of "recognise" a decree in terms of paragraph 2(a) was unclear. In any event, the rule on expenses as currently drafted supported the conclusion that a party does not have twenty years to progress the award of expenses to taxation. It would otherwise raise issues under Article 6.

[14] Finally, Mr Logan focussed on the plea of mora, taciturnity and acquiescence. Reference was made to the case of *Hendrick* v *Chief Constable of Strathclyde* 2014 SC 551. If the first two elements are established then either prejudice or acquiescence can be inferred from the facts and circumstances. Reference was also made to *B* v *City of Edinburgh Council* 2016 SLT 180. In the present case, the length of time and the defender's right to get on with her life in circumstances where she had cause to believe that expenses were not to be pursued,

together with her Convention Right to have matters dealt with within a reasonable time were all relevant. Here, prejudice could readily be inferred where the defender had taken a family gift of heritable property which she would not have taken had she considered she was still vulnerable to a claim for expenses and she had, in good faith, now passed that gift to another family member.

Pursuer's submissions

[15] At the outset of submissions Mr Jones stated that he did not consider it was appropriate for me to take into account the affidavits which had been lodged or the other productions relating to transfer of title to the property in Scalloway. The factual background, or ability to pay expenses, as outlined in the affidavits was not accepted. It would be wrong to consider the terms of affidavits where their contents were disputed and not a matter of agreement.

[16] Mr Jones questioned the competency of the defender's motion to seek dismissal under Ordinary Cause Rule 15.7. Dismissal of the action at this stage would impact on the court's substantive interlocutor of 21 July 2015. Arguably the motion was seeking to review that interlocutor. No authority had been produced to suggest that dismissal at this very late stage was competent.

[17] Mr Jones outlined the requirements of the rule which had been introduced following the cases of *Tonner* v *Reiach & Hall* 2008 SC 1 and *Newman Shopfitters Limited* v *M.J. Gleeson Group Plc* 2003 SLT 83. In both cases the motion to dismiss had been brought in very different circumstances. In neither case had there been progress to any substantive procedure. These cases had been considered in *Hepburn* v *Royal Alexandra NHS Trust* 2011

SC 20 where it was held that the unfairness in question must be that a "fair trial" was no longer possible. Further, in the case of *Abram*, where the equivalent Court of Session Rule was considered it was recognised that the dicta in *Toner* and *Hepburn* remained useful when applying the rule.

[18] Mr Jones submitted that there was a two-stage process when applying the Ordinary Cause Rule under consideration. At stage one the question to be answered was, has there been inordinate and inexcusable delay which results in a substantial risk that justice cannot be done? Mr Jones argued the answer to this given the circumstances of this case was no. If, however, I concluded the answer to be yes then the second stage of the application of the rule related to exercise of discretion and, in order to succeed, the defender would require to convince me that the only course open to the court consistent with its function as a court of justice, would be to bring the proceedings to an end. Mr Jones submitted that I could not reach that conclusion. The reasons for delay in proceeding to taxation were outlined. The pursuer had not wanted to go to the expense of preparing an account or proceed to taxation until he considered there was a prospect of recovery.

[19] The current rule regarding taxation of expenses was not directly relevant as it was not in place when expenses here had been awarded. The previous rule which had governed lodging an account of expenses for taxation was very different. The rule at that time allowed the defender to ordain the pursuer to lodge an account. The defender had chosen not to do so. There could not be unfairness when the rule afforded the defender the right to avoid delay. At this stage, references by the defender to what she might have done if expenses had been taxed earlier, e.g. progressing to bankruptcy, was irrelevant as the test

under OCR 15.7 required the delay to result in unfairness specific to the factual circumstances, including the procedural circumstances, of the action itself.

[20] It was further submitted that the defender failed to specify any detail of the manner in which the preparation for and conduct of the diet of taxation would be prejudiced by the passage of time. Vague assertions about the passage of time or an agent having retired were insufficient to warrant the inference of any actual or potential prejudice. Taxation should be allowed to proceed to ascertain if, in fact, there was prejudice created by delay.

[21] In relation to prescription it was submitted the defender's contention was without merit. The defender was wrong to argue there was an obligation of accounting as provided for in paragraph 1(f) of Schedule 1 of the 1973 Act. In any event, paragraph 2(a) clearly stated that section 6 of the Act did not apply to an obligation to recognise or obtemper a decree. Also, in *Abram*, the court noted that seeking to derive guidance from the fields of prescription and limitation was not a particularly fruitful exercise when considering a Rule of Court.

[22] With regard to the plea of mora, taciturnity and acquiescence, Mr Jones did not consider that this assisted the defender. He questioned the competency of raising what was a preliminary plea in this case. In any event, mora did not come in to play. There may have been an argument had the defender queried if the pursuer had an intention to pursue expenses and received a response which suggested he did not intend to do so. In those circumstances the pursuer may have been personally barred from proceeding with taxation. There was nothing in this case which barred the pursuer in seeking his account to be taxed.

Decision

[23] As I have already noted, the facts and circumstances lying behind this opposed motion are unusual and, possibly, unique. I have never encountered a comparable set of circumstances, such a lengthy account for taxation nor such a large potential claim for expenses in the Sheriff Court. Accordingly, the matters raised are of considerable importance to both parties. That said, my primary reason for refusing this motion is uncomplicated based on my interpretation of Ordinary Cause Rule 15.7.

Relevant Ordinary Court Rules to be considered

[24] Ordinary Cause Rule 15.7 is in the following terms:

> "(1) Any party to an action may, while that action is depending before the court, apply by written motion for the court to dismiss the action due to inordinate and inexcusable delay by another party or another party's agent in progressing the action, resulting in unfairness.
>
> (2) A motion under paragraph (1) shall—
>
> > (a) include a statement of the grounds on which it is proposed that the motion should be allowed; and
> >
> > (b) be lodged in accordance with rule 15.1.
>
> (3) A notice of opposition to the motion in Form G9 shall include a statement of the grounds of opposition to the motion.
>
> (4) In determining an application made under this rule, the court may dismiss the action if it appears to the court that—
>
> > (a) there has been an inordinate and inexcusable delay on the part of any party or any party's agent in progressing the action; and
> >
> > (b) such delay results in unfairness specific to the factual circumstances, including the procedural circumstances, of that action.

(5) In determining whether or not to dismiss an action under paragraph (4), the court shall take account of the procedural consequences, both for the parties and for the work of the court, of allowing the action to proceed".

[25] Ordinary Cause Rule 15.7 was inserted by the Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) 2009 (SSI 2009/294), is effective as from 1 October 2009 and relevant to proceedings commenced on or after that date. It is a Rule which applies to this action.

[26] The current Ordinary Cause Rule governing the time for lodging an account of expenses is Rule 32.1A. That rule is as follows:

"**Time for lodging account of expenses**

32.1A (1) A party found entitled to expenses must lodge an account in process-

(a) no later than four months after the final judgement; or
(b) at any time with the permission of the sheriff, but subject to such conditions if any, as the sheriff thinks fit to impose….."

[27] As has been recognised, OCR 32.1A in its current form is not relevant. It is effective as from 29 April 2019 and applicable to cases where the date of final judgement is on or after that date (Act of Sederunt (Rules of the Court of Session, Sheriff Appeal Court Rules and Ordinary Cause Rules Amendment) (Taxation of Judicial Expenses) 2019 (SSI 2019/74). The same numbered Rule which subsisted at the time of final judgement in this case was in the following terms:

"**Order to lodge account of expenses**

32.1A A party found liable in expenses may, from 4 months after the date of the interlocutor finding him so liable, apply by motion for an order ordaining the party entitled to expenses to lodge an account of those expenses in process."

Dismissal of the action under Ordinary Cause Rule 15.7

[28] A fundamental requirement of Ordinary Cause Rule 15.7 is that a motion to dismiss can be made "while that action is depending before the court". This means the action is awaiting determination or a decision which disposes of the subject matter of the proceedings. I understand that to mean before final judgement, namely before the subject matter of the proceedings, excluding any matter relating to liability for expenses has been determined by taxation and decerniture. Given that final orders in the principal action and minute procedure were granted in 2015 and 2016 respectively, I do not accept Mr Logan's submission that the action remains depending before the court at this time. I do not accept that because this action relates to section 11 Orders regarding children the action remains in dependence for so long as it is competent to lodge a minute seeking variation of these orders. The action would only be in dependence if there was minute procedure before the court awaiting determination and, in my opinion, any motion in terms of OCR 15.7 could only relate to delay in the minute procedure itself. Further, I do not consider that the lodging and consideration of this motion means the action is in dependence before the court for the purposes of the Ordinary Cause Rule in question. On that basis the motion is incompetent.

[29] To view matters another way, both the principal action, and associated minute procedure, have been disposed of. Final judgements have been given. Within the four corners of this action, other than to grant decree for expenses following necessary taxation, or to adjudicate upon a minute seeking variation of section 11 Orders, the role of this court is *functus*. To do otherwise in the circumstances of the motion before the court would be to suspend or reduce the award of expenses which this court has already made. That cannot

be a competent method of review. It suggests an attempt at appeal against the award of expenses which cannot be within the competence of this court to consider.

[30] In any event, if I am wrong in law in reaching my conclusion on the competency of the motion, in the event that the action is depending before the court, I would still have refused the motion to dismiss under and in terms of Ordinary Cause Rule 15.7 for the following reasons.

[31] If the motion is competent I consider that all of the necessary requirements to succeed under the Rule have not been met. In particular, whereas I would accept that there has been delay in progressing the action and that the delay could be categorised as inordinate I do not consider that the delay could be categorised as inexcusable. The pursuer's reason for delay in proceeding to taxation was candidly given to the effect that the pursuer did not want to go to the expense of taxation until he knew there was a prospect of recovering expenses. On that basis the delay is, on balance, excusable.

[32] Furthermore, in the event that the action is depending before this court, I do not consider that the issue of unfairness could be determined at this stage. That could only be properly determined following a taxation having taken place. At the taxation objection can be taken to all or individual entries of the account. If that happens it is for the party claiming particular fees or outlays to justify these as reasonable to the satisfaction of the Auditor. Whereas the account lodged is for the sum of £223,926.72 it is, as yet, unaudited. I do not know what figure the Auditor will allow by way of taxed expenses. Furthermore, if all or some of the objections made to the Auditor are rejected by him, if the objections remain insisted upon, the matter will be considered by the Sheriff. Accordingly, at this time, I do not know, and no one knows, what the final award of expenses to be decerned for will

stand at. If no one knows the answer to that then the issue of unfairness cannot be quantified or fully considered at this stage.

[33] Even if the defender has established all of the foregoing elements, the procedural consequences for the parties is limited and the work of the court will not be impacted to any material degree. On that basis there is no reason why this action should not be allowed to proceed at this time.

[34] All of the above should be sufficient reasoning to refuse the motion. The defender raised further arguments which, in my opinion, went beyond the motion to dismiss under the Ordinary Cause Rule itself. Even if the further arguments based on prescription and the plea of mora, taciturnity and acquiescence could be advanced in support of the motion under Ordinary Cause Rule 15.7, or could competently be considered on a stand-alone basis, I would have refused each remaining line of argument for the following reasons.

Prescription

[35] The defender's argument is founded on extinction of certain obligations by the prescriptive period of 5 years provided for by section 6 of the Prescription and Limitation (Scotland) Act 1973. Schedule 1 of the Act has the effect of defining the obligations to which that section applies. It is submitted that the obligation here falls within the meaning of paragraph 1(f) of Schedule 1, namely an obligation of accounting, other than accounting for trust funds. I am not convinced that an interlocutor allowing a party to lodge an account for taxation falls within the definition of that prescriptive obligation. An interlocutor allowing a party to lodge an account for taxation does not create an obligation to account as commonly understood in law.

[36] In any event, a relevant exception to the five year prescriptive period is provided for by paragraph 2(a) of Schedule 1. It provides that section 6 of the Act does not apply to any obligation to recognise or obtemper a decree of court. The use of the words "recognise or obtemper" have been described as "excessively vague" (*Johnson on Prescription*, 2nd Edition, paragraph 6.40). That may be so but, to my mind, "recognise" in the context of the orders granting liability of expenses here, if given a straight forward or plain meaning leads me to the conclusion that the defender remains under an obligation to continue to "recognise" these yet to be taxed awards. Accordingly, the right to lodge an account for expenses, in my judgement, has not prescribed in terms of the 1973 Act.

[37] I also find force in the observations in the case of *Abram* relating to the operation of prescription. *Abram* considered the Court of Session equivalent Rule relating to dismissal due to inordinate and inexcusable delay resulting in unfairness. In considering the application of that Rule the Court described an attempt to seek assistance from the wider fields of limitation and prescription as "not a particularly fruitful exercise" (para 23). The Court considered that the concepts of limitation and prescription were not directly concerned with the progress of actions as distinct from timeous notice of claims. That is a conclusion with which I agree.

[38] Focussing on these observations in the case of *Abram* leads me to comment further on the current rule under 32.1A. It relates to the time for lodging an account for taxation and requires that an account must be lodged not later than four months after final judgement. That is not, however, prescriptive within the terms of the Rule itself. On the contrary, the Rule goes on to state that the account may be lodged "at any time" with permission of, and subject to conditions if any as considered appropriate by the Sheriff. Whilst the expectation

is that an account should be lodged within a relatively short period, my reading of the Rule suggests that the obligation to lodge an account for taxation, if indeed it is an obligation, does not prescribe under the five year extinction period.

Mora, Taciturnity and Acquiescence

[39] Finally, I turn to the plea of mora, taciturnity and acquiescence. Unless this can be preyed in aid of a competent motion under Ordinary Cause Rule 15.7 I do not consider it can be taken as an independent plea in bar of taxation in this action.

[40] As properly understood, delay in prosecuting a claim for a period shorter than a relevant statutory period of prescription or limitation is not in itself a defence to an action, but a pursuer may be barred from insisting on it if the delay has been prejudicial to the defender or if it gives rise to an inference of acquiescence on the part of the pursuer (see generally *MacPhail, Sheriff Court Practice*, 4th Edition, paras 2.148-149). The plea is ordinarily a plea to the merits of the action. There must be an irresistible inference of prejudice or acquiescence. In the facts and circumstances here delay on the part of the pursuer to seek taxation of expenses does not lead to an inference of acquiescence. Equally it does not lead to an inference of prejudice even if that is a relevant consideration. Facts as to the defender's ability to pay an award or expenses or the possible consequences of enforcement procedure are not agreed. I have already commented on the fact that no one can state what the final audited account will stand at.

[41] In any event, even if it was established in fact that the delay has, or will have, prejudicial consequences for the defender, related to what might ultimately happen to the transfer of a heritable property now in the name of the defender's sister, the defender cannot

hide behind her own inactions, or certainly not, for any remedy that she hopes to obtain within the four corners of this action. Accepted the pursuer did nothing to indicate his intention to pursue expenses until the account was lodged for taxation. Equally, the defender did nothing to ascertain if the pursuer intended to pursue expenses. I do not understand why she would not make enquiry prior to accepting the gift of a heritable property which would drastically change her financial circumstances if she remained concerned about the issue of liability for expenses. Had this been a relevant plea I would not have accepted the argument that there was no duty incumbent on the defender to clarify the intentions of the pursuer. The relevant rule anent lodging an account for taxation favoured the defender and would have pro-actively allowed her to progress the matter had she elected to do so. For whatever reason she chose not to avail herself of that rule. In those circumstances it is impossible to conclude that she has been prejudiced by the inaction or delay on the part of the pursuer.

Further Procedure

[42] For all of the above reasons, the defender's motion is refused. I have instructed the sheriff clerk to assign a hearing in relation to the question of expenses but parties may be able to agree a joint position on that, or any other matter arising, without the requirement for a hearing.