SHERIFF APPEAL COURT

[2022] SAC (Civ) 26
LIV-F367-20

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in the appeal in the cause

LINDSAY SIMPSON

Pursuer and Respondent

against

GAVIN SIMPSON

Defender and Appellant

Pursuer and Respondent: Aitkens, Livingston
Defender and Appellant: Urquharts, Edinburgh

26 August 2022

[1] This is an action for divorce, sale of property and payment of a capital sum. It called for a preliminary proof to determine the relevant date on which the parties ceased to cohabit as husband and wife. The pursuer and respondent (the "pursuer") averred the relevant date was 1 December 2019. The defender and appellant (the "defender") averred that the relevant date "had occurred by, at the latest, July 2016". After hearing evidence, the sheriff decided that the pursuer's case was proved. The defender appeals on the basis that the sheriff allowed the pursuer to lead evidence which went beyond the averments on record, and that the defender had no fair notice of the relevant lines of evidence. The defender

submits that exclusion of this evidence would have resulted in there being insufficient evidence to justify the sheriff's decision. The sheriff has granted permission to appeal.

The sheriff's assessment of the evidence

[2] The sheriff noted that the date of ceasing to cohabit requires objective assessment, and that the intention of the parties may be relevant, but is not determinative.

[3] The parties led only their own evidence, and there were no other witnesses. The sheriff did not find the defender to be credible or reliable. She found the defender to be unpersuasive, appearing to tailor his evidence to fit the circumstances as he wished them to be. She noted significant differences in his evidence from his own pleadings on record. She found the pursuer's account to be honest, open and straightforward.

[4] The sheriff found that the marriage was largely defined by the defender's career, leading to frequent trips abroad and absence from home. The pursuer gave up her job to care for the children. The pattern of the relationship meant that each party required to function quite independently from the other. In that respect the marriage differed from a more traditional model.

[5] The sheriff considered many aspects of the relationship. The parties holidayed together on occasions between 2016 and 2019 as a family and as a couple. Family milestones were celebrated as a family. She accepted that the relationship was under strain, but that the parties did not separate at that time. While the couple did not celebrate a landmark wedding anniversary, this was in keeping with their normal practice. The sheriff noted that the defender changed his position, from a terminus date in 2016 to a gradual breakdown of relationship over the subsequent year. The parties enrolled on a dog training course together. They shared a bedroom until late 2018 or early 2019, then they slept separately

due to the defender's snoring. Their house was big enough for them to sleep separately had they wished. They carried out home improvements together. They looked to buy new properties, but as a couple. They discussed concerns about the defender's health. They had a joint bank account and joint car, albeit the defender stated he would rather the pursuer did not drive the car.

[6] There was an incident on 30 November 2019 which marked a turning point. The defender objected to the pursuer driving a long distance in the family car, as he wanted to keep the mileage down. They argued. That day the defender told the respondent to stop using the joint bank account. The pursuer told the children the parties were separating but would live in the same household. She informed her brother she would seek legal advice. Christmas Day 2019 was spent apart.

The objections to evidence

[7] The sheriff records that during the hearing objection was taken to lines of questioning as to (a) holidays taken by the parties; (b) walking the dog together; (c) the parties consulting each other on significant matters; (d) the possibility of the parties buying another property, and subsequently viewing properties, and; (e) work done by the defender on properties solely owned by the pursuer. These points are founded upon in the appeal.

[8] The sheriff repelled those objections on the basis that these subjects were foreshadowed in the pleadings, at least in general terms, and that the amount of specification required was unreasonable. Reference was also made to an earlier counterclaim (not now founded upon).

[9] The defender has responsibly made detailed cross-reference to a transcript of the evidence, which means this court can have regard not only to the challenged evidence but also to the context. This is referred to below.

The averments on record

[10] The pursuer's averments do not set out any of these lines of evidence, but that is consistent with the pursuer's position. Her case does not rely on proving any significant event prior to her claimed date of separation, namely 1 December 2019. It was for the defender to prove that his claimed date, of July 2016 at the latest, was the correct one.

[11] The defender's averments raise, amongst other matters, the following: that the defender went on holiday to Turkey on his own about July 2016; that the parties no longer walked the dog together; that they went out together socially together rarely and only on exceptional occasions, and the same for family occasions; that they took separate holidays; that the parties did nothing to celebrate their anniversary; that the new car was not a family car but the defender's car.

The evidence objected to

[12] The first extract of evidence to which objection was taken relates to evidence of holidays taken alone. The transcript refers to a question in examination-in-chief of the pursuer. It related to the defender going on holiday by himself in July 2016, and whether it would have been unusual or significant. Objection was taken on lack of pursuer's averments. The sheriff, after hearing parties, repelled the objection.

[13] The second extract relates to a dog. The questioning was whether the parties had a dog and exercised it together prior to July 2016. The pursuer confirmed so. She was asked if

they exercised it between July 2016 and 2019 and confirmed that they did, and that they embarked on a six-week dog training programme. There was an unspecific objection which was not enlarged upon.

[14] The third extract related to discussion about significant events, between 2016 and 2019. An objection was made on the basis of no record. The pursuer's agent's position was that he required to prove none of this, as it was not his case. The question was allowed.

[15] The fourth extract related to work on the matrimonial home. It was led without objection.

[16] The fifth extract related to support by the pursuer for the defender. It related to encouraging medical help and discussing the reasons. It was led without objection.

[17] The sixth extract related to acquiring property elsewhere. It related to the possible acquisition of a holiday home. It was led without objection.

[18] The seventh extract related to work done by the defender on properties purchased in the pursuer's sole name. The proposition was that the defender did not know of these properties. The pursuer stated that they were bought with an inheritance, and the defender carried out work on them, in at least 2018. It was led without objection.

[19] The defender appeals on the basis that the sheriff erred in allowing these issues to be put to the pursuer, and put to the defender in cross-examination.

The law

[20] The defender relies on the following:

> "It is a fundamental rule of our pleading that a party is not entitled to establish a case against his opponent of which the other has not received fair notice upon record. It follows that a defender cannot be held liable upon a ground which is not included in the averments made against him by the pursuer. These are not mere technical rules, since their disregard would tend to create injustice, by imposing liability upon a

> defender for reasons which he had no opportunity to refute." (*Morrison's Associated Companies Ltd* v *James Rome & Sons Ltd* 1964 SC 160, per Lord Guthrie at page 190).

> "We accept that it is not incumbent on a party to aver in the pleadings every point of evidence which it is proposed to lead. On the other hand, the object of pleadings is to give fair notice to the other side of the case which is being made against it. In that situation, it is incumbent to give fair notice of any matter, the proof of which is necessary for the establishment of the case." (*Lord Advocate* v *Johnston* 1985 SLT 533 at page 534/535, per LJC Wheatley)

[21] These propositions are not controversial. The defender also maintains that it was not necessary to take objection on every occasion:

> "…there is no requirement, in our opinion, once a general objection has been clearly made at an earlier stage for that objection to be repeated on every occasion when an attempt is made to lead further objectionable evidence." (*Hislop* v *Lynx Express Parcels* 2003 SLT 785 per Lord Weir at p787 delivering the Opinion of the Court).

Decision

[22] The quotations from *Morrison's Associated Companies Ltd* and from *Lord Advocate* v *Johnston*, above, do not support this appeal. In the present case, the challenged evidence led from the pursuer did not relate to the pursuer's own case. The pursuer's case was that parties ceased to cohabit from 1 December 2019. Had the defender simply denied this, the pursuer had no requirement to discuss events before that date, or place these on record.

[23] The defender did not rely on a bare denial. He advanced his own positive case, that despite the parties still being married, they in fact ceased to cohabit at a much earlier date, namely in about July 2016. In doing so, he required to make his own averments to support such a case. He duly did so, in fairly limited terms. He assumed an evidential burden of proving his own, contrary case.

[24] The parties went to proof on those averments. Neither side was constrained to lead evidence only on their own averments. If there were a rule to the contrary, then neither

party could comment in evidence on the other party's position on record. The court would be deprived of a means of assessing the evidence on the balance of probabilities.

[25] Had the pursuer's rebuttal introduced material which was beyond the defender's prior knowledge, or which he could not fairly anticipate, then fair notice in the form of further averments may have been necessary. The means of giving fair notice is by averment on record. Each case will turn on its facts. What amounts to fair notice will be a matter for the decision of the court. The test in every case is whether the parties have received fair notice of the other's case.

[26] In the present case, the pursuer's rebuttal plainly did not involve the unfair introduction of unforeseen new evidence. There were only two witnesses, namely the parties. With reference to the numbered extracts, set out above, examination of the transcript and record shows the following:

[27] The first extract related to holidays taken alone. The defender averred, with reference to the period post-2016 that: "The parties did not go on holiday together, and instead took separate holidays, sometimes with one of both of their children." The matter was therefore raised by the defender himself, and he cannot complain that the pursuer was asked to comment on this averment.

[28] The second extract relates to dog training. The defender averred: "They no longer walked the dog together". The question (as opposed to the answer) did not relate to dog training, but to exercising the dog. The defender could not object to this question, as he himself raised the subject. The issue of training came from the answer, which arose naturally and directly from the question. It is not competent to object to an answer.

[29] The third to sixth extracts all relate to subjects raised by the defender himself. The third extract related to discussions about significant events. The defender averred: "The

parties did not discuss their activities with each other". The fourth extract relates to proposed work on the matrimonial home. The question related to running the home, and such decisions. The defender averred: "…the parties increasingly attended to their own domestic chores such as laundry, ironing, cooking and shopping." The fifth extract relates to support given by the pursuer to the defender. The defender averred: "The parties did not discuss their activities with each other." The sixth extract relates to the possibility of acquiring property. The foregoing averments cover this. The defender cannot complain of evidence being given on averments he has made.

[30] The seventh extract relates to work done on the pursuer's properties. The defender averred: "In 2018 the defender discovered that, in 2015 and then later in 2016 the pursuer had bought heritable properties in her own name…without making the defender aware she was doing so." From the transcript, the witness was asked: "Do you own any properties in your own name?", then: "It may be suggested your husband didn't even know you owned these two properties until 2018. Is that correct?" Both of these questions arise directly from the defender's averments.

[31] All of this is against a background of the pursuer's averments that: "Whilst the parties have had periods of difficulty and episodes of friction in their marriage for a number of years, neither party expressed to the other nor conducted themselves in a manner towards the other to state nor suggest that he or she considered himself or herself to have separated from the other party until on or around 1 December 2019".

[32] Accordingly it is evident that the defender has no legitimate complaint about fair notice. These were topics he himself introduced. The questions were asked during examination-in-chief of the pursuer, which was the only opportunity the pursuer had to comment. The pursuer led no evidence from third parties. She gave her own comments on

the defender's position. That is the essence of a proof. The defender may not have liked the replies, but he cannot complain he was taken by surprise that the subjects were discussed, or that the pursuer disagreed with him. Her position was plain on record. His averments expressly raised these topics.

[33] This appeal must fail, for those reasons.

[34] For completeness, had it been necessary to rule on the requirement to repeat objections, the general rule is that every objectionable question requires to be objected to. It is not sufficient for a party to sit quietly and then raise objections later. The only exception is when it has been accepted by the court that objections need not be repeated, on the basis that it is understood that there is a continuing objection to certain evidence. The dictum in *Hislop* v *Lynx Express Parcels* (above) was stated in the context of a case where this general rule was accepted (at paragraphs [8] and [9]), and that "effective objection" is required. The court stated:

> "The concept of an 'effective' objection is not self evident. The question must always be whether, in a given situation, it has been made clear to the court that a line of evidence is regarded as objectionable and that, in our opinion, can only be determined by an examination of the circumstances of each case." (at para [10])

[35] The court, in stating that an objection need not be repeated, applied the observation to "a general objection clearly made". In the present case I would not have been prepared to regard any of the objections to the fourth, fifth, sixth or seventh extracts, set out above, as a "general objection clearly made". One way of achieving clarity would be to ask the bench to make an express ruling that the general objection has been recognised and need not be repeated.

[36] The defender accepts expenses should follow success. I will therefore issue an interlocutor awarding the taxed expenses of this appeal to the pursuer.