SHERIFF APPEAL COURT

[2023] SAC (Civ) 2
PER-F23-20

Sheriff Principal MW Lewis
Appeal Sheriff AL MacFadyen
Appeal Sheriff T McCartney

OPINION OF THE COURT

delivered by APPEAL SHERIFF T McCARTNEY

in appeal by

JOANNA KNIGHT

Pursuer and Respondent

against

BARRIE JAMES HENDERSON

Defender and Appellant

Pursuer and Appellant: Malcolm QC; Blackadders LLP
Defender and Respondent: Hayhow QC; Macnabs LLP

4 August 2022

Introduction

[1] In this action the pursuer and respondent ("the pursuer") seeks decree for payment of a capital sum from the defender and appellant ("the defender") in terms of section 28(2) of the Family Law (Scotland) Act 2006 ("the 2006 Act").

[2] Section 28(2) insofar as relevant to the issue in dispute provides:

> "On the application of a cohabitant (the "applicant"), the appropriate court may, after having regard to the matters mentioned in subsection (3) make an order…."

[3] Section 28(8) provides that:

> "Any application under this section shall be made not later than one year after the date when the cohabitants cease to cohabit".

[4] The issue in this appeal is whether an application is made when the initial writ is lodged at the sheriff court or when the initial writ is served on the defender.

[5] Having heard submissions the learned sheriff found that the pursuer's application to the court was made timeously in terms of section 28(8) of the 2006 Act by lodging an initial writ at the sheriff court. The defender has appealed that decision.

Sheriff's decision

[6] The learned sheriff considered that the use of the words "application" and "applicant" in section 28(2) and 28(8) is significant. She considered that in selecting the word "application" Parliament meant something different from the time of commencement of the action. While the time of commencement of an ordinary action is clear, i.e. when defender has been cited, that is not necessarily the same as the time of commencement of an application.

[7] The learned sheriff noted the Opinion of the Inner House in *Simpson* v *Downie* 2013 SLT 178 where Lord Emslie identified the entitlement conferred by section 28(2) as of a procedural nature, permitting a claimant to seek a discretionary order from the court with a cohabitant having no independent substantive right to financial provision.

[8] In the sheriff's opinion there is a fundamental difference between "making an application" in order to create an otherwise non-existent right and "commencing an action" in pursuance of a pre-existing right.

[9] The sheriff decided that the making of an application by way of lodging of the initial writ establishes the section 28 right and secures jurisdictional competence if it is done within

the requisite time frame of one year. This step is anterior to subsequent processing which includes service of the writ in due course to effect the commencement of the action and to enable procedure to take place within the timetable laid down by the Ordinary Cause Rules 1993 (Amended) ("the OCR").

[10] The sheriff considered that to be in line with other types of litigation which are commenced by way of an application in which the *tempus inspiciendum* or relevant time is the time of lodging of the application itself. That is a matter entirely in the gift of the applicant and once the application has been made the clock effectively stops and the right to take further steps of procedure is established.

[11] The sheriff observed that it may well be the case that at the time when the initial writ is lodged the action cannot be said to have "commenced" in that the defender is not yet conjoined and will not be unless or until the action is served upon him or her. All that has occurred is that an application for an order has been made, and further procedure may follow thereon.

Submissions for the defender/appellant

[12] There is a right to make a claim in existence before any steps are taken to pursue that. The restriction imposed by section 28(8) is no more than an essential element of pursuing the right to make a claim; if the claim is not made within one year the court does not have jurisdiction to consider the matter.

[13] The sheriff's distinction between making an application in order to create an otherwise non-existent right and commencing an action in pursuance of a pre-existing right is an incorrect approach. It leads her to dismiss consideration of the fact that only once an action has been served is it in dependence and the jurisdiction of the court engaged. The

sheriff is in error in her view that there is no need for service in respect of an application to comply with section 28(8).

[14] The purpose of introducing a time limit for making claims was to avoid stale claims, and in order to allow a former cohabitant to know where they stand. It is not possible to give effect to that purpose if one interprets the term "application" in section 28 as meaning the date upon which an initiating document is lodged with the court.

[15] The procedure to be followed for section 28 claims is that an application is to be made by initial writ, under the OCR, in the Sheriff Court and by summons as an ordinary action in the Court of Session. An initial writ once submitted to the court, with an appropriate fee, for warranting is returned to the party who originally submitted it. They have a year and a day thereafter before they need to give notice of the claim being made, by service of the proceedings. Otherwise the instance falls: that is the initial writ is at an end and has no existence whatsoever.

[16] The context of an application in terms of section 28 is such that it is more appropriate to interpret an "application" as being one that the party who is being sued has to be given notice of within the time scales imposed so that they can react appropriately.

[17] The cases relied upon by the pursuer all deal with applications under different statutory contexts. The procedures adopted in each instance are different, being summary cause, petition or summary application each of which have their own peculiarities of procedure. They are of no real assistance to the court in interpreting the terms of section 28.

[18] In order to give a common sense interpretation to the time at which an application has been made, that has to be considered as being the point at which the applicant can do no more to ensure that the correct judicial process has been commenced, within any time restriction imposed. In the context of section 28 (and section 29), which require to proceed

as ordinary actions, that can only be achieved when the applicant has taken steps to convene the defender by service of the proceedings.

[19] If the interpretation adopted by the sheriff is applied, the situation is created whereby the nature of the proceedings is an ordinary action where the time bar will be deemed to have been interrupted without the other party to the proceedings being aware of their existence. Such would be an irrational or illogical result and therefore one that courts ought to generally avoid as a matter of statutory construction.

[20] The sheriff having erred in her approach to the interpretation of section 28 and the correct approach being that an application is made when the defender has been served with the proceedings in terms of which the claim is being made, the appeal should be allowed.

Submissions for pursuer/respondent

[21] The sheriff was correct both in her analysis of the law and in her decision as to the outcome. The statutory formulation adopted in section 28(8) requires the making of an "application" not later than one year after the day on which the parties ceased to cohabit. Section 28 makes no reference to "commencement of an action". The statutory formulation adopted in section 28(8) requires to be given its ordinary meaning.

[22] The application contemplated in section 28(8) is an application to have the court exercise its discretion to effect compensation in respect of an imbalance of economic advantage or disadvantage flowing from contributions made by cohabitants during the period of their cohabitation.

[23] Until the 2006 Act came into force no such right to compensation existed in Scots law, whether at common law or under statute. The making of an application under section 28 is the initial assertion of the pursuer's right to compensation. It validates and establishes the

jurisdictional competence of the court to regulate further procedure by which the right may be vindicated.

[24] When the initial writ is lodged with the sheriff clerk, accompanied by the appropriate fee, the "application" is made. The jurisdictional competence of the court to deal with the action has been invoked, and the right to seek payment under section 28 is created, so long as the application is made before the expiry of the time limit set out in section 28(8).

[25] Thereafter, the procedure by which an applicant's section 28 right to compensation is to be judicially determined is governed by the OCR relating to family actions. Such actions are ordinary causes brought by initial writ and which commence when the defender is convened by valid citation.

[26] Accordingly, the making of an "application" under section 28 of the 2006 Act and the "commencement of an action" under the Ordinary Cause Rules 1993 are conceptually and legally distinct.

[27] The sheriff's reasoning and judgment are unimpeachable and the appeal should be refused.

Discussion and decision

[28] A cohabitant's entitlement to claim for financial provision following the end of cohabitation was created by section 28 of the 2006 Act. In *Simpson* v *Downie* 2013 SLT 178 Lord Emslie described the entitlement created by section 28(2) as:

> "of a procedural nature, permitting a claimant to seek a discretionary order from the court. A cohabitant has no independent substantive right to financial provision. Section 28(2) conferring the new entitlement and sub-section (8) spelling out the time limit, seem to us to be intimately connected…… it is only compliance with the time

> limit which validates an application and clothes the court with the necessary jurisdiction."

[29] The entitlement is conferred by section 28(2). It is not created by the application. The learned sheriff has erred in finding that by making the application in terms of section 28(2) the applicant is, in effect, creating the right upon which she can then proceed.

[30] For the court to have jurisdictional competence a claim must be made within the time period set out in section 28(8). What was held in *Simpson* v *Downie* is that it is only compliance with the time limit which validates an application and clothes the court with the necessary jurisdiction.

[31] The issue for this court is what constitutes the making of an application. That was not an issue considered by the Inner House in *Simpson* v *Downie.*

[32] The sheriff attaches weight to the use of the words "application" and "applicant" in section 28. However section 28 is far from unique in that choice of wording. In section 11(3) of the Children (Scotland) Act 1995 "application for an order is made", in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 section 3 one can "apply to the court for an order" and in section 8 of the Family Law (Scotland) Act 1985 either party "may apply to the court for one or more of the following orders" for financial provision on divorce. All such actions proceed as family actions under the ordinary cause procedure. The learned sheriff errs in attaching special significance to the use of these words and concluding that in selecting the word "application" Parliament meant something different from the time of commencement of an ordinary action.

[33] When the 2006 Act came into force, the Act of Sederunt (Ordinary Cause Rules) Amendment (Family Law (Scotland) Act 2006 etc.) 2006 - SSI 2006/207 rule 2(58) provided for such actions to proceed as ordinary actions. By Act of Sederunt (Sheriff Court Rules)

(Misc. Amendments) 2012 – SSI 2012/188 such actions were added to definition of "family actions" in ordinary cause rule 33.1. "Family actions" proceed as ordinary actions but subject to special provisions as set out in Chapter 33. Thus an action under section 28 of the 2006 Act has always proceeded as an ordinary action in terms of the OCR.

[34] It is long established that an essential requirement for commencement of an ordinary action in the Sheriff Court is service of the initial writ, which is to give the defender notice of the writ and an opportunity to intimate an intention to defend *(Macphail*, 4th Edition, Paragraph 6.01*).* Subject to certain qualifications including interim orders such as interim interdict or interim delivery before service, arrestment on the dependence or to found jurisdiction which may be used before service, an action does not commence until the defender is cited. An application cannot be said to have been made under ordinary cause procedure before the action is commenced. There is no basis upon which to apply a special and different rule to an ordinary action which comprises an application in terms of section 28.

[35] The appellant relied upon the cases of *Secretary of State for Trade and Industry* v *Josolyne* 1990 SLT (Sh Ct) 48, *Secretary of State for Trade and Industry* v *Campleman* 1999 SLT 787, *Secretary of State for Trade and Industry* v *Normand* 1994 SLT 1249 and *Superdrug Stores PLC* v *Network Rail Infrastructure Ltd* 2006 SC 365 in support of the proposition that an application is made when the initial writ was lodged with the sheriff clerk. However each of those cases dealt with statutory applications and each had a very different context to that under consideration here.

[36] Each case in which the date of application was held to be the date of presentation/lodging of the relevant document involved from the outset the control of procedure by the court. In the Court of Session the petition is placed before a Lord Ordinary

for a first order; in the Sheriff Court the warrant for service of a summary application fixes a date of first calling before a sheriff and in a summary cause return and calling dates. The common thread in these cases is that the presentation of the petition, summary application or summary cause summons places the action under the control of the court or sets on course the appropriate judicial process.

[37] In contrast, in respect of actions initiated by summons or initial writ, there is no conjoining of parties so as to involve the court's jurisdiction until the defender has been cited by service of the initial writ. The distinction between the form of procedure in petition, summary application or summary cause and an ordinary action in the Sheriff Court is explained by Lord President Hamilton in the *Superdrug Stores* case:

> "In particular, it may be noted that in *Secretary of State for Trade and Industry* v *Normand* Lord Sutherland, in holding that an application had been made to the court on the date upon which the petition had been lodged in court, proceeded on the basis that under the relative rules 'the rest of the procedure follows automatically' as from that moment. That *dictum* tends to support the view that it is when, and only when, the would-be applicant has taken a step which, without more on his part, sets on course the appropriate judicial process that he can be truly be said to have made his application."

[38] In an ordinary cause action in the Sheriff Court the lodging of an initial writ and granting of a warrant for service does not place the action under the control of the court or set on course the appropriate judicial process. That requires service of the initial writ within a year and a day being a matter entirely within the control of the pursuer as to if and when to do so.

[39] An action brought under section 28 is an application by an individual for an order against another individual to make payment. An unserved, warranted, initial writ has no effect on the rights or property of either party. It would be anomalous for the time limit in this species of action under the OCR to have a different commencement date from time

limits in other types of action under the same rules. None of the authorities to which we were referred support the existence of some intermediate phase in ordinary cause procedure of an application having been made with no proceedings commenced.

[40] Parliament could have provided that an application under section 28 be under some other procedure such as summary application, but did not.

[41] For the defender it was submitted that it would be contrary to the intention of the time limit, which is to discourage stale claims and allow parties to a terminated cohabitation to know where they stand, to effectively increase to two years the period within which a claim has to be intimated to the defender. The side effect of upholding the sheriff's decision would be the potential for prejudice to the defender by delay in knowledge of the claim until potentially two years after cessation of cohabitation.

[42] In response the pursuer submitted that any time limit is entirely arbitrary and there are good policy reasons to prevent recalcitrant defenders avoiding service by allowing the pursuer a period for service after making the application.

[43] We note that the Inner House in *Simpson* v *Downie* observed that any strict statutory time limit with no power of extension or relief may cause hardship in some cases. It is not difficult to envisage circumstances which could be thought to be unfair on either side. However there is no discretionary element in section 28(8) and the court requires to decide the matter on the basis of statutory interpretation and application of the rules of court to the action before it. The inclusion in the section of that time limit is not material to the determination of this issue raised in this appeal.

[44] For the reasons stated, we conclude that compliance with the provision that an application for financial provision by a cohabitant has to be made no later than one year

after the day on which the parties cease to cohabit requires service of the initial writ on the defender within that period.

[45] Having concluded thus, there remains a factual dispute in this case as to whether valid service was effected within one year after the cessation of cohabitation. That factual dispute will require to be determined at first instance.

[46] Therefore we shall allow the appeal, recall the sheriff's interlocutor of 22 June 2021, and remit to the sheriff to proceed as accords.

[47] We shall grant sanction for the employment of senior counsel and find the pursuer and respondent liable to the defender and appellant in the expenses of the appeal as taxed.