SHERIFF APPEAL COURT

[2023] SAC (Civ) 31

Sheriff Principal Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL ROSS

in the appeal in the cause

TH

Pursuer and Respondent

against

VH

Defender and Appellant

Defender and Appellant: Hayhow KC; Gibson Kerr
Pursuer and Respondent: Scott KC; SKO

7 November 2023

[1] The defender and appellant (the "defender") challenges the orders for financial provisions made on divorce. The sheriff, along with other awards, found the pursuer and respondent (the "pursuer") liable to make payment of a capital sum, made no order for aliment of the parties' child, and ordained the defender to transfer her interest in the former matrimonial home to the pursuer. These are the elements of the overall interlocutor dated 4 May 2023 which are challenged.

The background

[2] The parties were married in 2017 and separated in 2021. They have a child together, born in 2019 and now aged 4 years. They were able to agree residence and contact, and those orders were pronounced of consent, as was decree of divorce.

[3] The child resides with the defender and the pursuer exercises regular contact, arranged around his regular requirement to work abroad. She attends a fee-paying nursery. The pursuer's undertaking to pay half the nursery/school fees and billed extras was noted in the sheriff's judgment. The Child Maintenance Service have made an assessment requiring the pursuer to pay maintenance for the child of £1,281 per calendar month.

[4] The matrimonial property includes the jointly-owned matrimonial home and contents, a joint bank account, the pursuer's three bank accounts and defender's single bank account, and pensions for each of the pursuer and defender. There is a joint matrimonial debt of the loan secured on the matrimonial home. The pursuer has met all but one of the debt repayments on that loan, which has served to reduce the outstanding loan. The pursuer's payments totalled approximately £80,000 and the defender's £1,730. The current loan amount outstanding is approximately £560,052, with £33,371 having been redeemed. The former matrimonial home is valued at £1,300,000. The pursuer spent a great deal of time, money and effort on improvements on that home. The parties have agreed division of the house contents.

[5] The purchase of the matrimonial home was partly funded by the proceeds of sale of an earlier property owned jointly by the parties (bought by them prior to the marriage in 2015). They had made unequal contributions to the purchase of that earlier property. They also made unequal contributions from their non-matrimonial funds towards the purchase of the matrimonial home. Overall, the pursuer contributed £314,111 and the

defender contributed £24,111 towards the purchases. The pursuer works as a project engineer. He has received various payments from his new partner, and also from his parents. He has significant savings. The defender has an income of around £2,655 a month, and company car.

[6] The sheriff's judgment noted in terms of section 8(2) of the Family Law (Scotland) Act 1985 (''the Act'') that any orders made required to be justified by the principles in section 9 of the Act and to be reasonable with regard to the parties' resources (defined as both present and foreseeable future resources in terms of section 27). The applicable principles in the circumstances of this case are: the fair sharing of the of the net matrimonial property in terms of section 9(1)(a) and section 10(1), subject to any applicable special circumstances in terms of section 10(6)(b); the fair sharing of the economic burden of child care in terms of section 9(1)(c); and consideration of the degree of the dependence of the defender on the pursuer and whether as result, the defender should be awarded reasonable financial provision, over a period of not more than 3 years, to enable her to adjust to that loss of support in terms of section 9(1)(d).

[7] The sheriff noted that this had been a short marriage, of 3 years and 8 months.

[8] In relation to the former matrimonial home, the sheriff noted that the defender wanted it exposed for sale on the open market. The pursuer did not, and sought transfer to him, with a balancing payment to the defender. He led evidence that he had spent thousands of hours drawing up plans, designing structural changes, dealing with work tenders, and sourcing materials. It would provide a base for contact with their child. The evidence was that the pursuer could obtain finance to pay a capital sum to the defender. Marketing would involve further cost. After considering competing expert evidence, the sheriff found that the evidence established a reasonable valuation of £1,300,000.

[9] The sheriff considered the source of the funds for both the earlier property and the matrimonial home, a somewhat complex arrangement. After a reasoned exercise in making allowances for each party's contributions, he found that the defender's interest in the former matrimonial property was reasonably valued at £224,974. He considered it fair to reflect the defender's claims by taking a more generous valuation, and made a fair allocation of the property of one-third to the defender. That brought out a figure of £246,650. This was further adjusted to a sum payable to the defender of £255,000.

[10] He also made an order of periodical allowance of £500 for 18 months, to allow the defender time to adjust to her new circumstances, and reflecting that the pursuer had already been paying her monthly since separation. That order is not challenged.

[11] He found that no payment of child aliment should be ordained. He found that the jurisdiction to do so rested with the Child Maintenance Service, so the court was precluded from making an order by section 8 of the Child Support Act 1991.

Submissions for the defender and appellant

[12] For the defender, it was submitted that, while the sheriff had a wide discretion in arriving at a fair division of matrimonial property, section 8(2) required any order to be reasonable with regard to the parties' resources. That was not a matter of discretion. The sheriff had erred in failing to apply his mind to the question of resources. The court should first identify the matrimonial property, then ascertain whether a departure from an equal division was justified. Thereafter, the sheriff should assess whether the proposed award was reasonable having regard to resources (*Murdoch* v *Murdoch* [2012] CSIH 2). It is this last element which was missing here.

[13] Further, the judgment required to leave the reader in no real and substantial doubt about the reasons for the decision. On appeal, the court could intervene if satisfied that the sheriff did not exercise his discretion, or misdirected himself in law, or erred in what evidence was taken into account, or his conclusion was such that error requires to be inferred (Macphail; *Sheriff Court Practice* (4th ed) at paragraphs 17.10 and following; 18.159 and following). In the present case, the financial outcome indicated that the sheriff had failed to take elements of the evidence into account, and had arrived at a conclusion which was manifestly wrong. This was the overall basis of the appeal.

[14] The first ground of appeal related to an error in the award of a capital sum. The sheriff erred in failing to have proper regard to the parties' resources. Had he properly considered these, he would have found that the payment of a capital sum of £255,000 to the defender was inadequate to represent a fair sharing of the matrimonial property, or the economic burden of caring for the child. The relevant factors included that the defender had limited borrowing capacity as a result of her limited income; she had incurred liability for legal fees; the child would reside primarily with her with resulting cost burden; there were ongoing and considerable nursery costs, and she required to purchase a house for them both and wished to reside near the school. By contrast, the pursuer had substantial resources. His net income was substantially higher than hers; he had considerable capital resources; his ability to borrow was higher, and he would not have to bear the expenses of buying property. Considerable legal fees would be deducted from the capital sum. This would not leave enough to purchase a property in the area near to the school, which is in the centre of Edinburgh. In consequence, the matter was at large for this court to decide.

[15] The second ground concerned payments made by the pursuer towards the joint loan following separation, which were taken into account in calculating the capital sum. The

sheriff deducted the sum of £33,371 from the calculation of the pursuer's net assets. It was contended that at most, only half of this sum ought to have been deducted from the calculation reflecting that fact that the mortgage was a joint liability. Further, the sheriff ought to have treated mortgage payments as a form of interim aliment, as reflected in the court's interlocutor of 25 November 2022. A pursuer who meets his alimentary obligations pending divorce should not be credited with those payments as an advance of capital to the defender.

[16] The third ground was a specific error in requiring the defender to transfer her interest within 1 month of the order. Senior counsel accepted that this point had been overtaken by the passage of time since the sheriff's interlocutor. It does not require adjudication.

[17] The fourth ground related to a failure to order discharge of the heritable security over the matrimonial property. During the appeal an undertaking was given at the bar that the pursuer would do so. It is no longer an appeal point.

[18] A fifth appeal point, relating to child aliment payments, was not insisted in, as child maintenance payments are now operating under statutory authority.

Submissions for the pursuer and respondent

[19] For the pursuer, it was submitted that question of how matrimonial property should be shared is a matter of exercise of the sheriff's discretion. The present grounds concern matters of detail for the court of first instance and not matters to be opened up for reconsideration on appeal (*Little* v *Little* 1990 SLT 785 at p787B).

[20] The sheriff heard evidence over 4 days, on the subjects of the value of the former matrimonial home, whether it should be transferred or sold, the extent of the capital sum

paid to the defender, and disclosure of assets. Parties did not dispute equal division of assets, except for the former matrimonial home.

[21] Ground 1 is to some extent affected by ground 2, as it is a total calculation. Otherwise, senior counsel submitted that the sheriff had carried out a careful assessment exercise, and set out the elements which went to make up the decision. He had selected one of the four options presented by the parties, and explained the reasons for so doing. In awarding a periodical allowance he had taken into account the parties' resources, and the award formed part of the overall award. It therefore had to be taken into account in assessing the fairness of the award, and reassessed in the event that the capital element was disturbed.

[22] Ground 2 related to loan repayments. The defender had only made a small payment. The pursuer's contribution was properly deducted from the calculation, and was not wholly deducted from the calculation of sums due, which was a correct calculation. Interest payments had, in fact, been treated as alimentary as they had been left out of the calculation. In any event, the figure of £255,000 represented an increased figure beyond the arithmetical result. A change in arithmetic would therefore not demonstrably have led to an increased final figure.

[23] Ground 3 was justified, not least because it was part of the crave and therefore should have directly been in the defender's contemplation. The defender made no submission on that. Further, the remedy was not in appeal, but an application under section 12(4) of the Act. There were in any event counter-balancing considerations which the sheriff had noted. More fundamentally, the passage of time rendered this ground otiose.

[24] Ground 4 was met with an undertaking to discharge the heritable security. Ground 5 was not insisted in. Neither required further judicial consideration.

Decision

[25] The making of an award of financial provision under section 8 of the Act is essentially a matter of discretion, aimed at achieving a fair and practicable result in accordance with common sense (*Little* v *Little* 1990 SLT 785; *Jacques* v *Jacques* 1997 SC (HL) 20 per Lord Jauncey at p21, approving *Little*). Flexibility is given by the provisions of sections 9 and 10(6). It is important that the details should be left in the hands of the court of first instance and not opened up for reconsideration on appeal. The grounds on which an appeal court can interfere with a sheriff's award of financial provision are: that the sheriff misdirected himself in law; or failed to take into account a relevant and material factor; or took into account an irrelevant factor; or reached a result which is manifestly inequitable or plainly wrong. An appellant has to demonstrate one of these grounds applies.

[26] Taking these considerations in turn, there is no misdirection in law in the present case. The sheriff did not misdirect himself in law, as it is plain that he applied the principles set out in sections 9 to 11 of the Act. He refers to those principles at paragraph 6 of the judgment, and repeatedly refers to either reasonableness or fairness at paragraphs 8, 10, 36, 38 and in the disposal at paragraph 46. The defender's submission to the effect that the sheriff failed to apply his mind to the question of reasonableness is, on the face of the judgment, unsupportable. Even had the sheriff arrived at an unreasonable decision on the facts, that does not by itself convert an error of fact into an error of law. Counsel placed reliance on the sheriff's discretion being constrained by section 8(2) of the Act (*Jacques*, above), but it is plain from the judgment that the sheriff had in mind, and was applying, the principles of the Act, not exercising an unfettered discretion. The sheriff did not err in law.

[27] Thereafter, the defender also submitted that the sheriff erred in failing to take into account relevant and material factors. This was by failing to have proper regard to the parties' resources. Had he properly considered these, he would have found that the payment of a capital sum of £255,000 to the defender was inadequate to meet her needs and those of their child. The defender's position on appeal was that the outcome proves that the error was a manifest one. The defender's submission amounted essentially to an attempt to open up the analysis of the facts, and to ask this court to step in and make a substitute award.

[28] The submission centred on post-divorce accommodation. Counsel revisited some of the same arguments which the sheriff heard, namely the effect of the accommodation on the child's journey to school; the pursuer's inability to afford to purchase a house close to the school in the city centre, and the fact that the child would mostly reside there. The defender's resources were depleted by paying legal fees and child care and nursery fees, on a much smaller salary than that of the pursuer. It was submitted that the sheriff had left this out of account and had not resolved competing submissions.

[29] This submission criticised the sheriff for apparently failing to address part of the defender's submission. The statutory requirement of the sheriff was not, however, to address every aspect of the competing claims, but to reach a fair sharing of matrimonial property, taking fair account of economic advantage and burden. A fair reading of the judgment shows that the sheriff carried out this task and, in doing so, considered in detail the financial resources of the parties. He considered that special circumstances applied to displace the presumption of equal sharing, namely that the matrimonial home had been purchased, and the loan repaid, with unequal contributions of funds. The marriage had been a short one. The pursuer had contributed considerably more to the matrimonial

property, including thousands of hours of unpaid labour. The defender has aspirations to purchase a property close to Edinburgh city centre. That, however, does not form a consideration under section 9(1) of the Act, which requires a fair sharing of the net value of the matrimonial property, and economic burden of caring for a child, essentially a retrospective exercise. While section 9(1)(d) makes provision for a party to be awarded a sum to allow adjustment for loss of support, that award is limited to no more than 3 years, and in any event the defender enjoyed pre-divorce financial support and received a post-divorce award. Subsection (e) is not founded upon, but in any event does not meet the pursuer's aim. None of these provisions supports the defender's position that she was unfairly treated.

[30] The sheriff took into account, and listed, the respective assets of the parties, and described how the special circumstances led to a departure from the presumption of an equal split. In doing so he correctly applied the Act principles. The sheriff cannot be faulted for not specifically repelling a submission which did not make any difference to his overall task.

[31] It follows that I do not accept that it has been demonstrated that the sheriff failed to take into account material facts. It is not submitted that the sheriff took into account any irrelevant fact.

[32] The remaining ground for challenge is that the sheriff reached a result which is manifestly inequitable or plainly wrong. The defender's secondary position, in ground 2, was that the sheriff made manifest errors in calculating the sums payable. He is said to have made an error in leaving approximately £1,730 of mortgage payment out of account. More significantly, he is said to have ignored that post-separation mortgage payments made by the pursuer were alimentary in nature. Third, he miscalculated that £33,371 of

post-separation mortgage payments made by the pursuer should serve to reduce the whole loan liability, rather than only the half for which he was liable. The pursuer should not be credited with one-half of that sum, of £16,685, because he was redeeming his own liability, not that of the defender.

[33] In relation to the first point, the sum of £1,730 is *de minimis* in the context of the wider calculation and does not demonstrate any discretional error. From *Little* (above), describing the task undertaken by the Lord Ordinary:

> "It was unnecessary for him in this case to value every item of matrimonial property or to calculate a single lump sum representing the net value of the entirety of the matrimonial property as a whole…If counsel for the defender's argument is right, there would be no escape from valuing every single item of property however trivial and however irrelevant it might be to the ultimate division which is to be made. But this would be absurd, and I cannot believe that it was the intention that an exercise of mathematical precision to this degree was to be carried out."

It falls properly to be disregarded for the purposes of section 9(1)(a) of the Act.

[34] The second factual challenge is that the payments towards the mortgage were not merely intended by the parties to pay off the loan, but rather to support the defender. Senior counsel for the pursuer submitted that these points had not, in fact, been argued before the sheriff. That would explain no mention being made in the judgment. In any event, in relation to the point about aliment, the figure of £33,371 was only part of the sum paid by the pursuer - the whole payments made by the pursuer post-separation was approximately £80,000. The sheriff had only taken £33,371 of that into account as payment towards the loan. It followed that the difference, approximately £47,000, was treated by the sheriff as alimentary.

[35] In relation to the third point, that the payment of £33,371 served in part to pay the defender's liability, this ground is not made out. The £33,371 was deducted from the

defender's net assets in the calculation undertaken, not subtracted in its entirely from the sum due to the defender. There is no apparent error in the sheriff's arithmetic.

[36] In applying section 9(1)(c), the sheriff had given proper regard to the parties' responsibility to share the economic burden of caring for their child. The pursuer was awarded an uplift to reflect the cost of housing.

[37] These points are intended to show that the sheriff reached a result which is manifestly inequitable or plainly wrong. I agree with the submissions for the pursuer that the defender has not done so. She has not, in my judgment, presented a picture where it can be shown the sheriff erred in the overall sum granted. The foregoing observation in *Little* applies here. This type of challenge is only sustainable where it has led to the overall distribution of matrimonial property not complying with the principles of the Act. An appeal cannot be based on selecting items to criticise, while not demonstrating that the overall settlement was unjust. The latter exercise would require examining the entirety of what is a comprehensive, and carefully explained, exercise carried out by the sheriff.

[38] In any event, there was no error in the sheriff's treatment of the principal asset, the matrimonial home, and the associated loan. The sheriff noted that the marriage was short and the defender's resources brought to the marriage were limited. He explained that the unequal contribution of assets amounted to special circumstances, requiring a departure from the principle of equal sharing. He considered, and rejected, a starting point which took into account only the contributions of parties towards purchase and improvement. That would have resulted in an allocation of 85% of the value of the matrimonial home to the pursuer and 15% to the defender. Instead, he adjusted the figure to reflect the wider circumstances, to the defender's benefit. The defender has been treated fairly as a result. Separately, the pursuer has shown that the arithmetical treatment of the payment of £33,371

is supportable. That alone is sufficient to show that there is no manifest error. In addition, I accept the pursuer's submission that not only has the defender failed to show that the figure of £33,371 is incorrect, but the figure can be demonstrated to be correct.

[39] Accordingly, for all these reasons, the defender has not shown that the order for financial provision did not comply with section 9 of the Act. She has not shown that the sheriff has erred in law, or misapplied facts. She has not demonstrated a result which is manifestly inequitable or plainly wrong. That is a high hurdle. In the words of Lord Clyde in *Jacques*:

> "…the matters raised are points of detail and not of principle and it cannot be held that any error has been made so gross as to warrant any alteration being made".

So is it in this case.

[40] The court is obliged (section 8(2)(a)) to make an order which is justified by the principles set out in section 9, but which is also (section 8(2)(b)) reasonable having regard to the resources of the parties. This assessment of reasonableness relates to the assessment already made. It does not operate to introduce a new ground of claim. It does not compel assessment of, or justify an increase of award to achieve, the financial, residential or lifestyle aspirations of either party. That, in essence, is what the defender seeks.

[41] For completeness, I also agree that this court would not have been in a position to make a new decision on the facts, even had it been appropriate, as there was no sufficient principal evidence before the court to allow a full and balanced reassessment of the whole assets. That exercise is a holistic one. It cannot be carried out by consideration of isolated points only. It is doubtful that such an exercise would be justified other than in extreme circumstances.

[42] Grounds 3, 4 and 5 of the appeal have been resolved by passage of time, resolved by undertaking, and withdrawn, respectively. They require no decision.

Disposal

[43] The appeal is refused, and this court adheres to the interlocutor of the sheriff. This appeal has suspended the effect of decree of divorce. The relevant orders will require to be made of new. Accordingly, this court will pronounce of new an interlocutor reflecting the awards made by the sheriff in the original interlocutor dated 4 May 2023.

[44] I will reserve the question of expenses for further submission. Parties should attempt to agree these in the light of this opinion. If no agreement has been reached within 21 days the court will fix a further hearing, whether by appearance of parties or in writing.