SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

A415/12

JUDGMENT

of

SHERIFF PRINCIPAL C A L SCOTT, QC

in the cause

Stephen George Gallagher Cameron

Pursuer

against

Caroline Frame Lukes

Defender

Glasgow, 3 December 2013.

The sheriff principal, having resumed consideration of the appeal, Allows same; Recalls the sheriff's interlocutor of 2 April 2013; in lieu thereof Grants decree for payment by the defender to the pursuer of the sum of Twelve Thousand Five Hundred Pounds (£12,500) with interest thereon at the rate of 8 per centum per annum from the date of citation until payment; Refuses the cross-appeal; Finds the defender liable to the pursuer in the expenses of the appeal procedure and in those of the action as a whole; Allows an account thereof to be given in and remits same, when lodged, to the auditor of court to tax and to report thereon; Certifies the appeal procedure as suitable for the employment of junior counsel.

NOTE:-

[1] This appeal concerns the sheriff's treatment of an application by the pursuer under section 28(2) of the Family Law (Scotland) Act 2006. As senior counsel for the pursuer pointed out, there is no equivalent "stand alone" application under the same provision, at the instance of the defender. The defender simply lodged defences resisting the pursuer's claim and founding upon the offsetting provisions in section 28.

[2] Having heard evidence, the sheriff determined that the defender had derived economic advantage from contributions made by the pursuer (see section 28(3)(a)) and that to the extent of £12,500. The foregoing figure was rounded up from £12,483.33, the latter sum having been the subject of express acceptance by the defender. (See the sheriff's note at paragraph 66). The sheriff held that no economic disadvantage arose in terms of section 28(3)(b).

[3] At paragraph 79 in his note, the sheriff went on to consider whether the economic advantage derived by the defender (viz. £12,500) was offset by any disadvantage suffered by the defender in the pursuer's interests. He answered that question in the affirmative. In the course of the appeal, the sheriff's justification for doing so was criticised by senior counsel for the pursuer.

[4] The parties had cohabited in subjects at Calico Way, Lennoxtown, which were owned by the defender. The sheriff determined that the pursuer had lived at Calico Way for the duration of the cohabitation and had done so "entirely rent-free". In the view of the sheriff, there was "a clear benefit to the pursuer in his living arrangements". At paragraph 81 in his note, the sheriff concluded that any advantage to the pursuer lay not in saving in mortgage payments but rather in what he was benefitting from, namely, living rent-free.

[5] At paragraph 82, the sheriff characterised the disadvantage suffered by the defender as not receiving an income from a co-resident. He stated that, "Her evidence

was that, amongst other options following the break-up of her marriage, she would have rented a room to a friend who was in similar circumstances. Because she allowed the pursuer to stay, she was unable to gain this income, which I accept was likely to be received, as the house was an attractive one. In my view loss of rent is a clear economic disadvantage."

[6] The sheriff's treatment of the loss of rental suffered by the defender is to be found at paragraph 84 in his note. His overall approach at paragraphs 82 to 84 was challenged by senior counsel for the pursuer. She submitted that there had been no evidence upon which to base the sheriff's conclusions. Moreover, senior counsel pointed out that there was no record to support a case based upon the contention that economic disadvantage in the pursuer's interests arose through rent-free living on his part and the defender's inability to rent out a room. Senior counsel explained (without demur from the defender's counsel) that there had been an attempt at the proof to lead evidence regarding rental income. Objection was taken, the question had been withdrawn and no other evidence had been elicited.

[7] Senior counsel reminded the court that the defender had opposed the pursuer's application primarily on the basis that she had not derived economic advantage from the pursuer's contributions but also because she contended that the pursuer had suffered no economic disadvantage in her interests. The application had been opposed on no other basis.

[8] The motion advanced on appeal by the pursuer was for the sheriff's award in the sum of £4,400 to be substituted by an order for payment by the defender to the pursuer in the sum of £12,500. In other words, the final sentence in finding in fact 3 ought not to stand and, consequently, there would be no offset in terms of section 28(5).

[9] In reply, counsel for the defender, initially under reference to the cross appeal, invited the court to allow the cross appeal; to recall the order made by the sheriff; and to make no order for payment of a capital sum under section 28(2)(a). Counsel also

submitted that if the court did not find favour with the defender's principal line of argument, then the existing order as made by the sheriff should stand.

[10] Counsel for the defender reflected upon whether the sheriff had properly assessed the net economic disadvantage experienced by the defender. She recognised the nature and extent of the evidence he had taken into account and conceded that, for instance, there had been no evidence regarding the identity of the individual who might have rented a room from the defender or the level of rental which a room in the house at Calico Way was likely to attract.

[11] It was submitted that the sheriff had set about the exercise of assessing the sacrifice made by the defender in favour of the pursuer. Counsel for the defender, in response to the principal appeal at least, supported the sheriff's approach. She argued that the identity of any prospective tenant was not a crucial factor nor was there any requirement for precise quantification *quoad* economic disadvantage under section 28(5). The Supreme Court in *Gow v Grant* 2013 SC (UKSC) 1 had made that clear.

[12] In turning to the cross appeal, as the debate evolved, a somewhat acute difficulty arose for the defender's counsel. She had indicated that the third substantive ground of appeal was not insisted upon. However, in attempting to focus upon grounds 1 and 2, it emerged that in substance neither of those grounds of appeal had found their way into the defender's pleadings at the stage when a proof before answer had been allowed. Moreover, there had been no attempt to present the substance of the cross appeal arguments before the sheriff nor had there been any attempt to amend the defender's written case.

[13] It was also pointed out that grounds 1 and 2 in the cross-appeal founded upon economic *advantage* gained by the pursuer. That could only become a consideration via section 28(6). However, the sheriff had determined that there had been *no* economic *disadvantage* suffered by the pursuer in the interests of the defender. Therefore,

section 28(6) could not apply. Economic *advantage* on the part of the pursuer was an irrelevant consideration.

[14] In those circumstances, senior counsel for the pursuer took objection to the propriety of the cross appeal and the court was constrained to agree. It was, to my mind, plainly wrong that a party should attempt to introduce novel contentions (absent any amendment) on appeal. In my view, the defender's cross appeal had to stand or fall on the basis of the averments and arguments laid before the sheriff. Additionally, the defender's reliance upon economic advantage gained by the pursuer was ill-conceived. Counsel for the defender was unable to counter the criticism levelled at the cross-appeal. Therefore, I refused to consider the cross appeal and the competing submissions rested on the merits of the main appeal itself.

Discussion

[15] It seems to me that, to a large extent, the pursuer's criticism of the sheriff's approach is not concerned with the application of the statutory provisions. Instead, senior counsel founded upon the absence of (a) averment and (b) evidence to found the sheriff's conclusions regarding the offset disadvantage of £8,100 as mentioned at paragraph 85 in his note.

[16] With regard to the absence of averment by the defender, in my view, the criticism is well-founded. The enquiry in this case proceeded by way of proof before answer. Whatever evidence was elicited before the sheriff it was not simply at large for him to apply the section 28 provisions. It is, of course, correct to say that in considering whether to make an order under section 28(2)(a) in this case, the sheriff required to have regard to section 28(5). That requirement must be viewed in the context of our well established rules regarding fair notice of the case which any party to a litigation seeks to make.

[17] The fact that, in the present case, there was no separate, standalone claim by the defender *per se* does not preclude the need to address the section 28(5) offsetting

exercise. However, the "first matter", as referred to within the sub-section, still requires, in my view, to be pleaded before the court is entitled to have regard to it. I note that the second plea in law for the defender refers to "economic disadvantage to the Defender as hereinbefore condescended upon." However, when one scrutinises answer 4, particularly at page 18 in the record, it appears that the foregoing plea in law is predicated upon the hypothesis that the pursuer had suffered economic disadvantage in the interests of the defender. As noted *supra*, the sheriff rejected any such contention (section 28(3)(b) refers) and, accordingly, the averments in the final five lines of answer 4 are no longer of any relevance. To the extent that it was not the subject of any averment by the defender, the sheriff erred in giving consideration to it. The appeal is well-founded for that reason alone.

[18] I have also concluded that the undisputed absence of evidence, particularly highlighted at page 3 in senior counsel's written submissions as appended hereto, is also fatal when it comes to the sheriff's conclusion at the end of paragraph 84. Even allowing for the "rough and ready" approach to valuation which appears to have found favour in *Gow*, it is plain that proper, evidential material must exist in order to found the court's decision in any section 28 application. In no sense do I desiderate a "narrow approach". Nor do I doubt that "...the overriding principle is one of fairness, rather than precise economic calculation..."

[19] However, even a broad economic assessment requires the court to work from material which emerges from the evidence in the case and from no other source. The court cannot utilise factual material which is truly the product of speculation or uninformed inference. Looking to paragraphs 82 to 84 in the sheriff's note, there must be a recognition that the sheriff has embarked upon an independent exercise of his own. It appears that the only evidence before him was that, having been left by her husband, with debts, the defender considered taking a friend as a flat mate. (See paragraph 30 in the sheriff's note). The avenue of rental income was not explored in evidence. There was no actual evidence entitling the sheriff to conclude (at paragraph 82) that such income was likely to be received "...as the house was an attractive one".

[20] Moreover, the sheriff made no finding in fact regarding the "attractiveness" of Calico Way or otherwise, or in relation to the prospects for letting out a room or in regard to likely rental levels. In my opinion, the factual assessment which he undertook at paragraph 84 in his note meant that he misdirected himself. There was no material from which to draw the inference that Calico Way "...would rent easily". Similarly, the sheriff's view that "...a rent of approximately £300 per month for a half-share seems a conservative estimate" is not associated with evidence led (or agreed) and directed towards those discreet facts.

[21] Accordingly, I accept the submissions advanced by senior counsel for the pursuer. There was no material available within the evidence or agreed facts to inform the sheriff's conclusion that £8,100 should be offset against the sum of £12,500. I do not consider that the final sentence in finding in fact 3 can stand. However, in giving effect to the appeal, there is no need for me to insert anything further in substitution therefor.

[22] All of the foregoing is sufficient to dispose of the appeal. However, I should mention the final paragraph on page 4 of senior counsel's written submissions. Reference is made therein to the court giving consideration to where parties were at the beginning and end of the cohabitation. I accept the force of such an approach but tend to the view that it ought not to be the only approach to be adopted by a court when considering a section 28 application. As always, much will depend upon the particular circumstances of any given case. Therefore, I express no concluded view on this aspect of senior counsel's submissions. In any event, argument on this point in the course of the appeal was only developed to a limited degree.

[23] I have allowed the appeal and refused the cross-appeal. It follows that the pursuer should be entitled to expenses. I have certified the appeal procedure as suitable for the employment of junior counsel.