



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 7

A261/21

OPINION OF LORD RICHARDSON

In the cause

MAURICE YOUSEFF FAWAZ

Pursuer

against

ELAINE PATRICIA HARGREAVES or FAWAZ

Defender

Pursuer: Party

Defender: Clark; Weightmans

30 January 2024

Introduction

[1] The pursuer and the defender were married on 1 September 2008. By decree, granted on 25 January 2017 by the sheriff at Dumbarton, the parties were divorced. Orders were also made in respect of the residence of the couple's children together with certain financial orders in favour of the defender. That decree was granted in absence and on the motion of the defender to the present proceedings.

[2] Neither of the parties is now resident in Scotland. The pursuer lives in Nigeria and the defender lives in Spain. Since the grant of the decree, the parties have been engaged in

litigation in both of those countries. In particular, the defender has brought enforcement proceedings against the pursuer in respect of assets held by him in Spain.

[3] In the present action, the pursuer seeks the reduction of the decree of divorce.

[4] When the present action was raised, the interim suspension of the decree was sought before service and granted on 28 October 2021.

[5] The action came before me for debate at the instance of the defender. The defender sought the dismissal of the action, which failing the recall of the order for interim suspension.

The pursuer's case

[6] The pursuer avers that in the Sheriff Court action, he was designed as residing at an address in Lagos, Nigeria. However, he avers that, when personal service was effected at that address on 19 March 2015, he did not receive the papers. He avers further that he was attending a business meeting in Ibadan, Nigeria some 130 kilometres away.

[7] The pursuer also avers that he did not become aware of the decree until March 2017. His position is that at that point reference was made to the decree in the course of Nigerian divorce proceedings which he had raised against the defender. He avers further that:

“The pursuer believed the Scottish decree was not in effect as the proceedings had not ever been served on him. He did not have the benefit of any legal advice in Scotland between 2017 and 2020. The pursuer was not aware that the Scottish decree was enforceable until in or around 2020, when the defender took steps to enforce the decree in Spain.” (Article 3 of Condescendence)

[8] That has not always been the pursuer's position. When the Summons was signetted, the pursuer's position was: “The pursuer did not become aware of the existence of the decree until in or around 2020, when the defender took steps to enforce the decree in Spain.”

The pursuer sought and obtained interim suspension on the basis of this averment. The present position was added by adjustment on 12 July 2022.

[9] The pursuer avers that he has a valid defence to the Sheriff Court action. He challenges, in a number of respects, what was said by the defender to constitute matrimonial property in those proceedings.

The defender's arguments

[10] At the debate before me, counsel for defender sought dismissal of the action.

[11] The defender submitted that the pursuer's averments were lacking in candour and, furthermore, that they were so lacking in specification as to be irrelevant. In this regard, the defender placed significant emphasis on the change in position as to the pursuer's knowledge of the decree highlighted above (see paras [7] and [8]).

[12] Counsel drew attention to the defender's own detailed averments about the Nigerian divorce proceedings raised by the pursuer. The defender set out the chronology of those proceedings involving written communication between the parties' representatives, which culminated in the dismissal of those proceedings on 8 March 2018 by the High Court of Lagos State, Family and Probate Division. The defender had also produced documents which she says evidence those averments. These averments are met only by a denial by the pursuer.

[13] The defender had also made averments as to the enforcement proceedings made by her in Spain since December 2017. The defender averred that the pursuer was engaged in opposing those proceedings and applied to challenge their validity. The defender averred that the pursuer's various challenges were rejected by the Court of First Instance of Marbella.

Again, the defender has also produced documents which she says evidence those averments.

Again, the defender's averments are met by a denial by the pursuer.

[14] Against this background, counsel noted that the pursuer had failed to explain why he did not take legal advice on the position in Scotland until 2020 and, thereafter, failed to raise the present proceedings until the end of 2021. In the absence of these averments, the defender submitted that the pursuer's case could not succeed. Counsel referred to the significance attached in *Robertson's Executor v Robertson* 1995 SC 23 at 30, in an action of reduction of a decree of absence, to the failure of a party seeking reduction to avail himself of other remedies and delays. She also highlighted the emphasis that the court had placed on the importance, in this context, of the pursuer providing a candid account of how decree came to pass (*Nunn v Nunn* 1997 SLT 182 at 184D-E).

[15] In the alternative, counsel submitted that, if the pursuer's averments were to be admitted to proof, interim suspension ought to be recalled. Counsel submitted that the defender had suffered significant distress as a result of the grant of suspension. The parties' marriage, which had been dissolved as a result of the Dumbarton Sheriff Court decree in 2017, had been revived four years later as a result of the grant of interim suspension.

[16] The grant of interim suspension had been obtained on the basis of averments, contained in the Summons as initially served, which were a misrepresentation of the facts. In response to service of the Summons, the defender had made detailed averments in the defences and lodged documentation which vouched the defender's position. The pursuer had then materially altered his position, as noted above (at paras [7] and [8]), in July 2022. Following the closing of the Record, both the pursuer's solicitors and counsel had withdrawn from acting. A significant period of time had then elapsed during which it was not clear whether the pursuer was insisting on the present proceedings. The pursuer only

clarified his position in February 2023. Thereafter, I was informed that the case calling before me for debate was the defender's first opportunity to argue for recall. This further delay had been caused by practical difficulties which the pursuer had experienced in arranging for attendance at the court hearing.

[17] Counsel submitted that the balance of convenience favoured recall. Practically, the main consequence of the grant of suspension had been the effect on the parties' status. The parties' children were now of age. So far as counsel was aware, although a balance was sought by the defender from the pursuer in Spain, there were not currently live proceedings between the parties ongoing there.

Response by the pursuer

[18] The pursuer's position, as I understood it, was that he had never denied knowing about the Sheriff Court decree in 2017. As to the position originally adopted in the Summons on his behalf, he considered that this must have arisen as a result of a misunderstanding on the part of his then lawyers. He could not otherwise explain it. He had never met the lawyers then representing him face to face.

[19] The pursuer submitted that at the time he found out about the Sheriff Court decree he had been suffering significant personal, professional and financial difficulties. At this time, he had also required to deal with the enforcement proceedings which the defender had commenced against him in Spain. As I understood, these difficulties were his explanation for the delay in raising the present proceedings.

[20] However, the pursuer recognised that his pleadings in the action did not presently set out the detail of these difficulties and did not explain why he had taken no steps to raise

the present proceedings until 2021. He explained that this was as a result of ongoing issues he had experienced in obtaining representation in Scotland.

Decision

[21] The approach to be taken by the court to the reduction of a decree in absence was summarised by Lord Woolman in *Jandoo v Jandoo* 2018 SLT 531 at para [14]:

“From *Robertson’s Exr v Robertson* and *Nunn v Nunn* I draw these propositions about the reduction of decrees in absence:

- a. a court decree is not to be lightly set aside
- b. there is no precise test
- c. the pursuer must show that:
 - i. the decree ought not to have been granted on the merits
 - ii. there is a reasonable explanation why he did not enter the proceedings
 - iii. the whole circumstances of the individual case justify reduction”

[22] For present purposes, I add two points to this helpful summary. First, from *Robertson* (above), it is clear that the “whole circumstances” include any failure by the pursuer to avail himself of other remedies and his delays in doing so (at 30B-D). Second, from *Nunn* (above), I note and respectfully agree with Lord Macfadyen’s view as to the importance of a pursuer, in an action of this sort, providing a full and candid account of the whole circumstances which are relied upon to justify reduction (184D-E).

[23] In the present case, the defender criticises the pursuer’s averments for two reasons. First, the defender understandably highlights the fact that the pursuer has materially changed his position as to when he became aware of the decree of divorce.

[24] Second, the defender criticises the absence of any explanation by the pursuer of his failure to challenge the decree of divorce having, on his own averment, become aware of it in March 2017 prior to the commencement of the present proceedings in late 2021. I have set

out the pursuer's averments above at para [7]. In light of the need for the pursuer to set out the whole circumstances including an explanation for his delays in availing himself of any remedies, the defender argues that the pursuer's averments are so lacking in essential specification as to be irrelevant.

[25] I consider that there is much force in both parts of the defender's criticism. Having considered the submissions made by the defender it is difficult to understand on what basis it could ever have been contended that he was not aware of the decree of divorce until 2020. The pursuer was unable to provide any explanation for the change in position.

[26] Furthermore, the lack of specification in the pursuer's pleadings was particularly striking when the pursuer's position is contrasted with the detailed averments made in Answer 3 on behalf of the defender in respect of the legal proceedings in Nigeria and in Spain. Both of these sets of proceedings, on the defender's averments, directly involved the pursuer and would, therefore, be within his knowledge. These averments are met by the pursuer only with a bald denial.

[27] As I understood the pursuer's position, he did not dispute the fact that his pleadings did not properly set out the explanation for the delay in raising the present proceedings. Instead, the majority of his submissions essentially amounted to an attempt by him to provide an explanation for that delay. However, whatever relevance or merit these explanations may have, about which I offer no view, they do not presently form part of the pursuer's pleadings.

[28] Accordingly, in these circumstances and on the basis of the pursuer's current pleadings, I am minded to sustain the defender's first plea in law and to dismiss the pursuer's case.

Recall of grant of interim suspension

[29] For completeness, I should record that having heard the parties at debate, I recalled the interim order of suspension of the decree of divorce granted on 25 January 2017 and thereafter made avizandum in order to consider the arguments made at debate.

[30] I granted recall on the basis that I considered the change in the pursuer's position as to when he had discovered the existence of the decree of divorce represented a material change in circumstance. As I have noted above, the pursuer was also unable to provide any explanation as to how the initial position had been advanced on his behalf.

[31] Thereafter, on the basis of the information before me, I did not consider that the pursuer had set out a *prime facie* case. I reached this conclusion essentially for the same reasons that I have set out above in respect of the arguments made at debate. In short, the pursuer had failed relevantly and with adequate specification to aver why he had not availed himself of any remedy in respect of the decree of divorce from March 2017 until October 2021.

[32] I considered further that, in light of what I understood to be the current state of the parties' various disputes in Spain, the balance of convenience favoured recall of the interim suspension. The principal effect of the continuing interim suspension of the decree of divorce was to impact on the parties' personal status by preserving their marriage which had otherwise been brought to an end in 2017. I can quite understand why this would be a matter of some significant distress to the defender whereas recalling the interim suspension would seem to make little practical difference to the pursuer.

Post-hearing developments

[33] While the case was at avizandum and shortly before this opinion was issued, the pursuer submitted what bears to be lengthy proposed amendments to his pleadings together with an inventory of productions.

[34] In light of this development, I will arrange for the case to be put out by order so that the parties, having considered my decision in respect of the arguments I heard at debate, can address me in relation to these additional submissions.