



OUTER HOUSE, COURT OF SESSION

[2018] CSOH 14

A299/16

OPINION OF LORD WOOLMAN

In the cause

RAJ JANDOO

Pursuer

against

NERINDER JANDOO or KAUR

Defender

**Pursuer: J Nisbet (sol adv); Nisbets, Solicitors & Solicitor Advocates
Defender: Party**

7 February 2018

Introduction

[1] Despair, distrust and desolation. These words are often associated with divorce.

The pursuer experienced all of these emotions following the breakdown of his marriage.

His former wife obtained decree of divorce in absence at Dunfermline Sheriff Court on

12 February 2016. She did so using the simplified procedure.

[2] The pursuer emphatically does not want to resume his marriage. Yet he seeks to set

aside the decree. He does so because he seeks an order for financial provision. He contends

that there was a dispute about their finances at the time of the divorce. Accordingly the

simplified procedure was not appropriate. Further, he did not know that the action had

been raised. If he had known, he would have taken steps to enter the process or to ensure that decree was not granted in absence.

[3] The defender has since remarried. She maintains that she properly followed all the required steps in the divorce action. She served the relevant documents on the pursuer and he failed to respond. He did not mark an appeal in time, or promptly raise the present proceedings. Further, he has no good claims against her. Accordingly reduction should be refused.

Background

[4] The pursuer and the defender met in late 2010 through an online agency. Each already had children. The couple quickly became engaged and began living together in his flat at 29 (PF1) Millar Crescent, Edinburgh ("PF1") in May 2011. They married on 15 December 2012. The pursuer said that at the time he dearly loved the defender. He saw their marriage as an opportunity for him to relive the family life he had lost.

[5] The pursuer had purchased PF1 with his former partner, CM, in June 2009. They held the title in joint names until February 2012, when he acquired full ownership by purchasing her half share.

[6] Meantime, in May 2011, the pursuer purchased the flat next door at 29 (PF2) Millar Crescent ("PF2") with a view to conjoining the two properties, so that there would be sufficient space for family life with the defender's two children, who were then teenagers. His own children had left home to go to university.

[7] The pursuer transferred title to both properties to the defender: (i) PF2 in October 2011, and (ii) PF1 in December 2012. Despite the dispositions narrating respective

purchase prices of £180,000 and £56,700, the pursuer received no payment from the defender in respect of either property.

[8] He explained that he made these property transfers to show his love and commitment to her, to alleviate her concern should anything untoward happen to him and also to secure possible protection from any creditors if there was any downturn in the business that he then operated. They were not outright gifts. He intended them to be part of the matrimonial assets.

[9] Very soon after the wedding, the pursuer agreed that the defender should move next door into PF2 to live with her children. He was concerned about their behaviour and believed she would exert a positive influence. The defender offers a different account. She states that the move marked the end of the marriage.

[10] I prefer the pursuer's evidence on this matter. He says that the marriage subsisted until either February or March 2013, when he returned from a visit to Poland and the defender picked him up by car from Edinburgh airport. She told him that the marriage was over and that "there is no us". They have not co-habited as man and wife since then.

[11] The defender has twice sought decree of divorce using the simplified procedure. The first occasion was in May 2015. On receipt of the application, the pursuer instructed solicitors, who wrote to the defender's solicitors and also to the sheriff clerk at Dunfermline. They stated to each that the simplified procedure was inappropriate, as he wished to seek an order for financial provision.

[12] On 20 May 2015 the sheriff dismissed the action on that basis. Ten days later, the pursuer sent an email to the defender. He invited her to engage in discussions to reach an agreement about their finances. He confirmed that he did not oppose the divorce itself. She did not reply.

[13] In late 2015 the defender was sequestrated and a trustee appointed for the benefit of her creditors. Shortly afterwards she again applied for divorce using the simplified procedure. Decree of divorce was pronounced in absence on 12 February 2016.

Legal framework

[14] From *Robertson's Ex v Robertson* 1994 SC 23 and *Nunn v Nunn* 1997 SLT 182 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

Should the decree have been granted?

[15] In my view the pursuer had a colourable case for seeking an order for financial provision under section 10 (4) of the Family Law (Scotland) Act 1985. I say no more on this point, as it is not an issue for determination in these proceedings. It is enough to say that simplified procedure is not available where there is a financial dispute: Ordinary Cause Rule 33.73(1).

Why did the pursuer fail to enter the divorce proceedings?

[16] The pursuer travelled to India on 6 December 2015, where he remained for three months. Before his return on 8 March 2016, he only had limited access to the internet. He exchanged communications from time to time by means of email and the *WhatsApp* social messaging platform.

[17] On 14 January 2016, her solicitors wrote to his solicitors, asking for a response to the simplified divorce application. They referred to an email that they had sent to the pursuer the previous day, which he says he did not receive.

[18] On 18 January 2016, his solicitors responded by stating that while they had yet to speak to their client, they understood that “he has financial claims to make on divorce. Accordingly, a simplified procedure would not be appropriate.”

[19] Her solicitors served divorce papers on 21 January 2016 by means of (a) sheriff officers delivering them through the PF1 mailbox and (b) follow-up first class post.

[20] The pursuer had asked his former partner, his son, and a neighbour, Manzoor Hassan, to keep an eye on matters while he was away. Mr Hassan said that he regularly checked PFI and saw no sign of any official mail. He was not, however, able to carry out his checks for a time in January because, as the defender accepted, she changed the locks on the main door at PF1. Mr Hassan gave unchallenged evidence that he saw her and her son removing all of the pursuer’s possessions and effects from the house. Although I regard Mr Hassan as an unsatisfactory witness in some respects, I accept his evidence on this point.

[21] On the balance of probabilities, I hold that the divorce papers were removed from the flat before those checking it on the pursuer’s behalf had an opportunity to see them and alert him to the fact that legal proceedings had commenced.

Other relevant factors

[22] The defender knew (a) that six months earlier, the pursuer had told her that he would press his financial claims in the event of a divorce; (b) that he was not residing at PF1 and that service at that address therefore might not be effective; and (c) that his solicitors had indicated in January that he was still likely to insist on his financial claims and that the simplified procedure was inappropriate. By proceeding as she did, the defender deprived the pursuer of the opportunity to seek an order for financial provision.

[23] When the pursuer returned from India in March, the days of appeal had already expired. I accept his explanation that he was unable to raise proceedings in this court for some six months, because of a combination of health and financial problems.

[24] The major factor pointing in the opposite direction is her remarriage. I do not, however, regard that as decisive. She did so a month after the pursuer raised the present action.

Conclusion

[25] I am satisfied that, having regard to the whole circumstances, the relevant criteria are met and that it is appropriate to grant decree of reduction.

[26] There are two complicating factors. First, there is the question of the defender's remarriage in October 2016. Decree of reduction would place her in a legal limbo. She cannot be married to two men at the same time.

[27] Secondly, the defender was sequestrated in October 2015. Her trustee in bankruptcy has raised an action to remove the pursuer from PF1 in Edinburgh Sheriff Court. That

action is currently sisted. Clearly the trustee has an interest in the outcome of these proceedings.

[28] To address the practical problems, at the conclusion of the proof I directed that the decree should not be extracted for a period of three months. That was designed to allow the parties to resolve matters, either judicially or extra-judicially.

[29] On further reflection, I prefer an alternative course. I shall fix a By Order hearing in three months' time. It is in the interests of the parties to cooperate and reach agreement. That may mean that no further hearing is required and I will not need to pronounce decree for reduction. If, however, no agreement is reached shortly, then the parties can either (i) amend the pleadings in this action to conclude for divorce and financial provision, or (ii) raise fresh proceedings in the Sheriff Court.

[30] Meantime I shall instruct the clerk of court to intimate a copy of my decision and this Note to the sheriff clerks at both Dunfermline Sheriff Court and Edinburgh Sheriff Court and to the defender's trustee.