SHERIFF APPEAL COURT

[2022] SAC (Civ) 12
AYR-F131-19

Sheriff Principal C D Turnbull
Appeal Sheriff W H Holligan
Appeal Sheriff T McCartney

OPINION OF THE COURT

delivered by APPEAL SHERIFF THOMAS McCARTNEY

in appeal by

PHYLLIS CARROLL or COCKBURN or McLEISH
Pursuer and Respondent

against

ALAN CARSON McLEISH
Defender and Appellant

Pursuer and Respondent: Malcolm QC; Frazer Coogans
Defender and Appellant: Brabender QC; Gilson Gray LLP

9 March 2022

Introduction

[1] This is a divorce action in which each party craves financial provision on divorce in terms of section 8 of the Family Law (Scotland) Act 1985 ("the 1985 Act"). The Defender and Appellant ("the appellant") appeals the decision of the sheriff of 22 February 2021, following a preliminary proof as to the "relevant date" in terms of section 10(3) of the 1985 Act. There is a cross-appeal by the pursuer and respondent ("the respondent").

[2] The "relevant date" is the date on which the parties ceased to cohabit. Section 27(2) of the 1985 Act provides that "For the purposes of this Act, the parties to a marriage shall be

held to cohabit with one another only when they are in fact living together as man and wife".

[3] In most cases ascertainment of the value of matrimonial property is an essential starting point in consideration of claims for financial provision on divorce. The value to be attributed to matrimonial property is the value as at the relevant date (section 10(2) of the 1985 Act).

[4] In this action the respondent avers that the relevant date is 23 January 2019. The appellant avers that the relevant date is 22 October 2016. A preliminary proof was assigned to determine the relevant date for the purposes of section 10(3) of the 1985 Act.

[5] The evidence led at the preliminary proof consisted of parole evidence and affidavit evidence. In terms of parole evidence the sheriff heard evidence from each of the parties and twelve other witnesses. The sheriff considered affidavit evidence from *inter alia* two other witnesses. The preliminary proof extended for six days over a prolonged period of almost one year. The sheriff found the relevant date to be 23 January 2019. We return below to the manner in which the sheriff chose to do so.

Submissions for the appellant

[6] Having found in fact that the "defender stayed overnight at [the pursuer's property] regularly at the pursuer's invitation, albeit he did not have a key to said property throughout this entire period" it was not open to the sheriff to find that cohabitation as husband and wife was established during the period up to January 2019. Therefore in finding in law that the relevant date is 23 January 2019 rather than 22 October 2016 the sheriff erred in law.

[7] It was submitted that there can be no cohabitation without habitation. Attending at property, for which one does not have a key, at the invitation of the heritable proprietor does not constitute habitation. It is an essential requirement of "in fact living together" that the place (or places) where the parties are said to be living together are fully accessible to both parties. Senior counsel referred to the cases of *Banks* v *Banks* 2005 Fam LR 116 and *MB* v *JB* 2014 SC EDIN 51 as illustrating the importance of the ability of both parties to access the property in which they reside together as indicative of continuing cohabitation. The sheriff's finding that the appellant's access to the respondent's property was by invitation negated any conclusion that the parties were in fact living together as man and wife, notwithstanding any other facts and circumstances as found by the sheriff. The sheriff therefore erred in law.

[8] It was further submitted that, on a proper assessment of the evidence, the sheriff's decision as to the relevant date was wrong. It was submitted that no reasonable sheriff could have reached the decision that he did as to the relevant date having regard to (a) the finding in fact that the appellant stayed overnight at the respondent's house at her invitation; (b) his assessment of the witness, Jessica Black, as credible and reliable; and (c) the absence of evidence to support a finding in fact that the parties' financial arrangements remained the same from their marriage until 23 January 2019.

[9] The sheriff found Jessica Black to be an impressive witness but he gave no reasons for his rejection of her clear evidence regarding where the appellant lived. The sheriff had erred in failing to find that the parties' financial arrangements had fundamentally altered when the respondent became responsible for the accommodation costs at the property then owned by her. On a proper assessment of the evidence, it was not open to the sheriff to find that the parties were in fact living together as husband and wife at any point after

22 October 2016. Consequently, the appellant maintained that a number of findings in fact ought to be recalled for want of evidence in support thereof.

Submissions for the respondent

[10] The respondent's cross appeal is that it was not open to the sheriff to make a finding in fact to the effect that the appellant stayed overnight at the respondent's property regularly at the respondent's invitation. On the evidence before the sheriff there was no material to support that part of the finding "at the respondent's invitation". Senior counsel for the respondent identified the pertinent evidence on this point as set out in her Note of Argument. The totality of the evidence supported a finding that the appellant stayed overnight regularly at the respondent's property. It did not support a finding that this was by invitation of the respondent. The sheriff preferred the evidence of the respondent to that of the appellant. The only conclusion available is that the appellant stayed overnight regularly at the respondent's property and that there was no question of that being by invitation.

[11] In opposing the appellant's appeal it was submitted that there was no error by the sheriff in the approach he took to weighing all of the relevant considerations before him. The conclusion he reached was one that was open to him on all the proved facts and he exercised his judgment in an entirely reasonable manner.

[12] In totality, the evidence was that the parties were living together albeit between three different properties. That was the evidence of the respondent, whose evidence was preferred to that of the appellant. The facts in the cases of *Banks* v *Banks* and *MB* v *JB* are very different to those in the present case. Each case turns on a consideration of its own facts and circumstances. There was no need to carry out an exercise to identify similarities

or differences between the period prior to October 2016 and thereafter. The parties' lives had moved on and they owned three houses in the subsequent period. The sheriff had to address how they lived their lives in that context.

[13] With regard to the evidence of Jessica Black, it was submitted that her evidence did not add any weight to the contention that the parties did not resume cohabitation after October 2016. With regard to financial arrangements, other than the respondent having bought a house for which she met the costs, the evidence did not indicate any major changes happening after 2016 during the periods the parties were living together. That was the evidence of the respondent, whose evidence the sheriff preferred.

Discussion

[14] This appeal is against the decision of the sheriff at a preliminary proof in a divorce action as to the "relevant date" for the purposes of the Family Law (Scotland) Act 1985. There is a cross appeal by the respondent. The appellant submits that the sheriff erred in law. Each party challenges certain findings in fact made by the sheriff.

[15] The "relevant date" is the date on which the parties ceased to cohabit. As previously noted, section 27(2) of the 1985 Act provides that "For the purposes of this Act, the parties to a marriage shall be held to cohabit with one another only when they are in fact living together as man and wife". The court must look at the matter objectively. The intention of the parties is not determinative. The approach to be taken is as follows:

> "The task of the Court is to determine when the parties ceased to cohabit, having regard to the statutory provision that cohabitation occurs only when parties are 'in fact living together as husband and wife'. That is, as the provision itself states, a matter of fact. The ultimate determination of the issue must depend upon the particular circumstances of a given case. As a generality, the Court must look at the issue objectively; no doubt taking into account the illustrative factors mentioned by Professor Clive. There may, of

> course, be many others which emerge as relevant. The intention of the parties cannot be determinative of the issue. In that sense, there is no absolute requirement for one of the parties to have decided that the marriage or relationship has run its course or that such a decision should have been communicated by one party to the other. However, the intention of the parties and any communication of them to each other may be relevant factors in the equation." [Lord Carloway in *Banks* v *Banks*, at paragraph 33].

[16] Each case turns upon its own facts. There is no fixed check list. The court looks at all of the evidence, attaching what it considers the appropriate weight to the various factors having regard to the particular relationship between the parties. We do not consider that there has been any error of law on the part of the sheriff. The appellant submits that it was not open to the sheriff to find that cohabitation as husband and wife was established in the period to 23 January 2019 because the sheriff found that the appellant stayed overnight at the respondent's property regularly at the respondent's invitation. We do not consider that that finding in fact leads to an error in law in the particular circumstances of the parties in this case. As previously stated, no one factor is determinative and the decision depends upon a consideration of all the relevant factors in the particular circumstances of the case. There were other factors which the sheriff took into account in reaching the decision which he did. The nature of cohabitation was but one factor.

[17] The sheriff made findings in fact on a number of relevant factors, including residence at the respondent's property and elsewhere, financial arrangements, sleeping and living arrangements, sexual relations, holidays, refurbishing their property in Spain, socialising, attending events, practical and emotional support and presenting themselves as a couple. It is not suggested that evidence of any material factor was left out of account.

[18] Insofar as the findings in fact challenged by the appellant are concerned the sheriff had the benefit of hearing evidence over six days. In the absence of some identifiable error, such as a material error of law, or the making of a critical finding of fact which had no basis

in the evidence, or a demonstrable misunderstanding of the relevant evidence, or a demonstrable failure to consider relevant evidence, this court will interfere with the findings in fact made by the sheriff at first instance on the basis that he has gone plainly wrong only if it is satisfied that his decision cannot reasonably be explained or justified (*Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203*)*.

[19] There was evidence which the sheriff accepted to support the findings in fact challenged by the appellant. In respect of specific criticisms made on behalf of the appellant, the sheriff was entitled to attach such weight as he considered appropriate to the evidence of Jessica Black (she considered the parties to be living separate lives during the relevant period) and weigh that against the contrary evidence before him. With regard to financial arrangements, the sheriff noted the respondent's responsibility for the house owned by her, which was a factor that had not previously existed, but also found that otherwise the financial arrangements remained as before. We find no error of the type stated by the Supreme Court upon which this court would be entitled to interfere with the decision of the sheriff in respect of the findings in fact challenged by the appellant.

[20] In respect of the cross-appeal, we are persuaded that there is merit in the respondent's submission that the sheriff erred in finding in fact that the appellant stayed overnight at the respondent's property "at the respondent's invitation". The respondent's clear evidence was that the appellant's attendance overnight at her property was not by invitation. The tenor of the evidence contained within text messages to which we were referred tends to support the evidence of the respondent. The sheriff accepted the respondent's account in relation to the marital arrangements which subsisted during the various periods of cohabitation and separation and, particularly, in relation to the parties' living arrangements. The sheriff records that where the appellant's evidence differed from

or contradicted that of the respondent, he preferred the evidence of the respondent. On that basis, the sheriff has gone plainly wrong in a manner that cannot be reasonably explained or justified in finding that the appellant stayed overnight at the respondent's property regularly at the respondent's invitation. The first sentence of the first bullet point in finding-in-fact 15 falls to be deleted and replaced with "The defender regularly stayed overnight at Treetops".

Disposal

[21] The appellant's appeal will be refused. The cross-appeal by the respondent will be allowed to the extent of varying the interlocutor dated 22 February 2021 by deleting the first sentence of the first bullet point in finding-in-fact 15 and substituting therefor, "The defender regularly stayed overnight at Treetops". The appellant will be found liable to the respondent in the expenses occasioned by the appeal and cross-appeal. The court will sanction the employment of senior counsel in relation to the appeal and cross-appeal. Thereafter, the cause will be remitted back to the sheriff to proceed as accords.

Postscript

[22] The sheriff heard a considerable amount of evidence over a number of days, in a case in which significant sums are claimed by way of financial provision by each party. Each party was represented by experienced counsel. Evidence concluded on 8 December 2020, at which time the sheriff continued the case until 22 February 2021 (a period of almost 11 weeks) for "issue of determination". The sheriff gave a decision on that date. He did so in a manner inconsistent with the requirements of the Ordinary Cause Rules. No criticism can be levelled at the sheriff for taking time to consider his decision. He was correct to do

so. It is, however, far from clear as to why the sheriff did not reserve judgment and subsequently issue an interlocutor and note in accordance with OCR 12.4. Contrary to the terms of the written decision produced, it is not an "extempore judgment". Only one pronounced at the conclusion of the evidence is an extempore judgment (see OCR 12.2.(4)(a)). In the present case an interlocutor and note in accordance with OCR 12.4 should have been issued.