SHERIFFDOM OF LOTHIAN AND BORDERS AT LIVINGSTON

[2017] SC LIV 68

A29/17

JUDGMENT OF SHERIFF DOUGLAS A KINLOCH

In the cause

DENISE SHAWNS

Pursuer

Against

STUART WALKER

Defender

Pursuer: Anderson;
Defender: Boni;

Livingston, 25 October 2017

The sheriff, having resumed consideration of the cause , repels the second plea in law for the defender, and appoints the case to call at Livingston Sheriff court on a date to be afterwards fixed as a hearing on the expenses as occasioned by the debate.

NOTE

[1] This case called before me at Livingston Sheriff Court on 5 September 2017 for debate on the question of whether the case was *res judicata*. The pursuer was represented by Mr R. Anderson, Advocate, and the defender by Mr Boni, Solicitor.

[2] Although it is the defender, by virtue of his second plea-in-law, who has taken the plea of *res judicata*, the debate was assigned on the pursuer's motion in order to allow the pursuer to argue that the defender's plea of *res judicata* was unfounded and should be

repelled. In support of that position the pursuer lodged a Rule 22 note, although as a plea of *res judicata* is not a preliminary plea (see *Macphail* on Sheriff Court Practice, Third Edn, at 21.04) such a Note was not, strictly speaking, necessary.

[3] The pursuer seeks a decree ordaining the defender to implement his obligations under a Minute of Agreement entered into by the parties by disponing a one half share of a farm to the pursuer. The issue for debate, very broadly stated, was whether the present action was excluded by the fact that two family actions in the Court of Session, involving the same parties and which referred to the same Minute of Agreement, had resulted in a decree of absolvitor being granted in favour of the present defender.

Background

[4] The factual background to this action is as set out in the defender's pleadings, which I must, of course, assume to be true at present. It appears from these averments that the parties were formerly in a relationship which began in 1997. When the relationship began the pursuer was already the owner of 44 acres of land in West Lothian called Brunton Farm. The farm land is said to have a current value of about £240,000. The pursuer built stables on the land and it is said that this was without planning permission. The lack of planning permission appears to have led to various problems for the pursuer which, in due course, resulted in the pursuer transferring ownership of the farm to the defender in 2001 without any consideration being paid. At the same time that the land was conveyed to the defender the parties entered into a Minute of Agreement, now lodged in process, whereby the defender undertook to "grant a conveyance of said subjects into the joint names of the Parties" if he was requested to do so by the pursuer. In other words, at any time the pursuer could ask the defender to reconvey to her a *pro indiviso* half share of the farm without

payment, in other words (putting the matter in simplistic terms) to give her half of the farm back.

[5] After the farm had been conveyed to the defender, the relationship between the parties unfortunately came to an end. The pursuer claims that this happened in April 2013, and in March 2014 the pursuer raised an action against the defender in the Court of Session (F20/14) in which she primarily sought payment of a capital sum by the defender to her of £300,000, this being a claim under section 28 of the Family Law (Scotland) Act 2006, that is a claim as a former co-habitee. Such claims have to be raised within one year of co-habitation ending, and so the action was raised shortly before the expiry of that period. The defender then raised his own counter action in the Court of Session (F26/14), and he, similarly, sought payment of £300,000 from the pursuer in the present action, his claim also being based on section 28. Each party lodged defences in the action by the other but, as I understood it, the Record never closed in either action, as agreement was reached between the parties that both would drop their claims, and that decree of absolvitor would be pronounced in both actions.

[6] The Joint Minute in the action raised by the present pursuer in the Court of Session (F20/14) has been lodged in process as one of the defender's productions. It is number 6/1/4 of process. It is in the following terms:

> "Crawford for the pursuer and
> Milne for the defender concur in stating to the Court that this action has been settled extra judicially. They therefore crave the Court:
> 1. To discharge the By Order Hearing set down for 14 December 2016.
> 2. Quoad ultra to grant absolvitor; and
> 3. To find no expenses due to or by either party."

[7] The interlocutor which followed upon that Joint Minute was as follows:

> "13 December 2016 Lady Wise

> The Lord Ordinary, on the unopposed motion of the pursuer, dispenses with intimation in terms of Rule of Court 23.1C; allows the joint minute between parties to be received and marked number 13 of process; discharges the By Order Hearing due to take place on 14 December 2016; finds no expenses due to or by either party; *quoad ultra* assoilzies the defender from the conclusions of the summons."

[8] The Joint Minute lodged in the action by the present defender, and the interlocutor of the court which was thereafter pronounced, have also been lodged in process. They are in identical terms to the Joint Minute and interlocutor quoted above.

Pursuer's averments regarding *res judicata*

[9] It is in these circumstances that the defender in the present action now avers as follows:

> "… the pursuer's craves in respect of the present action are *res judicata*, and for the following reasons: (1) there has been a prior determination made by the Court of Session, Edinburgh in the F20/14 Action in which a decree was issued by the Lord Ordinary; (2) the prior determination was pronounced *in foro contentioso* by virtue of a decree of Absolvitor being pronounced in the F20/14 Action in accordance with the Joint Minute; (3) the subject matter of the F20/14 Action and the present action are the same; (4) the *media concludendi* or points in controversy between the parties in the F20/14 Action and the present action of the same; and (5) the parties to the F20/14 Action and the present action are the same. Therefore, the pursuer is barred from raising the present action and is not entitled to decree as craved."

Nature of *res judicata*

[10] The principles applying to *res judicata* are summarised in *Macphail, Sheriff Court Practice*, 3rd Ed at paragraphs 2.104-2.109. At 2.104 it is said as follows:

> "The exercise of jurisdiction is excluded where the court sustains a plea of *res judicata*. The rule may be stated thus: When a matter has been the subject of judicial determination pronounced *in foro contentioso* by a competent tribunal, that determination excludes any subsequent action in regard to the same matter between the same parties or their authors, and on the same grounds. 'The plea is common to most legal systems, and is based upon considerations of public policy, equity and common sense, which will not tolerate that the same issue should be litigated repeatedly between the same parties on substantially the same basis.' … For the

> plea to succeed, the five conditions referred to in the following paragraphs must be satisfied …
>
> (1) The prior determination must have been made by a competent tribunal …
>
> (2) The prior determination must have been pronounced *in foro contentioso*, without fraud or collusion. It is not, however, necessary that the action should have been fully litigated to make the decree pronounced a decree *in foro contentioso*. In the sheriff court it is sufficient that defences should have been lodged in an ordinary cause … It is not material that the prior determination should have proceeded upon the compromise, consent or joint minute …
>
> (3) The subject matter of the two actions must be the same.
>
> (4) The *media concludendi*, or points in controversy between the parties, in the two actions must be the same. The *media concludendi* are not the same unless the specific point raised in the second action has been directly raised and decided in the first … Whether the *media concludendi* are the same will appear from a study of the pleadings and decision in the previous action: The Court looks at the essence and reality of the matter rather than the technical form and considers the question, what was litigated and what was decided …
>
> (5) … the parties to the second action must be identical with … the parties to the first action …"

[11] From this it was clear to me that it did not matter that the Court of Session actions had not been litigated to a conclusion, or that the actions had settled by way of Joint Minute, and that there was no judgment in either action. It did not matter also that the Records had not closed. The question, stated very briefly, was whether the subject matter of the present sheriff court litigation was the same as the subject matter of the Court of Session litigations, and whether the *media concludendi*, or points in controversy, in the two actions were the same.

[12] It appeared to be clear from *Macphail* that the question of whether the present action was *res judicata* was to be decided upon a study of the pleadings in the present action and in the Court of Session litigation. I had wondered why the defender in the present action had raised his own separate action in the Court of Session rather than lodging defences in the

action against him and incorporating his own conclusions, and I was told that the accepted view was , at least in Court of Session procedure, that it was not possible to do this, and that a separate counter action was necessary. So two actions had to be raised. Whether or not that was correct, it appeared to me that in reality there was one Court of Session litigation which for procedural reasons the parties had decided to litigate by means of two separate actions. It therefore seemed to me that in deciding whether the outcome of the Court of Session litigation meant that the present matter was *res judicata*, it was necessary to read the pleadings in both of the Court of Session actions, and not just (as averred by the defender) in the action F20/14. The Summonses in both actions have been lodged, as have the defences in the action raised by the present pursuer, although the defences in the action against her have not.

Averments in Court of Session actions

[13] Looking first at the Court of Session summons in the action by the pursuer in the present action (F20/14) it is an action for payment of a capital sum by the defender to the pursuer, together with another ancillary crave. The action is apparently based on the pursuer's rights as a co-habitant under section 28 of the Family Law (Scotland) Act 2006, although that Act is not mentioned anywhere in the pursuer's pleadings. The basis of the action is said to be, *inter alia*, that various factors arising from the period of cohabitation have resulted in the defender having been economically advantaged, and the pursuer having been economically disadvantaged. One of the factors referred to in the pleadings is the transfer to the defender for no consideration of the farm. The defences are directed towards a case that there has been no economic advantage or disadvantage such as to justify a capital sum being awarded.

[14] The averments in the Court of Session action by the defender in the present action (F26/14) are very brief. They are to the effect that it was the pursuer in the present action who was economically advantaged, and that therefore he, rather than she, should be awarded a capital sum.

Arguments for pursuer

[15] The arguments put forward by Counsel for the pursuer that the defence of *res judicata* ought to be repelled are summarised in his written submissions which were helpfully lodged. They are available in the process for reference. It is convenient to quote from these written arguments here. The relevant section is as follows:

> "(a) **The conclusions are different:** The Family Action had (i) a pecuniary conclusion for a payment of £300,000; and (ii) a conclusion for delivery of surfaces. The present action has a conclusion *ad factum praestandum* of a non-monetary obligation, namely to grant a disposition of a one-half share of ownership in heritable property.
>
> (b) **The grounds of action are different:** as the Defender's own averments identify (ANS 2, p 5, line 17; p p 6, line 32) the ground of action in the Family Actions was the Family Law (Scotland) Act 2006, s 28. The present action seeks implement of a specific obligation, enforcement of which was not sought in the Family Action.
>
> (c) **The pleas in law are different:** the Family Action pleas focussed on the matters central to the discretionary decision inherent in the statutory case under s 28, namely 'economic advantage'. The present pleas are founded on contract.
>
> (d) **The Family Action sought a discretionary remedy; the present action is petitory** (the Pursuer seeks the court to ordain the defender to do something based on a contractual obligation embodied in the Registered Agreement).
>
> (e) The mention of the Registered Agreement in the averments in the Family Action are not sufficient to found a plea of res judicata: *Stuart* v *Stuart* (No 2) 2004 SLT (Sh Ct) 44 at 48G-H (p 4 of 6 in the transcript).
>
> (f) The averments in the Family Action anent the Registered Agreement, properly construed, it is submitted were provided by way of background. The Registered Agreement was not the basis of the action. There was a recital that

> the Registered Agreement has never been implemented. **But there was no attempt to enforce the Registered Agreement in the Family Action.** It does not matter that the Registered Agreement *could* have been enforced in the Family Action (cf. *Short's Tr* v *Chung* 1999 SC 471 at 475C; *Primary Health Care Centres (Broadford) Ltd* v *Ravangave* 2009 SLT 673 at paras 31-33 *per* Lord Hodge). The fact is that there was no conclusion, averment or plea in law which provided a basis on which the Registered Agreement could have been enforced in the Family Action."

Arguments for defender

[16] The argument of Mr Boni, on behalf of the defenders, in responding to the pursuer's arguments, and in seeking to persuade me that the matter was *res judicata*, may be summarised as follows. He said that the family actions in the Court of Session were in reality largely about the fact that the pursuer had given the defender the farm without anything having been paid for it, and as part of that arrangement the parties had signed a Minute of Agreement which entitled her to have half of the farm back. They each therefore had claims in the Court of Session which revolved around the farm, and each had agreed to drop their claims, in return for decree of absolvitor being granted against each of them. The matter of the farm therefore formed a central part of these litigations, and had been dealt with in these litigations, and therefore it was no longer open to the pursuer to raise a new action which related to the farm.

[17] In support of his arguments, Mr Boni referred me to a number of cases. They included the following:

Grahame v *Secretary of State for Scotland* 1951 SC 368

Primary Health Care Centres (Broadford) Ltd v *Ravangage* 2009 SLT 673

Short's Trustees v *Chung* 1999 SC 471

These cases were helpful, and they assisted me in understanding the nature of the principle of *res judicata*, but as I have summarised above the principles relating to *res judicata* (as taken

from Macphail), I do not think that I need to rehearse the passages in these cases to which I was referred.

[18] Mr Boni also presented a separate, and somewhat different, argument in favour of the defender's plea of *res judicata*. It was, as I understood it, to the effect that the present action was incompetent and *res judicata* as it was not possible, as he put it, to "use a single act to found two court actions". Here, he argued, there was one act which was founded on by the pursuer, that is the transfer to the defender of the farm, and that act had already been founded upon in the Court of Session, and could not be founded upon again. In support of this argument, he referred to the following cases:

Smith v *Sabre Insurance Company Ltd* 2013 SC 569.

Steven v *Broady Norman & Co Ltd* 1928 SC 351

McPhee v *Heatherwick* 1977 SLT (Sh Ct) 46

Stevenson v *Pontifex & Wood* (1887) 15R 125

These cases illustrate the well-known rule that separate actions cannot be raised in respect of a single ground of action, the paradigm case being that all losses said to have arisen from an act of negligence must be sought in a single action.

Decision

[19] The decision in this case turns on the question of whether the parties were in reality litigating in the Court of Session about the same issue as is raised in the present case. The circumstances here are very similar, in many ways, to the case of *Short's Trustee* v *Chung* (see above) to which I was referred by the pursuer's Counsel. In that case a bankrupt had transferred certain properties to another person. The Trustee in Bankruptcy subsequently managed to have the dispositions reduced in the Court of Session on the basis that the

transfers were gratuitous alienations. The Trustee then raised further proceedings whereby he sought to have the person to whom the properties had been transferred ordained to execute dispositions of the properties to the Trustee. The defender in that action argued that the trustee's action was incompetent because the matter was *res judicata.* The arguments put forward by the defender in that case are, in essence, exactly the same as the arguments put forward by the defender in the present case. They were summarised by the Court as follows:

> "In submitting that the plea of *res judicata* should be sustained, counsel for the defender and reclaimer acknowledged that the present case was unusual: this was not a case where a pursuer, having failed to obtain the decree which he sought in an earlier action attempted to obtain a decree on similar grounds in subsequent proceedings. The present pursuer had obtained the decree which he sought in the original action: reduction. Correspondingly, the decree which he sought in the present action had not been sought in the original action … it could be seen that the pursuer was attempting to raise anew matters which had been disposed of in the original action … What the pursuer could not do was opt for the remedy of reduction alone, as he had done in the original action, and then come back to court, as he was doing in the present action, seeking a further or better remedy … The original action was to be seen not merely as one in which reduction had been sought and granted, but as one in which the possibility of any other remedy in terms of s34(4) had inevitably been in issue, and had therefore been disposed of by the eventual decree for reduction alone … "

The Inner House did not accept those arguments, saying:

> "It was no doubt unfortunate that an assumption had been made by all concerned,that reduction would achieve restoration of the property to the debtor's estate … Whether one said that the subject matter was different, or that the media concludendi were different, the short truth was that the present action was one in which the pursuer sought to litigate a matter different from that which had been litigated and decided in the original action. The decision in the original action reflected what had been litigated; and that decision stood. What the pursuer now sought to litigate lay beyond the boundaries of what had been litigated, or in issue, in the original action. The nature of the action was different … What was now sought had not been, and could not competently have been, dealt with upon the basis of the pleadings in the original action."

It seems to me that the conclusion which the court reached in the *Short's Trustee* case applies with equal force in the present action.

[20] As set out above, the present action is an action whereby the pursuer seeks to enforce an obligation entered into by the defender in terms of the Minute of Agreement to which he was a party. It is important that the Minute of Agreement was entered into by the parties as individuals - albeit individuals who happened to be cohabiting - and was not entered into specifically as cohabitees. The present action which is based on the Minute of Agreement therefore relates to obligations which the parties entered into as individuals. The Court of Session actions, however, related to a different matter. There, the parties were litigating as former cohabitees, not as individuals. They each sought payment of a capital sum, the basis for the sum sought arising from their cohabitation. Not only that, the remedy they sought was at the discretion of the court. They asked the court to exercise its discretion on the basis of a number of factors of which the transfer of the farm to the defender was only one.

[21] When these actions settled, the defender was therefore, in my view, only absolved of his liability to make payment, as a former cohabitee, of a capital sum. He was not absolved of his obligation, as an individual, to dispone half of the farm back to the pursuer. While the defender might well be able to say that he would not have put his name to a Joint Minute in the Court of Session if he had realised that the pursuer would subsequently raise the present action, that is really a complaint by him that the pursuer has acted unfairly. It does not mean that agreed disposal of the Court of Session actions has, as a matter of law, prevented her from doing so by virtue of *res judicata*. Similarly, to my mind the present action is not prevented by the rule that there cannot be more than one action arising from a single cause of action. The Court of Session actions were based on one ground of action (a discretionary power given to the court to award a capital sum to cohabitees) and the present action is based on a different ground of action (an obligation arising from the Minute of Agreement). There is no single cause of action common to both litigations.

[22] For these reasons I find the pursuer's arguments, as set out in the written note of arguments which I have quoted above, to be persuasive. The subject matter of the two actions was not the same. Neither were the *media concludendi*. In my view the present case has not been prevented by the raising, and subsequent settlement of, the Court of Session actions, and it follows that the plea *of res judicata* must be repelled. It does not, however, seem to me to be appropriate to delete the averments which the defender makes in support of this plea. Some of them may be relevant for other purposes. I have accordingly simply repelled the defender's plea of *res judicata.*

[23] None of this, however, prevents the defender from seeking to prove averments which he has made that as part of the settlement terms of the Court of Session actions the parties agreed, at least impliedly, that when their respective actions were disposed of "the defender would owe the pursuer no further liability in connection with the land at Brunton Farm". In other words, that the pursuer agreed that she would not bring any claim based on the Minute of Agreement. That is a separate issue from the *res judicata* argument, based it seems on an alleged contractual agreement between the parties, and the case must be allowed to go to proof on that point. The defender's agent confirmed that the defender no longer founded on any personal bar argument.

[24] As it was agreed by the parties that the question of the expenses of the debate would have to await my decision I have put the case out for a hearing on this. Further procedure in the action can be determined at that hearing.