SHERIFF APPEAL COURT

[2018] SAC (Civ) 11

EDI-F1524-17

OPINION OF THE COURT

delivered by APPEAL SHERIFF WILLIAM HOLLIGAN

in the appeal by

PS

Pursuer/Respondent

against

NS

Defender/Appellant

Appellant: Edward, Advocate, RSC Solicitors
Respondent: Thorley, Thorley Stevenson

20 April 2018

Note

[1] This appeal concerns an action of divorce. Put shortly, the respondent raised an action seeking decree of divorce ("the action") at Edinburgh Sheriff Court on 11 December 2017. The initial writ was warranted on 12 December 2017. At the time the action was raised there were, and continue to be, separate proceedings involving the children of the marriage ("the section 11 proceedings"). As a matter of courtesy, the respondent's agents sent to the agents then acting for the appellant in the section 11 proceedings a copy of the writ.

[2] The writ was served upon the appellant on 28 December 2017. The period of notice expired on 18 January 2018. The appellant had consulted different solicitors from those involved in the section 11 proceedings in relation to the action. She consulted with her solicitors after the period of notice had expired. Her solicitors immediately intimated a motion to allow a late notice of intention to defend to be received ("the motion"). Intimation of the motion was sent to the court and also to the respondent's agents. The motion was not marked as opposed. However, in the intervening period, the respondent's agents enrolled a motion for decree of divorce and decree was granted.

[3] The appellant marked an appeal against the decree. The respondent has challenged the competency of the appeal.

[4] The sheriff has written a helpful note. The sheriff was invited to grant decree on 25 January 2018. The sheriff was not informed of the motion. The minute for decree was supported by the usual affidavits and supporting documentation. Read short, there was no reason not to grant the decree. However, the sheriff notes that, had she been aware of the motion, she would not have granted decree. The appellant avers that she has claims for financial provision on divorce which claims she has now lost as a result of the granting of the decree.

[5] When the notes of argument were first lodged attention was focussed on whether the appellant was seeking to be reponed rather than appealing as such. Chapter 8 of the OCR (which deals with reponing) specifically excludes divorce actions from its terms. It followed that the appeal was incompetent. When the papers came before me I instructed the clerk to draw to the attention of agents the provisions of rule 33.33A which deals specifically with the late appearance and application for recall of (inter alia) decrees of divorce. Parties lodged supplementary notes of argument to deal with this provision.

Argument for the respondent

[6] The argument for the respondent as to the competency of this appeal can be summarised succinctly. In substance what the appellant seeks to do in the appeal is to be reponed. There is nothing intrinsically wrong with the decision of the sheriff. It is not suggested that the sheriff erred in granting the decree. The sheriff did not take into account irrelevant considerations or act beyond her powers. As an appeal, there is nothing which would suggest a legal basis upon which the appellate court could interfere with the grant of the decree. Reference was made to *Mahmood* v *Mahmood* 2007 SLT (Sh Ct) 176 and *Taylor* v *Taylor* Sheriff Principal Bowen QC (unreported, 24 September 2007). In relation to rule 33.33A no such application pursuant to that rule has been made.

Argument for the appellant

[7] Mr Edward's first point was that in terms of section 110 of the Courts Reform (Scotland) Act 2014 the appeal is competent. The interlocutor of the sheriff is a final judgment.

[8] Mr Edward accepted that, in pursuing the appeal, the provisions of rule 33.33A had been overlooked by the appellant's agent. However, that does not present an obstacle to the pursuit of the appeal. His second point was that there was an error of law in the granting of the decree. There was an outstanding motion before the sheriff for the late lodging of a notice of intention to defend. Clearly the sheriff was not made aware of the existence of the motion. Had she been aware she would have had to consider it. Reference was made to *JM* v *JW* [2017] SAC (Civ) 3 which is analogous to the circumstances in the present case.

[9] The appellant has a choice: she can either proceed pursuant to rule 33.33A (and see particularly paragraph (6)); alternatively, she can proceed by way of appeal. In support of this proposition reference was made to Dobie *Sheriff Court Practice*, pages 524-525; *AB* v *CB* 1912 2 SLT 255; *Whyte* v *Whyte* 1891 18 R 469.

Reply

[10] In his reply, Mr Thorley distinguished a decree by default from a decree in absence: *JM* v *JW* did not apply here. There is no extract in the present case. There is no error of law. The reasoning in *Taylor* v *Taylor* applies. In effect, rule 33.33A operates to the exclusion of an appeal.

Decision

[11] From the authorities referred to, including the respective rules of court in the sheriff court, the procedure to deal with review of undefended decrees of divorce has fluctuated over the years. One consistent rule is that, although decree of divorce is granted after evidence, an undefended action has always been treated as a decree in absence. In non-consistorial matters relief from the consequences of such a decree has been afforded by allowing a defender to be reponed. A feature of reponing is that an application may be made to the judge at first instance to grant relief on specified grounds (an explanation for the failure to appear and the proposed defence; see Macphail, *Sheriff Court Practice* (3rd edition), paragraph 7.24).

[12] In relation to practice in the sheriff court, Dobie (*The Law and Practice of the Sheriff Courts in Scotland*) was of the view that a defender was entitled to be reponed or to appeal (pages 524-525). The authorities relied upon in support of this proposition are *Whyte* v *Whyte*

and *AB* v *CD.* The former is a decision of the Inner House by way of reclaiming motion from a decision of a Lord Ordinary. The latter is the decision of a sheriff principal. Both reports are very short and contain little, if anything, by way of opinion. I note that the disposal in *Whyte* was to remit the matter back to the Lord Ordinary to consider reponing the defender upon such terms as the Lord Ordinary should deem fit. There is a further reference relied upon by Dobie: *Christie* v *Christie* 1917 34 Sh. Ct. Rep. 123 in which the sheriff appears to have taken the view that the ordinary cause rules in relation to reponing as originally enacted in the schedule to the Sheriff Courts (Scotland) Act 1907 ("the 1907 Act") applied. The judgements in *Mahmood* and *Taylor* contain a limited reference to the history of the rules in relation to this matter. Until the Divorce Jurisdiction, Courts Fees and Legal Aid (Scotland) Act 1983, the sheriff court had no jurisdiction in relation to actions of divorce. Following the grant of such a jurisdiction, provision was made in the ordinary cause rules for divorce actions including allowing a defender to be reponed in an action of divorce (Act of Sederunt (Consistorial Causes) 1984, SI 255/1984, rule 59A). Rule 59A was subsequently amended: (Act of Sederunt (Amendment of Ordinary Cause Rules) 1986, SI 1230/1986; (Act of Sederunt (Amendment of Ordinary Cause, Summary Cause and Small Claim Rules) SI 249/1992) and became rule 59B. It provided:

> "59B – Late appearance by defender in actions of divorce and of separation
>
> (1) The sheriff may make an order, with or without conditions, allowing a defender in an action of divorce or of separation who has not lodged a notice of intention to defend or defences –
>
> (a) to appear and be heard at a diet of proof;
>
> (b) to lodge defences and to lead evidence at any time before decree of divorce or of separation has been pronounced; or
>
> (c) to appeal within 14 days of the decree of divorce or of separation.

(2) Where an order is made under paragraph (1)(a), a defender may not lead evidence without the consent of the pursuer.

(3) Where an order is made under paragraph (1)(b), the pursuer may lead further evidence, by recalling witnesses already examined or otherwise, whether or not he closed his proof before the order was made."

[13] For some reason, no provision similar to rule 59B was made in the 1993 rules. That omission was considered by Sheriff Principal Dunlop QC in *Mahmood* and by Sheriff Principal Bowen QC in *Taylor*. Those judgements, in turn, made reference to two judgments of Sheriff Principal Nicholson QC in *Stroud* v *Stroud* 1994 SLT (Sh Ct) 7 and *McFarlane* v *McFarlane* 1995 SCLR 794. Family matters were excluded from the terms of Chapter 8 of the 1993 rules which dealt with reponing generally. The result was that no provision appeared in the 1993 rules in relation to reponing in cases of divorce. Sheriff Principal Nicholson QC concluded that the omission of such a provision meant that an appeal brought pursuant to section 27 of the 1907 Act could not be decided on reponing note considerations, the sheriff principal concluding that he could not "invent a reponing procedure for such a case when not only is no provision made for that but also the existing reponing provisions expressly excludes actions of divorce" (*McFarlane* at page 797 D-E). Sheriff Principal Dunlop QC and Sheriff Principal Bowen QC followed Sheriff Principal Nicholson QC.

[14] Whatever the reason for the omission, and following the suggestion of Sheriff Principal Dunlop QC (*Mahmood* at paragraph [23]), the ordinary cause rules were amended so as to insert rule 33.33A (see Act of Sederunt, Sheriff Court Rules and Miscellaneous Amendments) 2008 SSI 2008/223). Rule 33.33A provides:

"33.33A – Late appearance and application for recall by defenders:

(1) In a cause mentioned in rule 33.1(a) to (h) or (n) to (q), the sheriff may, at any stage of the action before the granting of final decree, make an order with such conditions, if any, as he thinks fit:

> (a) directing that a defender who has not lodged a notice of intention to defend be treated as if he had lodged such a notice and the period of notice had expired on the date on which the order was made; or
>
> (b) allowing a defender who has not lodged a notice of intention to defend to appear and be heard at diet of proof although he has not lodged defences, but he shall not, in that event, be allowed to lead evidence without the pursuer's consent.

(2) Where the sheriff makes an order under paragraph (1), the pursuer may recall a witness already examined or lead other evidence whether or not he closed his proof before that order was made.

(3) Where no order under paragraph (1) has been sought by a defender who has not lodged a notice of his intention to defend and decree is granted against him, the sheriff may, on an application made within 14 days of the date of the decree, and with such conditions, if any, as he thinks fit, make an order recalling the decree.

(4) Where the sheriff makes an order under paragraph (3) the cause shall thereafter proceed as if the defender had lodged a notice of intention to defend and the period of notice had expired on the date on which the decree was recalled.

(5) An application under paragraph (1) or (3) shall be made by note setting out the proposed defence and explaining the defender's failure to appear.

(6) An application under paragraph (1) or (3) shall not affect any right of appeal the defender may otherwise have.

(7) A note lodged in an application under paragraph (1) or (3) shall be served on the pursuer and any other party."

[15] Rule 33.33A is much more extensive than rule 59B. That said, both rules deal with two different circumstances: (1) the procedure to be adopted prior to grant of decree; (2) the procedure to be adopted post decree. I am only concerned with the latter and not the former. Rule 33.33A(3) is the relevant provision. That provision gives to the sheriff the power to make an order recalling the decree on specific conditions. Rule 33.33A(5) provides that an application for such relief requires the defender to set out a note of the proposed defence and an explanation for his/her failure to appear. Unlike its predecessor, the current rule entrusts to the sheriff the power to recall the decree.

[16] Returning to the present appeal, in dealing with the first argument for the appellant, in my opinion, in a narrow sense, an appeal against the decree of divorce is competent. It is a final decree. The terms of section 110 of the 2014 Act are clear. Furthermore, rule 33.33A(6) makes clear that the terms of the rule do not affect any right of appeal the defender might otherwise have.

[17] I do not however agree with the submission that the decision of the sheriff amounts to an error. The argument is that because a motion had been enrolled for the late lodging of a notice of intention to defend that somehow rendered the decision of the sheriff erroneous. It seems to me that the sheriff was not only entitled to grant the decree which she did upon the basis of the information placed before her but was bound so to act. There is nothing erroneous about the decision. (Sheriff Principal Nicholson QC reached a similar view in *McFarlane* in which the circumstances were very similar to the present case – page 796-B)).

[18] In relation to the third issue, in my opinion it is open to a defender against whom a decree of divorce has been pronounced in an undefended action to utilise either section 110 of the 2014 Act or rule 33.33A. Although both avenues provide relief to a defender, the basis for granting relief is different. In the case of the former, the jurisdiction of the appellate court is exercised upon conventional appeal grounds; in the case of the latter, the sheriff exercises the jurisdiction upon reponing grounds (see rule 33.33A(5)). In my opinion the two do not overlap. The two avenues may provide a similar outcome but the basis for the exercise of the jurisdiction is different.

[19] The appellant advances her case by way of appeal. If I am correct in my conclusion, there seems to be no basis upon which an appellate court could allow the appeal on conventional appeal grounds. The only basis for doing so is the motion for the late lodging of the notice of intention to defend. For reasons I have given, I do not consider that to

amount to an error which would entitle an appellate court to interfere. There is therefore no basis for this appeal to proceed. However, I do add this. Unlike the situation in *Mahmood,* the appellant does have a remedy and that remedy is to enrol a motion to allow the court to deal with an application pursuant to rule 33.33A although late. Mr Thorley fairly, and in my view properly, conceded that if an application were brought by the appellant pursuant to rule 33.33A he would be in no position to oppose it on its merits. Given the material before me, I find it difficult to see that such an application could be refused. The consequence is that I shall refuse the appeal. As requested I shall reserve all questions of expenses.