



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

2020 CSIH 24
A44/19

Lord Menzies
Lord Brodie
Lord Malcolm

OPINION OF THE COURT

delivered *ex tempore* by LORD MALCOLM

in the cause

by

SA

Appellant

against

PA

Respondent

Appellant: Shand QC; Kelly; Allan McDougall
Respondent: Grahame QC; Edward; Drummond Miller LLP

10 March 2020

[1] This is a reclaiming motion against the decision of the Lord Ordinary made in terms of the rules then in force, namely Rule of Court 42A.4(1), to send the action to a proof before answer rather than, as proposed by the defender, appoint a debate on various issues raised in his pre-by order roll statement.

[2] As explained in the relevant practice note, chapter 42A gives the Lord Ordinary wide powers to manage an action in a manner which will facilitate its efficient determination.

That was the task before the Lord Ordinary. For this purpose to be achieved, decisions of

this kind must be afforded a high degree of respect and deference by this court. If, as submitted on behalf of the defender, a decision to send a case to a proof before answer had to be overturned simply because the Inner House thought that an arguable issue had been raised which could justify a debate, the overall purpose of chapter 42A would be significantly undermined. It would also, as the discussion at the hearing clearly demonstrated, involve this court in the merits of the proposed debate; and this with a view to deciding whether to require the Lord Ordinary to conduct and determine a debate, something which is self-evidently inappropriate.

[3] Reference was made to Sheriff Principal Kerr's decision in *Cyma Petroleum (UK) Ltd v Total Logistics Concepts Ltd* 2004 SLT (Sh Ct) 112. It was based on the particular terms of the then procedural rule in force in the sheriff court. In so far as it was suggested that decisions of this kind are made on questions of law rather than matters of procedure, we respectfully disagree. In our view, this court should interfere with a case management decision of this kind sparingly, and certainly only if it is clear that it was an erroneous decision in the sense that it was not open to a reasonable Lord Ordinary.

[4] The Lord Ordinary has explained his reasoning in his note. We are unable to identify any good ground for interfering with his decision and ordering a debate on any of the issues proposed by the defender. The Lord Ordinary was fully entitled to reserve answering the questions in law until after evidence had been led. This will often be the preferable or, at any rate, a justifiable course of action. For the Lord Ordinary this would be all the more so since he understood that he had been told that a debate could not remove the need for some kind of proof in due course. The defender has not lost the opportunity to present the substantive points. They can be argued after the evidence has been led.

[5] Much of the discussion concerned the relevancy of the common law case of fault and, in particular, a need for the pursuer to offer to prove conduct which was reasonably foreseeably likely to cause a psychiatric disorder and which did, in fact, have that outcome. We are satisfied that the pursuer's averments in this regard are sufficient for a proof before answer, especially bearing in mind the court's powers to take steps to focus and explicate the issues to be explored at the proof.

[6] The result is that the court is not prepared to accept the invitation to address the various debate points raised by the defender. These will be a matter for the Lord Ordinary after the proof if and in so far as they are maintained at that time. For the avoidance of doubt we note that the above observations are made in the context of rules that were superseded on 1 March 2020, but they appear to be apposite to the replacement provisions and, in particular, new Rule 42A.3(4).

[7] For these reasons the reclaiming motion is refused.