EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 66
F1/19

Lord Malcolm
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD MALCOLM

in the appeal

by

SCA

Pursuer and Respondent

against

MMA

Defender and Reclaimer

Pursuer and Respondent: Brabender QC, McAlpine; Morton Fraser LLP
Defender and Reclaimer: Cheyne; DAC Beachcroft; Levy & McRae

27 October 2020

[1] The defender has reclaimed (appealed) against the Lord Ordinary's decision on financial provision on the parties' divorce. After a proof of 8 days she issued a detailed opinion (see [2020] CSOH 54) explaining her resolution of, amongst other things, complex expert evidence as to the value of the defender's business interests and her reasons for awarding the pursuer a substantial capital sum. In brief she rejected the commercial surveyor and forensic accountancy evidence led for the defender and accepted that

presented on behalf of the pursuer. She adopted an illustrative valuation of the defender's various business interests at just under £10m as set out in appendix 15 (as revised) of a report from Mr Greg Rowand CA. It proceeded on the basis that all his various business assets and trading entities would be consolidated in one company and then sold to a willing purchaser as a whole. This would maximise the value, in contrast to the defender's approach of addressing each part of the business separately. Ultimately it would increase the value of the matrimonial property.

[2] The first ground of appeal was withdrawn. The second focusses on one item in the defender's business empire, namely a restaurant which is owned by a partnership and tenanted by a company owned by him. The partnership consists of the defender and his father, and together they own the subjects as trustees for the firm. Mr Rowand's appendix 15 valuation proceeds on the assumption that the father is paid out at the figure shown in his partnership capital account at the relevant date. In his evidence Mr Rowand explained that if the father was paid out at his share of the revalued market value this would decrease the amount available to the defender from the hypothesised "collapsed" sale of all his business assets and interests. The respective possibilities and resultant figures are explained in his report at sections 8.2.7/9.

[3] The father gave evidence that he would object to the sale, but this was rejected by the Lord Ordinary on the view that if there was a reasonable financial incentive for him, he would not stand in the way of a realisation of the partnership interests (paragraphs 5 and 32 of her opinion). The submission for the defender was that the father's evidence should have caused the Lord Ordinary to reject the partnership valuation relied on in appendix 15, and this on the view that he would have held out for more than his capital account. In the ground of appeal this is described as an error of calculation on her part. It is said that the

end result is that the value of the matrimonial property is overstated. Various figures and calculations have been presented on behalf of the defender in support of an eventual submission that the capital sum should be reduced by £142,059. They are not easy to follow or reconcile. They are disputed and were described by the pursuer's counsel as internally inconsistent, and bearing no relation to the evidence before the Lord Ordinary.

[4] A fundamental difficulty for the defender is that, as his counsel acknowledged, this submission is being made for the first time in this reclaiming motion. The Lord Ordinary was not invited to recalculate the relevant part of appendix 15 on the basis of inferences to be drawn from the father's evidence. We do not know what her view would have been. No doubt it would have taken into account any contrary submissions from the pursuer's counsel who, in this court, observed that the defender could terminate the partnership at any time. If she did accept the point, we do not know which alternative figures the Lord Ordinary would have used, nor whether there would have been an impact on other parts of her calculations. The absence of such a submission is not particularly surprising. It concerns one small aspect of a complex set of competing reports and valuations. The focus was on bigger issues, including which of the differing approaches of the respective experts should be accepted. And there were a number of other disputes over and above the valuation of the defender's business interests to be addressed and resolved.

[5] The point raised now, while perhaps not *de minimis*, is relatively insignificant in the overall context of the case and the sums involved. It is not open to the defender to characterise it as an error on the part of the Lord Ordinary, and certainly not something which would warrant this court in upsetting her detailed and careful assessment of the value of the matrimonial property. The Lord Ordinary was entitled to accept a considered valuation by an expert forensic accountant. There is no merit in the submission that she

misunderstood it, for example see her discussion at paragraphs 15 and 16. She was not obliged to identify and address the point only now being raised by the defender.

[6] Counsel for the defender recognised that if his general approach was accepted in principle, this court would have to assess whether a capital gains tax liability would have arisen, if so at what amount, and its impact on the figures. Counsel for the pursuer observed that there was no evidence to allow this to be done, none of the witnesses having mentioned such a liability. This is illustrative of a more general problem in that, even if the court did see merit in this ground of appeal, it is not in a position to unscramble the Lord Ordinary's figures and identify appropriate alternatives.

[7] In *Little* v *Little* 1990 SLT 785 the First Division recognised the danger of categorising each step in a discretionary process as a potential error of law. An appellate court should be slow to interfere with decisions of the present kind, leaving the details to the court of first instance. In short the court accepts counsel for the pursuer's submission that the Lord Ordinary did not err, and that her assessment of an appropriate capital sum cannot be categorised as unreasonable or plainly wrong. It follows that this ground of appeal is rejected.

[8] After issuing her opinion the Lord Ordinary held a by order hearing to discuss the precise terms of her interlocutor. As explained in her note to this court, amongst other things she decided that because of the impact of the current pandemic on trading, and given the size of the capital sum, it should be payable in instalments, with interest falling due on each instalment from the date when it is due. The pursuer cross-appealed against this outcome, arguing for interest on the whole sum from the date of the Lord Ordinary's interlocutor. There is no merit in this challenge to a discretionary decision which was clearly

open to the Lord Ordinary. She listened to the competing submissions and reached a decision which cannot be described as unreasonable or manifestly wrong.

[9] Similar reasoning applies to the one remaining matter, namely the defender's ground of appeal challenging the Lord Ordinary's decision to award the pursuer 80% of the expenses of the proof. She did so on the basis that the pursuer had been successful on most of the contentious issues and had beaten a pre-proof offer by a significant amount. Counsel for the defender invited the court to reduce the award to 50%, but the court has identified no good reason to do so.

[10] The overall result is that the reclaiming motion and the cross-appeal are both refused. For completeness parties were agreed that the Lord Ordinary's interlocutor contains a minor clerical error which should be corrected. Subject to that, the court adheres to the interlocutor of the Lord Ordinary.