SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2025] SC GLA 46

GLW-A735-23

JUDGMENT OF SHERIFF ANDREW McINTYRE

in the cause

THOMAS BARBOUR

Pursuer

against

MARION McEWAN

Defender

Pursuer: McQuade, Counsel; Browns Solicitors, Glasgow
Defender: Jones, Solicitor; MacNairs & Wilson Solicitors, Glasgow

GLASGOW, 3 July 2025

The sheriff, having resumed consideration of the cause: (i) Repels the fourth plea-in-law for the defender; (ii) Allows the record to be opened, amended in terms of the pursuer's minute of amendment, as adjusted, and closed of new; and (iii) Appoints the cause to a procedural hearing to permit further procedure to be determined.

NOTE:

Background

[1] This is an action in which the pursuer seeks payment of a capital sum from the defender. The pursuer's case, stated broadly, is as follows. The parties were formerly in a relationship. They co-habited for a period of around 33 years until they separated on 12 July 2022. The pursuer avers that while he and the defender cohabited he made certain financial

and other contributions from which the defender derived an economic advantage. In particular he avers that he provided to the defender all of his income during that period and that he made improvements to the house in which the parties lived but which was owned solely by the defender. He quantifies the advantage derived by the defender (and his own corresponding disadvantage) in the sum of £150,000 and seeks payment from the defender of that amount.

[2] Proceedings were commenced by service of an initial writ on the defender on 12 July 2023. In due course the defender lodged answers stating, *inter alia*, a preliminary plea to the relevancy and specification of the pursuer's averments. That plea arises from a glaring omission in the pursuer's pleadings: they fail to specify the legal basis on which he would become entitled to payment of a capital sum from the defender in the event of him proving all that he has averred. The pleadings refer neither to any remedy at common law, nor, explicitly, to any statutory remedy.

[3] Perhaps unsurprisingly, the pursuer's position is that his claim is based on section 28 of the Family Law (Scotland) Act 2006 ("the 2006 Act") which permits the court to make orders for financial provision where cohabitants separate. The relevant part of section 28 provides as follows:

> **"28 Financial provision where cohabitation ends otherwise than by death**
>
> (1) Subsection (2) applies where cohabitants cease to cohabit otherwise than by reason of the death of one (or both) of them.
> (2) On the application of a cohabitant (the 'applicant'), the appropriate court may, after having regard to the matters mentioned in subsection (3)—
> (a) make an order requiring the other cohabitant (the 'defender') to pay a capital sum of an amount specified in the order to the applicant;
> (b) make an order requiring the defender to pay such amount as may be specified in the order in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents;
> (c) make such interim order as it thinks fit.

(3) Those matters are—
  (a) whether (and, if so, to what extent) the defender has derived economic advantage from contributions made by the applicant; and
  (b) whether (and, if so, to what extent) the applicant has suffered economic disadvantage in the interests of—
    (i) the defender; or
    (ii) any relevant child.

(4) In considering whether to make an order under subsection (2)(a), the appropriate court shall have regard to the matters mentioned in subsections (5) and (6).

(5) The first matter is the extent to which any economic advantage derived by the defender from contributions made by the applicant is offset by any economic disadvantage suffered by the defender in the interests of—
  (a) the applicant; or
  (b) any relevant child.

(6) The second matter is the extent to which any economic disadvantage suffered by the applicant in the interests of—
  (a) the defender; or
  (b) any relevant child,
  is offset by any economic advantage the applicant has derived from contributions made by the defender.

(7) [. . .]

(8) Any application under this section shall be made not later than one year after the day on which the cohabitants cease to cohabit.

(9) [. . .]

(10) [. . .]".

[4] The pursuer readily acknowledges that his pleadings ought to have specified the 2006 Act and, thus, the legal basis of his claim. The omission was said to have been a mere oversight which the pursuer now seeks to cure by an amendment which would, *inter alia*, insert reference to the 2006 Act into his crave for a capital sum.

[5] The defender submits that the pursuer's failure to mention the 2006 Act is a radical incompetence which cannot be cured by amendment. The defender also argues that the pursuer's case, as currently pled, is not based on section 28 of the 2006 Act and that to allow the amendment would permit the pursuer to make a fundamental change to the basis of his case. To permit such a change after expiry of the one year time limit imposed by section 28(8) would be to allow the pursuer to circumvent the, otherwise strict, time limit.

For these reasons, the defender submits that the amendment should be refused and her plea to the relevancy sustained.

[6] The cause ultimately proceeded to debate before me for determination of the defender's preliminary plea and the pursuer's minute of amendment. At debate the parties' submissions focussed solely on the implications of the pursuer's failure to mention the 2006 Act and the question of whether he should be allowed to introduce reference to the Act by amendment at this stage. I was not ultimately addressed on the other amendments which the pursuer seeks to introduce, nor the question of specification more generally.

[7] Having considered the parties' submissions, for which I am grateful, I have concluded that: (i) the failure to mention the 2006 Act neither renders the pleadings incompetent nor irrelevant; (ii) the pursuer's case, as pled, is a claim in terms of section 28 of the 2006 Act; (iii) by his proposed amendment, the pursuer does not seek to change the basis of his case; (iv) the pursuer's case, as pled, sets forth a relevant and sufficiently specific claim in terms of section 28 of the 2006 Act and that, accordingly, the defender's preliminary plea should be repelled; (v) the proposed amendment will not result in prejudice to the defender; (vi) the proposed amendment is necessary for determining the real question in controversy between the parties; and (vii) I should exercise my discretion to allow the minute of amendment. I have reached these conclusions for the reasons that follow.

The omission of reference to section 28 of the Family Law (Scotland) Act 2006

[8] The defender submits that the pursuer's failure to specify the statutory provision on which his claim is based is a radical incompetence that cannot be cured by amendment. That submission was not foreshadowed by a plea to the competency of the proceedings but no objection was taken to the submission, no doubt because the absence of such a plea

would not preclude dismissal of the action if it were found to be incompetent. Nonetheless, the defender did not develop her objection to the competency under reference to any particular authority, and I was not directed to any case in which the court had found an action to be incompetent by reason solely of a failure to mention a statute on which the claim relied. On the submissions before me, I was not persuaded that the omission of reference to the 2006 Act amounted to a radical, or fundamental, incompetence which rendered the pleadings incapable of amendment.

[9] Leaving the question of competence aside, parties' submissions turned to the question of relevance and whether the failure to mention the 2006 Act was such a fundamental omission that it necessarily rendered the pleadings irrelevant. Under reference to *N.V. Devos Gebroeder* v *Sunderland Sportswear Ltd* 1987 SLT 331, the pursuer submitted that the omission was neither fatal to the competence of the pleadings nor did it render them irrelevant. *N.V. Devos* concerned an action for breach of contract. The contract was one for the sale of goods and the defenders sought to rely on a contractual term, implied into the contract by the Sale of Goods Act 1979 ("the 1979 Act"), to the effect that the goods would be reasonably fit for purpose. But the pleadings did not mention the 1979 Act. Nonetheless, the court held that the defenders were entitled to rely on the 1979 Act. The court observed that while the normal practice was to specify the legislative provision relied upon, it was not necessary so to do in that context. Since the 1979 Act applied to all contracts for the sale of goods, it was sufficient to aver the existence of a contract for the sale of goods in order to bring the provisions of the statute into operation. The court distinguished that type of provision from other statutory provisions (such as the provisions of the Factories Act 1961) which required the averment and proof of specific facts in order to bring the circumstances within the ambit of the statute.

[10] The pursuer's submission was developed under reference to *MAC Electrical and Heating Engineers Ltd* v *Calscot Electrical (Distributors) Ltd and Anor* 1989 SCLR 498. In that case the pursuers bought a factory unit but claimed that, in error, a different factory unit had been disponed to them. The pursuers applied to the court for rectification of the disposition but, in so doing, failed to specify the statutory provision which permitted the remedy craved. At debate, the pursuers "made it clear" that they were proceeding in terms of section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 ("the 1985 Act"). That section provides as follows:

> **"8.— Rectification of defectively expressed documents.**
>
> (1) Subject to section 9 of this Act, where the court is satisfied, on an application made to it, that—
>
> (a) a document intended to express or to give effect to an agreement fails to express accurately the common intention of the parties to the agreement at the date when it was made; or
>
> (b) a document intended to create, transfer, vary or renounce a right, not being a document falling within paragraph (a) above, fails to express accurately the intention of the grantor of the document at the date when it was executed,
>
> it may order the document to be rectified in any manner that it may specify in order to give effect to that intention.
>
> [. . .]".

The court held that the pursuers had averred a relevant case notwithstanding the failure to specify the statutory basis on which the application was made. The court concluded that section 8 of the 1985 Act was a provision which established a general rule of law and that the pursuers were not, therefore, precluded from relying on it by reason of having failed to mention it in the pleadings.

[11] The pursuer in the present action submits that the circumstances in this case are analogous to those before the court in both *N.V. Devos* and *MAC Electrical*. The defender submits that section 28 of the 2006 Act is a provision of the type distinguished by the court

in *N.V. Devos* as requiring the averment and proof of specific facts in order to bring the circumstances within the ambit of the statute, and therefore requiring explicit reference to the statutory provision.

[12] I am not persuaded that section 28 of the 2006 Act is a provision of the kind that was distinguished by the court in *N.V. Devos* as requiring proof of specific facts in order to bring the circumstances within the ambit of the statute. The example of such a statute which was given in *N.V. Devos* was the Factories Act 1961. In my view that type of provision is quite different, and readily distinguishable, from section 28 of the 2006 Act. The Factories Act was an example of a statute, the provisions of which created obligations and applied in very specific circumstances. It is perhaps easy to see that fair notice demands that a party who sets out to prove a breach of a particular statutory duty, which is not borne by all people in all circumstances, ought to specify, by explicit reference to the statute, the precise circumstances giving rise to the duty and the particular manner in which it was breached.

[13] I agree with the pursuer's submission that section 28 of the 2006 Act is particularly similar to the provision that was considered in *MAC Electrical* (section 8 of the 1985 Act). While the provisions in question provide remedies for very different problems, they operate in a similar manner. Both provisions: (i) give the court a discretionary power to make a specific order; (ii) specify the circumstances in which the court *may* make that order; and (iii) provide that the order may be made on an application to the court. Both provisions create a general right to make an application which arises, automatically, by operation of the statute.

[14] There is, of course, one respect in which the two provisions differ. Whereas, in theory, any person may make an application in terms of section 8 of the 1985 Act, an application for payment of a capital sum under the 2006 Act can only be sought by one

former cohabitant against the other former cohabitant. However, I am not persuaded that that qualification distinguishes the present circumstances, in any material way, from those in *MAC Electrical*. By averring that the parties were co-habitants who have separated, the pleadings necessarily imply that the pursuer is a person entitled to make an application in terms of the 2006 Act. I accept that, in the fullness of time, it might not be established that the parties were co-habitants who have separated, but that would be no different from a failure to establish that there was a contract of sale in the example which arose in *N.V. Devos*. In both situations, the applicability of the statutory rule relies on certain preliminary facts being averred and established but if those facts are averred then, by necessary implication, so too is the application of the statutory rule.

[15] For the foregoing reasons I am persuaded that, in the context of this case, the failure to mention the statutory provision on which the pursuer bases his application does not in, and of, itself render the pleadings either incompetent or necessarily irrelevant.

The basis of the existing claim and the nature of the proposed amendment

[16] While I have found that the pursuer's failure to mention the 2006 Act is not *necessarily* fatal to his claim, that is not the end of the matter. The defender submits that it is not obvious that the pursuer's case is, indeed, founded on section 28 of the 2006 Act. In her submission, the absence of any reference to the 2006 Act suggests that the claim is one brought at common law. That being so, the defender submits that the pursuer, by his amendment, is seeking to change the basis of his case. It is said that the pursuer is seeking to convert his existing action into one brought in terms of the 2006 Act, when that is not the basis on which it was originally pled.

[17] Moreover, the defender submits that the pursuer is seeking to change the basis of his case after the expiry of the one-year time limit imposed by section 28(8) of the Act. The time-limit would prevent the pursuer from raising proceedings afresh at this stage and, accordingly, allowing the amendment would permit the pursuer to circumvent the time limit. It was submitted that the time limit is a strict one from which there is no scope for discretionary relief: *Simpson* v *Downie* 2013 SLT 178 and *Knight* v *Henderson* 2023 Fam LR 28. This, says the defender, is the very kind of amendment which the court identified as being impermissible in *Pompa's Trustees* v *Edinburgh Magistrates* 1942 SC 119, in which it was said, at p125 per LJC Cooper:

> "It is well recognised that, where a statute prescribes a special method for enforcing a statutory right or liability, the general rule is that no other method of enforcement can be resorted to (Maxwell on Statutes, pp. 339-40, and cases there cited). Further, our reports contain many decisions showing that the Court will not in general allow a pursuer by amendment to substitute the right defender for the wrong defender, or to cure a radical incompetence in his action, or to change the basis of his case if he seeks to make such amendments only after the expiry of a time limit which would have prevented him at that stage from raising proceedings afresh."

[18] The pursuer took no issue with the defender's submissions in respect of the limitation on amending after expiry of a time limit, but submitted, simply, that the pursuer's case had always been a claim founded on section 28 of the 2006 Act. The claim was made within one year following the date of the parties' separation and, thus, on time. Accordingly, the pursuer was not now seeking to change the basis of the case, nor was he seeking to defeat the statutory time limit.

[19] Parties agreed that the correct approach was to determine whether the proposed amendment involved a fundamental change in the pursuer's case. Guidance on the approach to that question has been provided by the court in *Perth and Kinross Council* v *Scottish Water* 2017 SC 164 *per* Lord Drummond Young at paragraph 15:

> "In applying the principles laid down in *Pompa's Trustees v Edinburgh Burgh Council*, the critical question is whether on a proper analysis the proposed amendment involves a fundamental change in the pursuer's case, whether as to the identity of the parties or the ground of action or the general competence of the action. That analysis must in our opinion address the substance of what is proposed, not its mere form. This means that the case as originally pled and the amended case that is proposed must each be considered as a whole: the identity of the parties, the remedy sought and the ground of action must be taken together in deciding whether there is a fundamental change."

[20] With the foregoing guidance in mind, I have considered the pursuer's case as originally pled. It seems quite clear that the pursuer's existing pleadings follow, broadly, the provisions of the 2006 Act and adopt the language used therein. In particular the pursuer craves a "capital sum" and makes averments relating to "economic advantage", "economic disadvantage", and the extent to which either is "offset". These are all particular statutory terms which can immediately be recognised as arising from the provisions of the 2006 Act.

[21] I accept that the absence of any reference to the 2006 Act may have left the defender's solicitor in some confusion. However, I am satisfied that any confusion that did arise did not result in any material prejudice to the defender. Certainly, the defender's solicitor might have found the pleadings to be unusual, but it was clear from submissions that she was (as would be expected) familiar with the provisions of the 2006 Act. In particular, it is plain that the defender's solicitor was able to answer the claim in some detail and, more importantly, has addressed the matters relevant to section 28 of the 2006 Act, no doubt precisely because the pursuer's pleadings were directed towards the relevant matters set forth in the statute and also, no doubt, due to her own skill and diligence in navigating what was admittedly an imperfect situation. Notwithstanding the degree of confusion that may have been caused, having considered the pleadings, I am left in no doubt that, in substance, this has always been a case founded on section 28 of the 2006 Act and on no other basis.

[22] I have also considered the effect of the proposed amendment. With the exception of the controversial mention of section 28 of the 2006 Act, the proposed amendments seek to do no more than provide further specification of the pursuer's claim. In particular, they expand on the reasons for which it is said that the defender has been advantaged by the pursuer's contributions and provide further (and arguably much needed) specification of the financial and other contributions made by the pursuer. The pursuer's crave for a capital sum and pleas-in-law remain substantially unchanged.

[23] I am satisfied that the pursuer's case would remain fundamentally unchanged if the amendment were to be allowed. Overall, the pursuer seeks to do little more than insert reference to the well-known statutory provision which entitles the pursuer to make such an application to the court, thereby rectifying a technical omission. Fundamentally, the claim always was, and if amended will remain, one under the 2006 Act. The proposed amendment does not seek to alter the basis of the claim nor does it involve any other fundamental change. I do not consider, therefore, that the amendments the pursuer seeks to make are of the kind identified in *Pompa's Trustees* as generally being impermissible.

Do the pleadings set forth a relevant claim in terms of the 2006 Act?

[24] I am satisfied that the pleadings in their current form are not only founded on section 28 the 2006 Act, but that they also set forth a relevant and sufficiently specific claim in terms of that provision. The pursuer's claim craves payment of a capital sum of £150,000. Thereafter, the pursuer makes averments allowing it to be proved, *inter alia*, that: (i) the parties were in a relationship during which they cohabited for approximately 33 years; (ii) the parties separated on or around 12 July 2022; (iii) during the course of the relationship, the pursuer made certain financial and other contributions which included

providing all of his earned income to the defender, and making improvements to property owned by the defender; (iv) on separation the defender owned a number of assets which included the house in which the parties resided and to which the pursuer contributed; (v) on separation the defender retained no assets; and (vi) the defender has gained an economic advantage as a result of the pursuer's contributions. There are further averments which, if proved, would be capable of founding the inference that, as a result of the foregoing, the pursuer has suffered an economic disadvantage in the interests of the defender and also that, by inference, neither the pursuer's disadvantage, nor the defender's advantage, has been offset by the financial consequences for the other party. Thereafter, the pursuer's pleadings conclude with a plea-in-law in the following terms:

> "The Defender having gained [an] economic advantage as a result of the Pursuer's financial [. . .] contributions, and that not being offset either in whole or in part by her economic disadvantage, decree should be granted as first craved."

I am satisfied that, read as a whole, the pursuer's pleadings make sufficient averments of fact which set forth the essentials of a relevant claim in terms of section 28 of the 2006 Act. Accordingly, even if I were not to allow the pursuer's proposed amendment, I would nonetheless repel the defender's plea to the relevancy and specification of the pleadings.

Should the amendment be allowed?

[25] I have found that, in their current form, the pleadings are competent and state a relevant and sufficiently specific case in terms of section 28 of the Family Law (Scotland) Act 2006. I am satisfied that the proposed amendments are simply an expansion of the case already pled on record. However, while I have found that the existing averments are sufficient, they are undoubtedly limited, particularly in their specification of the basis on

which the pursuer quantifies the capital sum which he seeks. That being so, I am satisfied that the proposed amendments are necessary for determining the real question in controversy between the parties and will provide greater notice to the defender of the pursuer's case. Finally, I can identify no prejudice to the defender in allowing the amendment, particularly in circumstances in which I have otherwise decided that there is no ground on which to grant decree of dismissal and in which the action is set to continue.

Conclusion

[26] For the foregoing reasons I shall repel the defender's plea to the relevancy and specification (the defender's fourth plea-in-law) and allow the record to be amended in terms of the pursuer's minute of amendment as adjusted.

[27] I was not addressed on the question of expenses and, in the event that expenses are not agreed, I invite the parties to lodge a motion with the sheriff clerk seeking a hearing thereon.