



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 25
A256/23

Lord Pentland
Lord Tyre
Lady Wise

OPINION OF THE COURT

delivered by LORD TYRE

in the cause

by

SADDIQ AHMED, in his capacity as executor of the late Bashir Ahmed

Pursuer and Respondent

against

KAMALL AHMED, in his capacity as executor of the late Bashir Ahmed

Defender and Reclaimer

Pursuer and Respondent: Motion, sol adv; BTO Solicitors LLP

Defender and Reclaimer: Party

13 August 2024

Introduction

[1] Bashir Ahmed died intestate on 1 July 1996, survived by nine children. The pursuer and defender are two of his sons. Following contested proceedings, they were appointed as the deceased's executors dative by the sheriff at Wick on 3 July 1998. No application for confirmation was made at that time.

[2] At the date of his death the deceased owned various heritable properties which were subject to securities granted in favour of Habib Bank. At least some of these properties had

been repossessed by the bank prior to the deceased's death. Both parties appear to accept that the bank, as heritable creditor in possession, disposed those properties many years ago to members of the deceased's family, to whom it had agreed to offer them on a "first refusal" basis.

[3] On 5 April 2023, the defender, without informing the pursuer of his intention, applied to Wick Sheriff Court for confirmation in favour of himself and the pursuer as co-executors dative. In the inventory of assets, the defender listed a number of heritable subjects as forming part of the deceased's estate at death, including properties repossessed before or shortly after his death. The application form contained the standard declaration that the executors "have entered or are about to enter upon possession and management of the deceased's estate". The defender signed the usual certificate that to the best of his knowledge the information provided was "correct and complete". Confirmation was granted by the sheriff on 12 May 2023.

[4] In this action the pursuer seeks reduction, suspension and interim suspension of the grant of confirmation. He also seeks interdict and interim interdict against the defender from taking any step in reliance upon the grant of confirmation, including taking or attempting to take any step to sell, burden or otherwise deal with any of the properties listed in the inventory.

[5] In support of the conclusions for reduction and suspension, the pursuer contends that the application contained material errors. First, it had not been correct to state that the executors were about to enter into the management of the deceased's estate, the pursuer having been unaware of the defender's intention to apply for confirmation until after it was granted. Secondly, the inventory included a property which had not belonged to the deceased at the date of death. Thirdly, the deceased's estate now consisted of a single

property, the rest having been disposed long ago by Habib Bank as noted above. The inventory to the confirmation ought not to have included the repossessed properties or the property which had not belonged to the deceased. In consequence of these errors, the application was not correct and complete. Moreover, had he known in advance of the defender's intention to apply for confirmation, the pursuer would have resisted it on the ground that the defender was unsuitable to act as an executor. In support of the conclusion for interdict, the pursuer founds upon a letter sent on 1 August 2023 by the defender to "the Ahmed family members" in which he asserted an entitlement to act alone in the administration of the estate and expressed an intention to investigate the transactions carried out in connection with the repossessed properties.

[6] The pursuer raised the present proceedings in August 2023. On 4 August 2023, on a motion before the calling of the action, the Lord Ordinary *ad interim* suspended the confirmation and interdicted the defender from taking any steps in reliance upon it. Defences were lodged which include a number of preliminary pleas. When the record closed the parties were unable to agree on further procedure. The pursuer sought a proof before answer; the defender sought a debate on the procedure roll. On 29 May 2024 the case called on the By Order (Adjustment) Roll in accordance with Rule of the Court of Session 22.3(5)(b). The defender appeared in person at the hearing; the pursuer was represented by a solicitor-advocate.

The Lord Ordinary's decision

[7] Having heard parties, the Lord Ordinary fixed an 8-day proof before answer for dates in October and November 2024 and made other orders. Her interlocutor, so far as material, stated:

“The Lord Ordinary, having heard Mr Motion and Mr Ahmed personally... on the unopposed motion of the defender Allows the third, fourth and fifth inventory of the defender to be received and marked 7/5-12 of process; on the opposed motion of the defender, refuses the defender's motion to appoint Mr Deryck de Maine Beaumont as a lay representative in terms of Section 126B.2 [sic]; on the unopposed motion of the pursuer, Allows the Record to be received and marked number 11 of process; Allows to parties a proof before answer of their respective averments on record.”

Following upon the marking of the reclaiming motion, the Lord Ordinary issued a brief opinion setting out her reasons for the various decisions that she required to make at the By Order (Adjustment) Roll hearing, including in particular her reasons for refusing to allow Mr de Maine Beaumont to be appointed as the defender's lay representative, and for allowing a proof before answer.

[8] As regards the appointment of a lay representative, the Lord Ordinary was informed that Mr de Maine Beaumont is an enrolled solicitor who does not hold a practising certificate. She considered that on one view of RCS 12B.1(2)(a), being on the roll of solicitors was sufficient to preclude appointment as a lay representative. In case that was wrong, the Lord Ordinary considered the application on its merits. She concluded, having regard to various factors including the fact that Mr de Maine Beaumont had been the subject of disciplinary proceedings by the Law Society of Scotland, that he had previously been instructed by other members of the family in a dispute involving some of the properties which were the subject of the present proceedings, the duty of confidentiality owed by him to his former clients, and the likelihood of him being called as a witness in these proceedings due to his close involvement with the subject matter, that his appointment would not assist

the court, and accordingly that the test in *Aslam v Glasgow City Council* [2016] CSIH 78 was not met. She explained to the defender that he was not precluded from seeking to apply for the appointment of another lay representative, or a lay supporter, if he so chose.

[9] As regards further procedure, the Lord Ordinary took the view that given the number and nature of the issues raised, it would be difficult to tease out discrete questions of law that might resolve the case in whole or in part in the absence of evidence being led to inform the legal submissions. She determined that the most appropriate procedure would be by way of a proof before answer, with provision for case management by the court.

[10] The Lord Ordinary noted that she had refused motions made at the bar by the defender for appointment of Mr de Maine Beaumont as a lay supporter, and for recall of the interim orders previously granted, on the ground that it was not appropriate to address these matters at a hearing whose purpose was to determine further procedure.

[11] The defender now reclaims (appeals against) the decision to fix a proof before answer, as a means of bringing the entirety of the Lord Ordinary's interlocutor under review. As the proof was fixed for October 2024, the court on 27 June 2024 granted the pursuer's opposed motion for urgent disposal.

Grounds of appeal

[12] The defender's Note of Appeal contains 10 grounds. Some of these are of no substance. Ground 1 states that the Lord Ordinary erred by stating that the defender ought to have enrolled his motion for appointment of a lay representative earlier, but as she decided in exercise of her discretion to hear the application, the matter is academic.

Ground 6 states that the Lord Ordinary erred by allowing the record to be received late, but as the pursuer's motion for receipt was unopposed there is nothing to this point. Ground 7

states that the Lord Ordinary erred by failing to allow two of the defender's inventories of productions to be received, but as it remains open to him to lodge them, there is no substance to this ground either. Ground 8 states that the Lord Ordinary erred in refusing to hear a motion that "was or should have been before the court", dealing *inter alia* with recall of the interim orders and a sist of the action pending an application to the sheriff at Wick for correction of the inventory. As it seems clear that the motion was not properly before the court, the Lord Ordinary was correct to refuse to address these matters at a hearing on the By Order (Adjustment) Roll. The matters of substance raised by the defender in his grounds of appeal are (i) refusal of his application for appointment of Mr de Maine Beaumont as a lay representative; (ii) procedural unfairness; and (iii) allowance of a proof before answer. We address these in turn.

Appointment of Mr de Maine Beaumont as lay representative (grounds 2 and 3)

Arguments for the parties

[13] The defender submitted that the Lord Ordinary had erred in her interpretation of rule 12B.1(2)(a), the consequence of which would be that all people who could be referred to as "solicitors", such as academic or retired solicitors, were barred from providing lay representation. That would have serious implications for access to justice by lay persons such as the defender. His Convention rights would be breached. Moreover, this being a new matter raised *ex proprio motu* by the Lord Ordinary, time should have been given for the parties and especially a party without representation to prepare a response.

[14] As regards her assessment of Mr de Maine Beaumont, the Lord Ordinary had misapplied the case of *Aslam v Glasgow City Council*. She had erred in inquiring as to whether Mr de Maine Beaumont had been the subject of any negative findings as to his

professional conduct, and ought not to have attached any weight to this. She had further erred in accepting the pursuer's submission that due to having acted for three of the deceased's other children while in practice, Mr de Maine Beaumont would be unsuitable for appointment. It had not been demonstrated that this had any relevance to the issues for determination in the present action.

[15] In answer, it was submitted on behalf of the pursuer that the Lord Ordinary had been correct to take into account that the proposed lay representative was a solicitor, and to leave out of account the question of whether he held a practising certificate. She was correct to attach weight to an adverse finding by Mr de Maine Beaumont's professional regulator. The grounds of appeal and notes of argument, which bore to have been drafted by Mr de Maine Beaumont, were discursive and prolix and demonstrated that the Lord Ordinary had been correct to conclude that his appointment would not assist the court. In any event, it had not been demonstrated that the defender, an experienced businessman, would not be capable of conducting the litigation without assistance from a lay representative.

Decision

[16] Rule of Court 12B makes provision for a party to be represented by a lay representative. Rule 12B.1(2) defines a lay representative as a person who is not a solicitor, an advocate, or someone having a right to conduct litigation, or a right of audience, by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. The enabling provision for rule 12B was section 5(e) of the Court of Session Act 1988, inserted by section 126(a) of the Legal Services (Scotland) Act 2010. Section 5A of the 1988 Act, inserted by section 126(b) of the 2010 Act, contained the same definition of a lay representative as rule 12B.1(2).

[17] Section 149(2)(a) of the 2010 Act provides that in that Act the expression “solicitor” is to be construed in accordance with section 65(1) of the Solicitors (Scotland) Act 1980, which defines a solicitor as “any person enrolled or deemed to have been enrolled as a solicitor in pursuance of this Act”. The definition makes no mention of holding a practising certificate. In contrast, section 4 of the 1980 Act (entitled “Qualifications for practising as a solicitor”) provides that no person shall be qualified to practise as a solicitor unless (a) he has been admitted as a solicitor; (b) his name is on the roll; *and* (c) he has in force a certificate issued by the Council of the Law Society of Scotland authorising him to practise as a solicitor. An enrolled solicitor cannot therefore practise without a practising certificate, but he remains a solicitor so long as his name is on the roll. The case of *McKechmie v Murray* 2016 SC 339 affords an illustration of the distinction: see in particular Lady Clark of Calton at paragraph 19. There is in our view no warrant for reading into the definition of a solicitor for the purposes of the 2010 Act - and hence rule 12B - an additional requirement that the solicitor hold a current practising certificate.

[18] Mr de Maine Beaumont is an enrolled solicitor; this was confirmed at the hearing before us. He is therefore excluded by the terms of the legislation from appointment as a lay representative. We observe that the exclusion would not apply to a retired solicitor who had applied successfully to the Council under section 9 of the 1980 Act for removal of his name from the roll of solicitors. In these circumstances it is unnecessary to consider whether there is anything specific to Mr de Maine Beaumont, such as his prior involvement in the family’s legal affairs, that would warrant refusal of the defender’s application.

Procedural unfairness (grounds 4, 5 and 10)*Argument for the defender*

[19] The defender submitted that the Lord Ordinary had acted unfairly by not allowing him an adjournment to find another lay representative after his application in relation to Mr de Maine Beaumont had been refused. An advocate would have received time to deal with something so unexpected and it was unfair to expect a litigant in person to deal with these matters himself.

Decision

[20] The defender was aware that he was not entitled to lay representation as of right. He was or ought to have been aware that his application might be refused and that the hearing would nevertheless proceed. He was not treated less favourably in this regard than a professional representative. In any event, he did not move for an adjournment, and the Lord Ordinary cannot be faulted for not taking it upon herself to suggest that he do so. There was no procedural unfairness.

[21] The defender also sought to appeal against the decision of the procedural judge to grant the pursuer's motion for urgent disposal, which he contended had been unfair because it required him to prepare his case within a compressed timetable. Such an appeal could lie only to the UK Supreme Court. Rule 41A.2(1) and (2) requires such an appeal to be made in form 41A.2 and to set out the proposed grounds of appeal and the basis on which permission to appeal is sought. Thereafter, rule 41A.3 requires a formal order from the court for service of the application with a period for answers. No such application had been presented to the court and the motion was accordingly refused as incompetent.

Allowance of proof before answer (ground 9)*Argument for the defender*

[22] The defender submitted that the Lord Ordinary had erred in fixing a proof before answer. His pleadings contained a plea of “all parties not called” as well as pleas to the relevancy and specification of the pursuer’s case. These had been insisted in. Many of the pursuer’s pleadings were irrelevant to the conclusions of the summons. Reduction was only competent in the absence of an alternative remedy; in this case the pursuer had the alternative remedy of lodging an eik to the confirmation if he considered that it was incorrect. Interim suspension was not competent in an action for reduction. All of these points were best dealt with at debate. An 8-day proof was neither an appropriate nor an efficient means of disposing of the action.

Argument for the pursuer

[23] On behalf of the pursuer it was submitted that the Lord Ordinary’s reasoning for allowing proof before answer rather than debate was supported by the pleadings. The pursuer’s fundamental concerns were the defender’s clandestine application for confirmation; his apparent intention to revisit the administration of the deceased’s estate, involving third parties, when there was no basis for this (either in law or in fact or on account of passage of time) to the detriment of the remaining estate fund; and the inclusion in the inventory of property that ought not to have been included. These concerns gave rise to disputed issues of fact which could only be resolved after proof. Obtaining an eik to the confirmation would not resolve the other fundamental issues. The pursuer sought to be restored to the position prior to the defender expediting confirmation, so that he could object to the application.

Decision

[24] A preliminary matter, not addressed in the parties' submissions to the Lord Ordinary or to the court, is whether the Lord Ordinary had a discretion to refuse the defender a debate when he had preliminary pleas in which he wished to insist.

[25] Where, following the closing of the record, the parties have been unable to agree on further procedure, Rule of Court 22.3(5)(b) requires the pursuer to enrol a motion to appoint the cause to the By Order (Adjustment) Roll. In the annotations to the Rules of Court it is stated at paragraph 22.3.12:

“The [By Order (Adjustment) Roll] generally involves a purely formal hearing where parties are not agreed as to the next step in procedure. The roll is of little value because where parties are not agreed about the next step at the hearing on this roll the cause will be sent to the procedure roll...”

This annotation reflects the practice generally adopted in all civil actions prior to the trend in recent years towards active judicial case management. For certain categories of action, express provision is now made for the judge to exercise discretion in deciding whether to accede to a party's motion to send a case for debate rather than proof: see for example rule 42A.3(4) (complex personal injuries actions), rule 43.6(5) and (6) (personal injuries actions), rule 47.12(2)(a) (commercial actions) and rule 49.33(4) (family actions). No such express provision has however yet been made for ordinary actions.

[26] In *Deolin v Chief Constable of Strathclyde Police* [2007] CSOH 103, the defender reclaimed a decision by the Lord Ordinary (Malcolm) on the By Order (Adjustment) Roll allowing a proof before answer in an action remitted to the ordinary roll from chapter 43. The ground of appeal was that the Lord Ordinary had had no discretion to refuse a hearing on the procedure roll if that was what the defender wished. Lord Malcolm observed in his opinion that that was not the basis upon which the matter had been discussed before him

and that he had not consciously rejected the submission now made. He summarised the views of authors of practitioners' works on Court of Session practice and concluded that they presented an unclear picture. He noted that the view of judges in response to the Review of Business of the Court of Session conducted by Lord Cullen in 1995 had been that there was no need for judicial case management in all defended actions, and that the focus had thereafter narrowed to personal injuries actions. The reclaiming motion was appointed to the single bills for urgent disposal and, on 13 July 2007, with no appearance on behalf of the pursuer, the reclaiming motion was granted and the cause appointed to the procedure roll. No opinion was issued.

[27] Attitudes have moved on since 1995 (and indeed since 2007). The advantages of judicial case management of both first instance and appellate business are now widely recognised. Even in the absence of express provision in the Rules of Court for ordinary actions, it can no longer be said that it is the invariable practice to send a case to the procedure roll solely on the insistence of one of the parties. There will, for example, be cases in which it will be obvious to the judge at the By Order (Adjustment) Roll hearing that no issue for debate can be identified in the pleadings, and that insistence on a debate is a dilatory tactic. In such cases there is no rule that precludes the judge from declining to accede to the demand. That said, it remains the case in ordinary procedure that the decision whether an issue is best determined after enquiry is one that ought normally to be made by the judge hearing a debate on the procedure roll, with the advantage of written notes of argument and full oral submissions, rather than by the judge at the By Order (Adjustment) Roll hearing who does not enjoy that advantage.

[28] In the present case the defender has stated preliminary pleas including a plea to the relevancy of the pursuer's case. He lodged a note in advance of the By Order (Adjustment)

Roll hearing (6/70 of process), setting out at paragraph 5 the issues that he wishes to debate. These include a challenge to the relevancy of the pursuer's case for reduction and suspension of the confirmation. The defender wishes to argue that the confirmation was not vitiated either by having been applied for without the consent of his co-executor or by errors in the statement or valuation of the assets in the estate. These are matters of law. He also seeks to argue that much of the case pled by the pursuer is irrelevant to the remedies sought in the conclusions. Whatever may be said about some of the other issues raised in the defender's note, the Lord Ordinary erred in refusing to allow the defender a debate on the procedure roll in order to present his arguments on relevancy. Were those arguments to be successful, the scope of any subsequent proof could be much reduced. In these circumstances the appropriate course of action for the By Order (Adjustment) Roll judge was to appoint the cause to the procedure roll.

Disposal

[29] We shall allow the reclaiming motion to the extent of recalling the interlocutor of the Lord Ordinary allowing proof before answer, and the ancillary orders associated with the allowance of proof, and appoint the cause to the procedure roll. In terms of rule 22.4, any party seeking to have a preliminary plea sustained must lodge and intimate a note of argument complying with that rule. One day will suffice for oral argument. We reserve meantime all questions of expenses.