SHERIFF APPEAL COURT

[2017] SAC (Civ) 29
AYR-F417-12

Sheriff Principal I R Abercrombie QC
Appeal Sheriff N A Ross
Sheriff Principal C A L Scott QC

OPINION OF THE COURT

delivered by APPEAL SHERIFF ROSS

in appeal by

JACQUELINE BRADLEY

In the cause

JAMES BRADLEY

Pursuer/Respondent

against

JACQUELINE BRADLEY

Defender/Appellant

Pursuer and Respondent: Coutts, advocate; Lambert & Co
Defender and Appellant: Rattray, advocate; Black Hay

21 September 2017

[1] Section 16(1)(b) of the Family Law (Scotland) Act 1985 allows a court to set aside, in whole or in part, an agreement as to financial provision to be made on divorce "where the agreement was not fair and reasonable at the time it was entered into". In the present action the sheriff, having heard evidence, was persuaded that this test had been met, and set aside

the parties' pre-divorce agreement. The defender and appellant (hereafter the "defender") appeals that judgment in that respect. Parties are otherwise agreed that divorce be granted.

[2] The pursuer and respondent (the "pursuer") is a retired police officer, and in receipt of payments under the police pension scheme. The defender is a civil servant who is still in employment. The matrimonial assets are agreed, and in summary include the matrimonial home, a proportion of the pursuer's pension, a small pension of the defender, two investment policies, and motor vehicles. The date of separation was 10 May 2007. The parties' ages are not given.

[3] By agreement dated 2 December 2008, subsequently registered, the parties agreed the distribution of assets between them. In summary, that distribution involved the following features:

[4] The pursuer retained assets including the police pension, a vehicle and shares of the investment policies. He also received a capital payment of £120,000 from the defender, who obtained a loan in that sum and for that purpose, in return for his agreement that she would retain the matrimonial home. He undertook to pay the defender a one-half share of his monthly pension payments, without limit of time, until the death of one of the parties. In order to give the defender a degree of security for this ongoing monthly payment, the pursuer (who used the £120,000 to purchase a house) was to grant a security over that house for all sums due to the defender.

[5] The defender retained the matrimonial home, her own modest pension entitlement, a share of the investment policies and a vehicle. She also assumed the burden of paying off the loan of £120,000. She was to receive a monthly income from the pursuer of approximately £1000, being one-half of his monthly pension payment.

[6] The parties thereafter operated that arrangement. The present action was raised in late 2012. The divorce proof was heard in 2016. As part of his pleadings, the pursuer sought reduction of the 2008 agreement.

The Grounds for Reduction

[7] The pursuer argued that the agreement was unfair and unreasonable at the time it was entered into because (i) he had received no legal advice when he signed it; (ii) he was in poor mental health; (iii) he was dominated by the appellant and was in fear of her; (iv) she withheld vital information from him; and (v) he did not read it before signing.

[8] After proof, the pursuer failed on all of these grounds. He was found to be a strong character who was overplaying his evidence. There was no undue pressure. The parties discussed the terms of the agreement frequently and in detail. He did read the agreement. He had negotiated with the aim of obtaining a mortgage-free property and not having to pay a lump sum (from his pension) to the appellant. The parties' agreement achieved his aims.

[9] Notwithstanding this failure, the sheriff was persuaded that the agreement, viewed objectively, was unfair in its terms. The sheriff set aside two of the clauses of the agreement. One of these, clause 6, which amongst other matters required the respondent to create a standard security over his new house, is not a matter of dispute – the defender offered to make this concession prior to the proof. It is not part of the appeal.

[10] This appeal focuses on clause 4, which provides:

> "Mr Bradley, as a retired police officer, is in receipt of a police retirement pension which provides him with a net monthly income. With effect from the date of transfer of title of the matrimonial home…Mr Bradley will make payment to Mrs Bradley each month of a sum equivalent to one-half of the net pension income received by

> him. This payment is acknowledged to be made in lieu of the capital sum which would otherwise be due to Mrs Bradley on a fair division of matrimonial property. Mr Bradley undertakes to do nothing to adversely affect the pension income he receives… These provisions will prevail until the death of either party, unless varied by mutual agreement."

[11] Clause 4 was set aside, and was replaced by new provisions imposed by the sheriff with the assistance of parties' counsel. These new provisions were, broadly, based on aggregating the whole value of the matrimonial net assets, finding an appropriate percentage allocation between the parties, assessing the actual value received and ordaining payment of the difference. A short-term adjustment was made to address short-term difficulties, and provided for monthly payments, at reducing figures, for a period of 18 months. A pension sharing order was substituted for the ongoing monthly payments, payable when the appellant reached the age of 60.

Grounds of Appeal

[12] The first ground is that the sole justification relied upon by the sheriff, namely the pursuer's choice to sign the agreement without legal advice, was not sufficient to show that the agreement was unfair and unreasonable at the time it was entered into. The second ground is that the variation imposed by the sheriff amounted to a rewriting of the agreement in a way which would not have been agreed to, and which cannot work on a practical level many years after the agreement was made.

[13] We have upheld the first ground of appeal. It is unnecessary to make a finding on the second ground, but we comment on this below.

Ground 1 – Unfair and Unreasonable

[14] The sheriff's view was that, while accepting that parties were free to contract as they wished, and that while the court should be slow to overturn agreements freely entered into, nonetheless the agreement failed the test. The sheriff stated:

> "The onus of establishing that the agreement is unfair and unreasonable rests on the pursuer and I am satisfied, on the balance of probabilities, that he has discharged this onus. However, the sole basis upon which I consider he has done so is in relation to a lack of legal advice on what was an extremely unusual and open ended agreement. The defender had an advantage over the pursuer in that she had legal advice and was made aware of her entitlements. The pursuer by contrast did not. I am satisfied that the pursuer was unaware that this Agreement flew in the face of the 1985 Act principles. Had he been so aware and chosen to enter into it regardless, that may have placed a different perspective on it…"

[15] The sheriff identifies two elements in this approach. The first consisted of the principles, or what the sheriff elsewhere described as the "ethos", of the 1985 Act. The second was the lack of legal advice as to that ethos or those principles. We consider the sheriff erred in both respects.

The Ethos of the 1985 Act

[16] The sheriff was undoubtedly correct in identifying that the ethos, or at least an ethos, of that statute is a "clean break" between the parties. On appeal, this ethos was not discussed in detail or elaborated upon by either counsel, but both accepted the sheriff's statement to be correct. The matter is sufficiently well established that we can accept that this is the underlying approach of the 1985 Act.

[17] Two points arise. The first is that the 1985 Act does not set out any principle by which the unreasonableness or unfairness of a provision is to be judged for the purposes of section 16. The only test is whether the agreement was "not fair and reasonable at the time it

was entered into". This is a judgement to be made on the facts of each case. Such a judgement is not informed by any overarching principle other than that of fairness and reasonableness.

[18] The second point is that the concept of a clean break only forms part of the ethos of the 1985 Act. That ethos embraces competing principles. Another important principle is that parties are free to contract as they please, subject to the ability to apply under section 16(1)(b) for reduction on the basis of fairness and reasonableness. Another principle is that parties are encouraged to settle their differences by agreement, thereby avoiding the stress and expense of litigation. These factors have been recognised in *Gillon* v *Gillon (No 3)* 1995 SLT 678, wherein the Inner House accepted that the court should not be unduly ready to overturn agreements validly entered into.

[19] We have concluded that the sheriff misdirected herself in considering that fairness and reasonableness required a time-limited agreement. An apparently indefinite payment arrangement may be capable of operating unfairly or unreasonably, but this will turn on the facts of each case, not on any other principle introduced by the 1985 Act. Whatever the legislative intent of the 1985 Act might be, the terms of the 1985 Act do not limit parties' freedom in reaching their own specific arrangements. Parties are free to regulate their own affairs by agreement, subject to fairness and reasonableness. The 1985 Act does not require parties to conform to any particular model of agreement, or time-scale, or content. It does not require parties to obtain the consent of the court. It does not require the court to approve any such arrangement. Any arrangement remains in force until one party assumes and discharges the burden of proving to a court that the agreement is unfair or unreasonable. In that context, section 16(1)(b) directs the court to assess only whether the

terms of the agreement are unfair and unreasonable, without reference to any wider test or ethos.

[20] The sheriff found that the relevant terms were unfair and unreasonable because they "flew in the face of the 1985 Act principles". In this, we consider that the sheriff was in error. There are (for the purposes of section 16(1)(b)) no such principles, other than fairness and reasonableness. The sheriff allowed herself to be swayed by an argument which is tautologous.

[21] For completeness, neither party to the appeal argued that the terms "unfair" or "unreasonable" were ambiguous or unclear. We agree with that approach. What amounts to unfairness or unreasonableness in any case depends on the facts and circumstances of each case.

Lack of Legal Advice

[22] We consider that the sheriff erred in this respect also. There was no evidence before the sheriff, or finding in fact, that such legal advice was unavailable, or would have been given, or acted upon, or that there was any causal connection between the absence of advice and the pursuer's decision to agree the relevant terms.

[23] The sheriff records that the pursuer:

> "had broad legal advice at that (sic) start of 2008 but I consider that he was disadvantaged in not having legal advice on the specific terms of this Agreement. He chose not to do so, but I do not consider that the court should, in these circumstances, proceed in a way that binds him indefinitely to an Agreement entered into in ignorance of the law or of his entitlements."

[24] This view appears to run contrary to the evidence. The court's findings in fact and note reveal the following facts: the pursuer had a solicitor at the material time, who was

dealing with conveyancing matters; the pursuer chose not to take legal advice; there was no pressure on him to agree or execute the agreement; he was able to give clear instructions to his solicitor on other matters; the pursuer and defender discussed the terms of settlement frequently and arrived at a position that was of immediate mutual benefit to them; the pursuer read and revised the draft agreement; he was advised to take legal advice; he considered that he did not need such advice as the parties had reached their own agreement on terms that broadly suited their immediate needs; his main objective was to obtain a mortgage-free property and not to pay a lump sum to the appellant; the agreement met those immediate aims; it was his choice not to involve a solicitor; he had earlier discussed his assets, liabilities and pension with his solicitor; he was advised that he should get a valuation of his pension, but declined to do so; he chose not to follow advice. The agreement achieved what the parties meant it to achieve.

[25] On the basis of these findings, we consider that the sheriff had insufficient factual basis to conclude that the pursuer had suffered unfair or unreasonable disadvantage as a result of lack of legal advice. The pursuer had legal advice if he wanted it. He chose not to take legal advice, as the sheriff says "perhaps displaying a degree of arrogance on his part". There is no finding that he would have taken any such advice even if he had received it. No causal connection between advice and actings has been shown, or appears to have been the subject of any evidence. It is unclear what the sheriff had in mind when referring to the law and to the pursuer's entitlements. We can identify no entitlement which he has not received. The sheriff's findings point, if anything, the other way, and appear to support the proposition that the pursuer had access to legal assistance if he so wished, and that he understood what he was agreeing to.

[26] The agreement expressly provided for monthly payments to start and continue without limit of time, other than the death of one of the parties. The pursuer's case did not principally found on the proposition that that was inherently unfair, but on other features which the sheriff rejected. The mere fact that an agreement becomes inconvenient or a matter of later regret, does not mean that it was unfair or unreasonable at the time it was entered into. Even the fact that it subsequently transpires that the agreement has led to an unequal, and possibly very unequal, division of assets does not by itself necessarily give rise to any inference of unfairness or unreasonableness (*Gillon* v *Gillon (No 3)* 1995 SLT 678).

Decision

[27] We have determined that the sheriff was in error in finding that the agreement was unfair and unreasonable at the time it was entered into. It follows that this appeal must be granted. We refrain from commenting on the merits of the agreement as a whole. It is not the function of an appeal court to conduct a further assessment of unfairness or unreasonableness. The burden remains on the party offering to prove the existence of those characteristics and, in that regard, the pursuer has failed.

[28] We would, however, endorse the approach in *Gillon* v *Gillon (No 3)* (above) to the effect that fairness and reasonableness involve consideration not only of the written terms of the agreement, but also "all the relevant circumstances leading up to and prevailing at the time of execution of the agreement", which might include the nature and content of legal advice, the short-term aims of the parties, the respective abilities of the parties and their knowledge. It follows that it will rarely be sufficient to focus on a single aspect of an agreement, such as an ongoing obligation to make periodical payments.

[29] This is illustrated in the present case, where a number of factors appear to have been given insufficient weight. These include: that there was no unexpected development and parties reached and operated an agreement in exactly the terms they chose; that the parties had operated this arrangement for approximately four years prior to raising this action and eight years before decree, without explanation why the pursuer's attitude had changed; that the pursuer had achieved his aim of avoiding payment of a lump sum from his pension; and that the defender had paid the pursuer a lump sum of £120,000 having taken out a loan, which she still has the burden of repaying and paying interest upon, which burden would continue while her income stream was removed. Further, the sole reason for reducing the agreement was said to be the "endless" nature of these payments, but we note that the agreed payments are not endless. They end on the death of one of the parties. In this respect there is a similarity to the pension sharing order which was put in place.

Importance of Grounds of Appeal

[30] We would observe that during the appeal a number of points arose, which had not been the subject of argument before the sheriff and which had not been expressly explored in the judgement. These included submissions that (i) this was in fact a clever arrangement between the parties which allowed the defender to receive pension payments immediately, rather than to wait until her own pension age; and (ii) the monthly payments were unfair because they were made out of the whole pension payments, rather than just from the percentage of the pension which was matrimonial property. Whatever the merit of these submissions, we decline to take them into account because they were not in the grounds of appeal, there was no cross-appeal, and there was no challenge to the existing findings in

fact. An appeal court is not the forum to re-open a discussion of the facts, except in very defined circumstances (*Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203).

Limitations of Appeal Process

[31] The second ground of appeal requires comment. As drafted, it is:

> "The learned sheriff erred in law in that by altering clause 4…she was thereby rewriting the agreement in terms that would not have been agreed to at the time and in a way that cannot work on a practical level over seven years after the Agreement was entered into".

[32] It is not clear how it could be argued that it "cannot work on a practical level" without the court being drawn into a full-scale reconsideration of the web of financial arrangements between the parties, involving investments policies, two pensions, two properties, a heritable security, monthly payments and moveable assets. No transcript of the evidence at proof was lodged and no cross-references to that evidence were provided to the court. The second ground of appeal appears to amount to nothing short of a re-run of the submissions made to the sheriff, with some augmentation in hindsight. This is not a legitimate use of the appeal process. In the event we have not required to carry out this exercise.

Pleadings

[33] We consider that the pleadings in this case are inadequate to fairly allow the court at first instance to perform its function. We note that, in attempting to identify the correct outcome, the sheriff has carried out a careful and painstaking assessment exercise, and we have every sympathy for the magnitude of the task which faced her. However, as the sheriff notes:

> "It was apparent in this case that counsel for both parties were trying to find imaginative ways in which to approach the difficult situation the court now faces in trying to unravel the financial situation that the parties have put themselves in".

[34] That is not a position that any court should be faced with. The pleadings state at length why the agreement might be unfair or unreasonable. They do not, however, set out any proposed solution. They fail to plead what specific terms the court requires to impose in order to achieve the minimal requirements of fairness and reasonableness at the time the agreement was entered into. Had they done so, any proposed solution would have been focused, tested and challenged by questioning of witnesses. Owing to this shortcoming, parties appear not to have elicited adequate evidence for this purpose from experts or others at proof. Meanwhile, the court was left unsighted until the last moment as to parties' proposed solutions, and was thus deprived of notice, and thereby the opportunity for informed enquiry, as to those proposals. As a result, the court found itself having to work out a fair and reasonable solution, in a complex of diverse but interdependent financial arrangements which had operated for many years, while starved of adequate evidence or relevant expert opinion. In our view that imposes an unrealistic burden on any court, and creates an unnecessary obstacle to identifying a fair and reasonable variation of the agreement.

[35] This difficulty is magnified on appeal. Counsel invited us to consider that the varied arrangements would operate unfairly. How an appeal court could carry out an accurate judicial assessment of fairness and reasonableness, on a historic basis, relating to the interaction of complex financial and pensions arrangements, in the absence of any expert analysis or clear explanation of the detailed finances, far less any evidence of the same, was not made clear. We cannot take such a course.

[36] In our view, if a party to an agreement seeks setting aside or variation under section 16(1)(b), that party must plead and prove: (i) the practical financial or other consequence of the existing arrangement, within the context of the whole arrangements; (ii) why that consequence operated unfairly or unreasonably at the time the agreement was entered into; (iii) that such consequence is not offset by any comparable disadvantage to the other party; and (iv) what specifically would be the minimum practical solution required to alleviate such unfairness or unreasonableness as at the relevant date, having regard to the effects on both parties. The court has wide powers under section 16(1)(b), but the exercise is not merely an audit by the court. A pursuer must aver and prove, amongst other matters, a specific fair and reasonable outcome. Identifying a fair and reasonable variation of the agreement cannot be left to "imaginative ways" revealed by parties for the first time at the end of the proof.

Disposal

[37] We will therefore allow the appeal, and vary the sheriff's interlocutor but only to the extent of recalling (a) the order setting aside clause 4 of the Minute of Agreement dated 2 December 2008 referred to in part (Two) of the sheriff's interlocutor; (b) the order granting a pension sharing order set out in part (Four) of the interlocutor; and (c) the order granting payment of the periodical payment set out in part (Five) of the interlocutor. Parties were agreed as to the disposal of expenses in relation to the appeal. Accordingly, we will find the pursuer and respondent liable to the defender and appellant in the expenses of this action, including the appeal, but as an assisted person, and certify the action as suitable for the employment of junior counsel.