EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 44
F66/21

Lord Pentland
Lord Tyre
Lady Wise

OPINION OF THE COURT

delivered by LADY WISE

in the hearing on expenses

by

SARAH GUNN OR FOSTER

Pursuer and reclaimer

against

ROSS FOSTER

Defender and respondent

Pursuer: J Scott KC, Mountain (sol. Adv.); Brodies LLP
Defender: Brabender KC; Harper McLeod LLP

12 December 2023

Introduction and background

[1] On 29 September 2023, the pursuer's reclaiming motion was granted, the interlocutor of the Lord Ordinary making final orders for divorce and financial provision was recalled and fresh orders were made. As the pursuer succeeded in the reclaiming motion she seeks an award of expenses in relation to that. The defender suggests that resisting the reclaiming motion was necessary as the application by this court of the decision in *Murdoch* v

Murdoch 2012 SC 271 was a novel one. It is not suggested that there was any measure of success for the defender at the appellate stage of proceedings.

[2] The pursuer also seeks the expenses "of and occasioned by the preparation and conduct of the proof" and the subsequent By Order hearings (save insofar as already ordered) in the Outer House and moves also for an additional charge in terms of rule 5.2(6) of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019. Those motions are opposed by the defender, who suggests that a finding of no expenses due to or by either party would be the appropriate disposal for the proof.

[3] A decision on expenses in a financial provision on divorce case primarily involves the exercise of discretion, but regard will be given to, amongst other matters, (i) success on the issues in contention at proof, (ii) conduct and (iii) extra judicial offers (*Sweeney* v *Sweeney No 3* 2007 SC 396 ; *McCallion* v *McCallion* 2022 Fam LR 63). It is also relevant to consider the impact an award of expenses may have on the division of matrimonial property achieved through court orders (*Little* v *Little* 1990 SLT 785; *Sweeney* v *Sweeney No 3* at p 398).

[4] In this case, the main areas of contention in relation to the application for expenses relate to first, identifying the main issues in dispute at proof, secondly assessing the extra judicial offers made and thirdly the impact of expenses on the division of matrimonial property.

Parties' submissions

[5] In relation to the first of these, the pursuer submits that the main issue in dispute at proof was whether her shares in RRR Holdings Limited should be transferred to the defender in return for a capital sum. The outcome of the reclaiming motion illustrates that she should have succeeded on that issue before the Lord Ordinary. On behalf of the

defender it is submitted that the main issue on which the pursuer proceeded to proof was the valuation of the parties' shareholdings in RRR and that the defender was wholly successful in relation to that. It is accepted on his behalf that there was also an issue about the mechanism for realisation of the value of the pursuer's shares and that the pursuer ought to have been successful on that issue. He contends that the parties can truly be regarded as having enjoyed mixed success and so no award should be made.

[6] On the second issue, it seems that the parties began settlement negotiations as late as the Friday afternoon prior to the commencement of the proof. The defender made an offer based on figures derived from his expert's valuation report. He did not offer to acquire the pursuer's shareholding as an individual but proposed that her shareholding be realised through its purchase by a new company. The defender's highest offer for purchase of the pursuer's shares through a new company was £1,175,213 in instalments over a period of 5 years and 2 months, made in the early evening of the day prior to proof. The previous Friday the pursuer had made a proposal indicating that she would accept the sum of £1,424,700 for purchase of her shareholding by a new company, but with enumerated safeguards. There were a number of other issues covered by the various proposals and counter proposals (e.g. duration and quantum of periodical allowance) but these were less significant and neither side achieved complete success on those after proof. One matter, whether a claim for business asset disposal relief would succeed, was resolved by legislation that came into force while the case was at avizandum. The pursuer submits that it is not possible to draw a clear distinction between pure valuation evidence at proof and evidence about the nature of the business. The fact that the Lord Ordinary preferred the defender's expert's approach should not detract from the overall success of the litigation from the pursuer's perspective.

[7] Thirdly, the defender contends that an award of expenses against him would disrupt the balance of financial provision achieved through court orders. While he will retain all of the company shares, it is said he retains no personal assets. He cannot borrow from the company and has no resources from which to meet an expenses award.

Decision

[8] There is no dispute that the pursuer enjoyed complete success in the reclaiming motion. While the disposal may represent a fresh application of the approach set out in the *Murdoch* case, at the heart of the dispute was the defender's claim that he had insufficient personal resources to acquire his wife's shareholding as an individual. We will award the expenses of the reclaiming motion in favour of the pursuer.

[9] So far as the expenses of preparing for and conducting the proof are concerned, there are several factors to consider.

[10] To some extent there was divided success on the issues that were litigated at proof. The dispute on the value of the company both at the relevant date and the date of proof was relatively significant, a difference in the order of £500k on each of the two dates even after certain adjustments had been made in evidence by the pursuer's expert. The defender succeeded on that issue. However, it was naïve at best for the defender to conduct the proof on the basis that the court could either countenance and somehow implement the setting up of a new company for the purchase of the shares, or reach a satisfactory result without dividing the parties' major asset. That was the central issue of principle on which the pursuer should have succeeded at proof and in which she has now succeeded. In essence, the pursuer required to litigate the case to proof to achieve fair financial provision on divorce.

[11] Looking at the offers, in value terms the defender's proposals close to proof were reasonable (a sum of £1,175,000 for the shares over 5 years, with the ultimate sum awarded being £1,100,000 in four annual instalments). Those proposals did not, however, take account of the restricted orders that could be made by the court should the proof proceed. The notes of evidence illustrate that the mechanics of the share purchase remained an important unresolved issue at proof.

[12] On the issue of the balance of the division of property achieved by the court, we reject the notion that the defender currently has no personal realisable resources. His 100% ownership of the company will give him complete flexibility to organise his affairs. The information available at the time of the proof was that the company was extremely valuable (net asset value of about £4 million) and that provided at the reclaiming motion was to the effect that it continues to trade and remains profitable. An award of expenses for the Outer House proof is unlikely to have a material effect on the division of assets now achieved.

[13] In all the circumstances we consider that an award is appropriate, but that it should take account of the element of mixed success in respect of the issues litigated at proof. We will award the expenses of the preparation and conduct of the proof and the subsequent By Order hearings (save insofar as already ordered) to the pursuer but restricted to 50%.

[14] The pursuer seeks an additional charge under heads (a), (b), (c), (d), (e), (f) and (g) of the 2019 Rules. She contends that this was a complex action, involving expert evidence on valuation, tax and commercial issues. The legal argument was novel, the risks high and the case an anxious one. Skilled family law solicitors were required to prepare the case and communicate the issues to the client. There were a large number of documents and some were lodged late by the defender. There were difficulties in finalising expert reports as a result. The pursuer's living conditions were hinged on the outcome of the case. The asset

values were significant, the company alone being worth in excess of £4 million. Agents had conducted the litigation efficiently and two Joint Minutes of Admission had been negotiated. On behalf of the defender it is submitted, in essence, that this was a Court of Session action conducted by skilled solicitors on both sides who instructed very experienced counsel. Arguments that the solicitors acted beyond what might reasonably be expected have to be tested against that backdrop. At first instance, the defender's side had cooperated fully and given the pursuer's forensic accountant access to all relevant material. Before the Inner House the appendix and lists of authorities had all been lodged on the advice of counsel. In any event, should the court award an additional charge it should be kept to a minimum.

[15] We have decided that an additional fee is not justified under any of heads (c),(d),(e) and (g). The number of documents does not seem to be beyond what would be prepared in a litigation of this type; no relevant issues seem to arise in relation to the place and circumstances of the proceedings and their preparation; all financial provision on divorce cases are important and involve uncertainty of outcome. The pursuer retained the home in which she and the student children of the marriage live for her to sell or retain at her option, thus her living conditions did not change; and steps taken to settle the proceedings were initiated only a short time before the commencement of proof and any steps taken to limit the extent of the evidence appear to be no more than the court would expect.

[16] There is greater force in the submissions under heads (a),(b) and (f). There were complexities in the case that went beyond the norm when compared with other financial provision on divorce cases. The court's ability to resolve a situation utilising sections 8, 12 and 14 of the 1985 Act to transfer property in return for a capital sum by instalments even where the transferee did not conclude for that disposal appears not to have been fully understood following the *Murdoch* case. That, the perceived tax implications of share

transfer in the context of a relatively high value case and the multiplicity of issues in contention will have demanded considerable expertise on the part of the solicitors instructed. The values of the various assets involved in the dispute were high, relative to some other financial provision cases litigated in the Court of Session.

[17] Taking these factors together we will grant the motion for an additional charge under those three heads of rule 5.2(6) of the 2019 Rules, but will fix the total percentage at 30%. This will apply to both the Outer House and Inner House procedure.