EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 41
A321/18

Lord Woolman
Lord Pentland
Lord Doherty

OPINION OF THE COURT

delivered by LORD WOOLMAN

in the reclaiming motion

by

GEORGE AMIL AND M V OVERWAELE

Defenders and reclaimers

against

GEORGE LAFFERTY

Pursuer and respondent

Defenders and reclaimers: Parties
Pursuer and Respondent: Forsyth; Drummond Miller LLP

30 July 2021

Introduction

[1] This is an opinion of the court to which each member has contributed.

[2] The defenders are siblings. For many years they have occupied Knockderry Castle, Helensburgh ("the subjects"). Members of the first defender's family also live there.

[3] The second defender formerly owned the subjects. She was sequestrated in 2000. The pursuer is her trustee in sequestration, having succeeded to that office in 2017.

[4] The current proceedings, raised in November 2018, arise from a disposition dated 20 August 2009 by which the second defender conveyed the subjects to the first defender for "certain good and onerous causes" and retained a liferent interest.

[5] The pursuer alleges that the conveyance was designed by the defenders to frustrate him, as trustee, and creditors from possessing and selling the subjects. He contends that the second defender had no title to convey the subjects and seeks the following orders: (i) reduction of the disposition and any liferent interest; (ii) interdict preventing the defenders from dealing with the subjects; (iii) declarator that they have no right or interest to occupy the subjects; and (iv) decree ordaining them to vacate the subjects.

[6] The court fixed and then discharged a number of proof dates. Ultimately it set down a proof to begin on 30 March 2021. The case did not, however, proceed on that date because neither defender appeared at the hearing. Each relied on a medical certificate to justify their non-attendance.

[7] Having scrutinised the certificates and reviewed the whole circumstances, the Lord Ordinary granted decree by default on the basis that the defenders had failed, without reasonable excuse, to attend or be represented at a peremptory hearing of the case.

[8] The defenders now reclaim. They maintain that their absence was excusable and that the grant of decree was unreasonable, unfair and breached their human rights.

Background

[9] As is not infrequently the case, the petitioning creditor's debt was relatively small, but significant other claims quickly emerged after sequestration was granted. Creditors' claims and the expenses of the trustee's administration of the estate now amount to several hundred thousand pounds. Part of the reason for that is that both the pursuer and his

predecessor as trustee have been embroiled in various litigations raised at the instance of the second defender over the past 20 years. Those can be summarised as follows.

[10] Between 2000 and 2002 the second defender raised an action to recall her sequestration. She was unsuccessful at first instance, in a reclaiming motion, and on appeal to the House of Lords.

[11] In 2002 a sheriff granted decree in absence ejecting the defenders from the subjects. Rather than directly challenging that decision, the second defender instead raised two separate actions in the Court of Session. One sought to interdict her trustee from repossessing the subjects. The other sought to reduce her sequestration. The action for reduction was dismissed in April 2004 and the interdict proceedings were dismissed in December 2009 (see *Petition of Marian Van Overwaele* 2009 CSOH 164).

[12] In 2017 the second defender challenged the pursuer's appointment as trustee. Her action was dismissed by the sheriff, whose decision was upheld by the Sheriff Appeal Court.

[13] There are two other notable features. The first is that at the time of the 2009 disposition, the interdict proceedings were ongoing but the second defender did not notify the court or her then trustee of the conveyance. The disposition was not registered until 2013; the reason for the delay is unclear. The Keeper of the Registers has excluded indemnity in respect of the disposition given the extant sequestration.

[14] The second is that the defenders, although legally represented at an earlier stage of proceedings, now proceed as party litigants. The withdrawal of agents representing the defenders and ensuing requests for the discharge or continuation of hearings on the basis that additional time was required to secure new representation has been a feature of both prior and present proceedings.

Procedure in this action

Proceedings after the case began

[15] The action has a very extensive procedural history, some of which is recounted by the Lord Ordinary in his note. It includes an unsuccessful reclaiming motion against the grant of interim interdict. On 29 March 2019 the court refused *in hoc statu* the pursuer's motion for summary decree. Counsel for the first defender opposed the motion. There was no appearance by or on behalf of the second defender. The basis of the court's refusal was that the adjustment period had only recently commenced following the return of the process from the Inner House. Counsel for the first defender indicated that he proposed to adjust the defences to add a defence of *mora*, taciturnity and acquiescence and to specify the price said to have been paid by the first defender to the second defender for the disposition. The court was informed that that price was £200,000.

[16] In fact, subsequently no specification of the price was provided in the pleadings. Nor is there any defence of *mora*, taciturnity and acquiescence.

First proof date

[17] The court scheduled the first diet of proof to begin on 12 May 2020, but it was discharged because of the COVID-19 pandemic.

Second proof date

[18] At a by order hearing on 24 September the court (i) assigned a fresh proof to commence on 24 November, (ii) noted the defenders' preference for an "in person" proof, and (iii) appointed the second defender to lodge medical vouching as to her fitness to participate in any future court hearings.

[19] Subsequent to that hearing, the Lord Ordinary rejected the second defender's allegation that the interlocutor was inaccurate. Later still, he set aside an order for commission and diligence for the recovery of documents when he discovered that the second defender had not intimated the relative motion to the pursuer's agents.

Pre-proof hearing for November proof

[20] At a pre-proof hearing on 11 November the court (a) refused the defenders' opposed motion to discharge the proof due to take place in just under a fortnight's time, and (b) appointed it to take place as a remote hearing. It also fixed a further hearing so that the first defender could confirm that he had engaged legal representation.

By order hearing

[21] By the next hearing on 19 November, the first defender had still not instructed new agents. The court granted the renewed motion for a discharge and assigned a new proof date on 23 February 2021.

Pre-proof hearing

[22] At a pre-proof hearing on 11 February 2021 the defenders again sought to discharge the proof because the first defender did not have the benefit of legal representation. The court continued matters until 18 February, when it granted the motion and fixed a fresh "in person" proof on 30 March. Both defenders indicated that they would attend the proof. The minute of proceedings records that this was to be the final opportunity for the defenders to obtain legal representation. It also states that, given the procedural history, the court expected the proof to proceed on the scheduled date. At this hearing the second defender

produced a GP certificate, but it did not identify a health issue that would preclude her attendance in court on 30 March. The Lord Ordinary informed her that if she were to suggest that she was medically unfit to participate in the proof that would require to be vouched by an appropriate medical certificate

Further motions

[23] The defenders made three further motions prior to the proof. On 16 March the first defender sought to discharge the proof. On 23 March the second defender applied to discharge the proof. On 26 March she sought leave to reclaim the interlocutor pronounced 3 days earlier and requested the Lord Ordinary to recuse himself on the basis that he was not impartial because he had heard this matter on a number of occasions. All of these applications were refused.

Proof diet 30 March 2021

[24] When the matter called for proof on 30 March, neither defender was present. The previous day each had emailed a medical certificate to the court, neither of which was signed on soul and conscience.

[25] The first defender's certificate was a "Statement of Fitness for Work For social security or Statutory Sick Pay" which indicated that he was not fit for work from 29 March 2021 until 11 April 2021 due to a physical health condition.

[26] At 10.32 on 29 March 2021 the second defender sent an email to the court stating: "I am isolated under the Corona Virus COVID-19 and awaiting Doctor advise *(sic)*". In the late afternoon of that day her GP practice sent an email to the clerk of court stating:

> "Mariam has been examined today and is currently suffering from a diarrheal illness. She will be unable to attend the appointment in Edinburgh regarding a court case 30/3/21".

[27] The clerk, acting on the instructions of the Lord Ordinary, contacted the second defender's GP practice to make further inquiries. The locum doctor with whom she had consulted provided the following statement:

> "I can confirm that it was myself who typed the letter re this lady - she reports having a diarrhoeal illness so felt she could not attend a legal meeting in Edinburgh today 30/3/21. She would not give me any further details about the meeting and I was unaware it was at the High Court."

Submissions for the pursuer and the Lord Ordinary's decision

[28] Counsel for the pursuer invited the court to find that the defenders were in default having failed to attend a peremptory diet or that the Lord Ordinary was at least entitled to come to that decision. It was for the court to decide whether a party was unfit to attend court, from any certificate produced and any other relevant circumstances. He referred to *Scottish Ministers* v *Smith* 2010 SLT 1100 at paragraph 7 and to the opinion of Lord Doherty in *A Limited etc* v *F* (2014) CSOH 169. He submitted that the court should grant decree by default in terms of RCS 20.1, having regard to the terms of the certificates, their timing, the lack of soul and conscience certification thereon, and to the whole background including the extensive procedural history. The Lord Ordinary approached matters in two stages. First, he considered whether the defenders' failure to attend a peremptory diet constituted a default. He decided that it did in terms of RCS 20.1. Second, he considered whether to exercise his discretion and grant decree. His approach could not be faulted.

[29] With regard to the medical certificates, neither had been made on soul and conscience. The first defender had only raised a medical issue for the first time on the eve of

the proof. His certificate only dealt with his fitness for work, not his ability to participate in court proceedings. Accordingly, it had no weight.

[30] The second defender's certificate appeared to run contrary to the earlier email, which stated that she was isolating due to COVID-19. The email had made no mention of a diarrhoeal illness. Her condition was a self-reported one, and it had not been certified on soul and conscience.

[31] Along with the certificates, the Lord Ordinary also carefully reviewed the whole background, including the lengthy procedural history, the delaying tactics, and the willingness of the court to accommodate the defenders' requests. Assembling all these factors together, he held that the defenders were not unfit to attend at court for the proof and he granted decree of default in terms of the conclusions.

Grounds of Appeal

[32] The defenders invite this court to set aside the decision of the Lord Ordinary. They jointly contend that it was unfair, unreasonable and breached their human rights. In particular, he erred in law by disregarding the medical certificates. He did not give them the opportunity to provide more detail about their respective medical conditions, or to establish their defence to the action.

[33] Individual points are also taken. The first defender argues that the court should have made further inquiries into his medical condition, as it had done with the second defender. He also makes a somewhat peculiar reference to 30 March 2021 not being suitable as a date for proof, as it fell within the Easter holidays, when he required to spend time with his family.

[34] The second defender submits that the Lord Ordinary was not qualified to overrule a medical certificate, and did not take proper account of her motions to reclaim the interlocutor of 23 March and to recuse himself. Further, it was improper of the Lord Ordinary to make enquiries, via his clerk, with her GP practice relative to the certificates. Much of her argument, however, focuses on the underlying merits of the action, for some of which she has no written pleadings.

Analysis

[35] The issue which this court has to decide is a narrow one: was the Lord Ordinary entitled to grant decree by default?

[36] Decisions made in terms of RCS 20.1 involve the exercise of a discretion: *Munro & Miller (Pakistan) Ltd* v *Wyvern Securities Ltd* 1997 SC 1. That has consequences for the scope of any appeal.

[37] This court can only overrule the Lord Ordinary's decision if (i) he took into account irrelevant considerations, (ii) he failed to take into account relevant considerations, or (iii) he reached an unreasonable or "unjudicial" decision: *Thomson* v *Corporation of Glasgow* 1962 SC (HL) 36, per Lord Reid at p66. Put short, this court will not intervene simply because it might have reached a different decision.

[38] The Lord Ordinary attached no weight to the certificate which the first defender tendered. In our view that was a course he was (at least) entitled to take in the circumstances. The certificate was not a soul and conscience certificate. More fundamentally, it did not address the first defender's fitness or otherwise to attend the proof. It addressed a different matter, his fitness for work. Moreover, the certificate was obtained and intimated on the eve of a proof, in circumstances where the first defender had

not previously suggested that he suffered from a medical condition which would make him unable to attend court and where the defenders had a recent history of having sought to have the proof discharged.

[39] The Lord Ordinary was not satisfied that the second defender was unfit to attend the proof. Several matters influenced his conclusion. The letter from the GP was not a soul and conscience certificate. More importantly, the GP's observations and conclusions were reliant upon the second defender's self-reporting of her symptoms. The Lord Ordinary was not prepared to rely on that self-reporting. His scepticism was attributable to a number of factors. One factor was the history of the action, and in particular the defenders' very recent unsuccessful attempts to have the proof discharged. Another was the fact that in her email at 9.32 on 29 March the second defender had not suggested that she was suffering from diarrhoea. Yet another was that she had not disclosed to the GP that the proof was to commence on 30 March. All that he was told was that she had "a legal meeting" in Edinburgh. In our opinion, on the basis of the material which was before him it was at least open to the Lord Ordinary to decide that he was not satisfied that the second defender was unfit to attend the proof.

[40] The Lord Ordinary carefully reviewed all of the relevant circumstances, including the terms of the certificates, their timing, and he did so against the background of the whole procedural history of delay and procrastination on the part of the defenders. He did not take into account irrelevant considerations. He also had due regard to the interests of the pursuer and the need to bring the case to a conclusion. In our view, he was certainly entitled to grant decree by default. In our judgement it cannot be said that the decision to do so was an unreasonable one.

[41] Accordingly, we refuse the reclaiming motion and adhere to the decision of the Lord Ordinary. We reserve meantime all questions as to the expenses of the reclaiming motion.

[42] Lest it be thought that we have given no consideration to the defences to the action, we would add the following. In our opinion, of the defences pled the only one of any potential merit is the first defender's defence that he acquired the property in good faith and for value. However, to be in good faith, the first defender would have to have been unaware that the sequestration had occurred (*Fortune's Trustee* v *Medwin Investments Ltd* 2016 SC 824, at paras [27] - [28]). That is a highly unlikely scenario in the circumstances. More importantly, it is not the first defender's position. Rather, his stance (Answer 4) is that he was aware of the sequestration but that he understood that the second defender was free to deal with the property because she had obtained her discharge. It follows that the first defender cannot have been in good faith on any possible view of matters.

[43] Moreover, despite having had more than ample opportunity to do so, the first defender has not provided any evidence that he acquired the property for value. All that he avers is that he paid the second defender "a sum of money" and that he undertook to carry out certain roof repairs to the property. No vouching of any payment, let alone a payment representing or approaching the market value of the subjects, has been produced. Nor is there any documentation vouching that the first defender obliged himself to perform other onerous obligations in return for the disposition being granted. It follows that there is no sustainable defence advanced on behalf of either defender.