OUTER HOUSE, COURT OF SESSION

[2021] CSOH 58

P812/20

OPINION OF LORD BRAILSFORD

In the petition of

MARTIN WILSON

Petitioner

for

INTERDICT AND INTERDICT AD INTERIM

Petitioner: Party
Respondent: Welsh; MBS Solicitors

1 June 2021

[1] The petitioner seeks an order under section 46 of the Court of Session Act 1988 prohibiting the person named in the petition from intromitting "any sale of [subjects at 120 Dowanhill Street, Hillhead, Glasgow], return certain items of moveable property to the said subjects and prohibit any transfer of the said subjects." Called as a respondent and the sole party upon whom service of this petition was sought is Margaret Wilson, residing at 120 Dowanhill Street, Hillhead, Glasgow who is the petitioner's mother. That person is of advanced years and answers were lodged to the petition by three persons acting as her attorneys conform to a continuing power of attorney granted by the said Margaret Wilson on 23 April 2012 and registered with the Office of the Public Guardian on 9 October 2012.

[2] The petition was presented to the court on 6 October 2020. On 7 October 2020 an interlocutor was pronounced permitting intimation and service. On 3 December 2020 the court found the petition as suitable for urgent disposal and appointed parties to be heard on Monday 11 January 2021 for the purpose of identifying an appropriate date for a substantive hearing and to determine the scope and conduct of such a hearing. On 11 January 2021 the court assigned 25 January 2021 as a date for the hearing which was confined to the respondent's first plea-in-law, a plea of *res judicata*. The respondent was ordained to lodge written submissions prior to that hearing. The petitioner was permitted to lodge written submissions "if in a position to do so" by a date prior to the said hearing. The petitioner did not lodge written submissions but made a full oral presentation of his case supported by documents lodged which included his affidavit dated 29 November 2019.

Respondent's submission

[3] The respondent initially set out the law as regards the plea of *res judicata*. The plea was said to be to the effect that a court should not permit proceedings to continue in circumstances where the substantial merits of a cause have already been decided by a court of competent jurisdiction in a cause relating to the same subject matter and between the same parties or parties having the same interest. Reliance for that proposition was based upon *Esso Petroleum Company Ltd* v *Law*.[1] It was then submitted that when considering a question of *res judicata* the court should have regard to the essence and reality of the subject matter in the relevant causes. Authority for that proposition was found in *Grahame* v *Secretary of State for Scotland.*[2]

[1] 1956 SC 33 per Lord Carmont at page 38
[2] 1951 SC 368 per the Lord President (Cooper) at 383

[4] The court was then reminded that the modern law in relation to a plea of *res judicata* was summarised in *Durkin* v *HSBC Bank*.[3] From that authority the following propositions were taken. First that the court requires to be one of competent jurisdiction. Second that there has been pronounced a decree in a previous action *in foro contentioso*. Third that the subject matter and *media concludendi* are the same in both actions. Fourth that the parties or their representatives are the same in each case.

[5] Counsel for the respondent then outlined the background to the litigations between the compering parties in the present petition. It was submitted that the petitioner has a history of bringing proceedings in the Court of Session against his mother. The petitioner was said to be responsible for bringing the following proceedings: (a) an action of proving the tenor of a will in 2012; (b) an action of reduction of a will in 2017; (c) a petition seeking to prevent the sale of the property which is the subject of the crave in the present petition in 2018 and (d) the present petition to prevent the sale of the same property in 2020.

[6] Having drawn the court's attention to those proceedings counsel essentially confined his submission to the action of reduction raised by the petitioner in 2017. The basis of the 2017 action, in outline, was the present petitioner's allegation that his mother, the person named as respondent in the present petition, permitted the performances or adaptions of her late husband's, the petitioner's father, musical compositions and that those actings amounted to a material breach of an undertaking given by Mrs Margaret Wilson. That action was ultimately concluded by way of a minute of abandonment presented at a hearing before Lord Ericht on 17 December 2019. In terms of that minute the petitioner was found liable in expenses to the respondent. An account of expenses was prepared and taxed by the

[3] 2017 SLT 125 at paragraphs 9-11

Auditor of the Court of Session. The Auditor's report was issued and intimated to parties on 8 September 2020 with a finding against the petitioner in the sum of £50,084.70. That account was not paid timeously and decree of absolvitor was granted. The petitioner sought to reclaim that interlocutor and in the resulting reclaiming motion the same was refused as being incompetent.[4] As at the date of the hearing with which I was concerned the decree of absolvitor stood unchallenged.

[7] Counsel for the respondent then addressed the four tests which, as already noted, had authoritatively been stated as required in order to establish a plea of *res judicata*. It was submitted that in relation to jurisdiction it was an express averment in the 2017 action that Mrs Margaret Wilson was domiciled in Scotland. This was not challenged in the 2017 action. The court in that action therefore had jurisdiction in accordance with the provisions of paragraph 1 of schedule 8 to the Civil Jurisdiction and Judgments Act 1982. In that action, jurisdiction was also found in the place of performance of the contract in question. Again that was the subject of express averment. Jurisdiction was accordingly available in terms of paragraph 2(b) of schedule 8 of the said Act of 1982. It followed that the requirement in relation to court of competent jurisdiction was satisfied in the 2017 action.

[8] In relation to the second requirement, that a decree has been pronounced *in foro contentioso* it was submitted that a decree *in foro contentioso* is any decree after the lodging of answers. The 2017 action was defended and the decree was accordingly *in foro*. It was further noted that the decree pronounced was of absolvitor. The effect of a decree of

[4] *MW* v *BW* 2021 CSIH 1

absolvitor is as stated by an extra division in the case of *Waydale Limited* v *DHL Holdings (UK) Limited*.[5]

[9] In relation to the third test, the subject matter and *media concludendi* in the actions are the same, my attention was drawn to the pleadings. In support of a submission that the *media concludendi* between the 2017 action and the current petition were identical my attention was drawn to the fact that statements 5, 6, 7, 8 and 9 of the present petition are lifted word for word from articles 3, 4 and 8 of the 2017 action. My attention was further drawn to the fact that the present petition is in the same terms as the 2018 petition which was in itself a replication of the 2017 action. I was reminded that the respondent was assoilzied from the 2017 action by interlocutor of this court and orders under the 2018 petition were refused when moved by the petitioner. In these circumstances it was submitted to be clear that the 2017 action, the 2018 petition and the 2020 petition were all premised on the same factual averments anent alleged actions of Mrs Margaret Wilson. The factual basis of the present petition and the previous two proceedings are said to be identical. In essence the subject matter of all the petitioner's litigations against his mother, or her attorneys, are the same, the petitioner does not accept the provisions of his late father's will and holds his mother responsible for them. These matters have been placed before the court and either abandoned by the petitioner or subject to decree of absolvitor in favour of the respondent.

[10] For completeness I was reminded that in considering whether the parties to two litigations when a plea of *res judicata* is being considered are "the same" that term is not to

[5] 2000 SC 172 per Lord Coulsfield at 183: "In our view, the rule which the authorities overall clearly establish is the rule briefly and clearly expressed by Lord Deas, namely that the difference between dismissal and absolvitor is that dismissal leaves it open to bring a fresh action while absolvitor does not."

be interpreted over-strictly and it is sufficient if the interests of the parties in the first and second proceedings is the same.[6] The final element in the test relative to the plea of *res judicata* is that the parties are the same. That was said to be self-evidently established.

[11] In concluding submissions counsel for the respondent submitted that the rules anent abandonment of actions were designed to protect defenders and respondents from the cost, and no doubt strain, of having to litigate the same matter repeatedly. Those considerations were entirely apposite in the context of the present petition. The requirements of a plea of *res judicata* were said to have been "very clearly" made out in the circumstances of this case. I was invited to uphold the plea of *res judicata* and refuse the prayer of the petition.

Petitioner's submission

[12] The petitioner initially sought to identify elements of novelty in his current petition. When it was put to him that these matters had already been before the court and the factual circumstances of the same were considered in relation to the productions my understanding was that he ultimately accepted that there was no novel feature in the present petition.

[13] Beyond that the petitioner essentially relied upon the contents of his productions and drew my attention to the fact that his accepted ill-health occasioned him difficulty in both presenting his case and, further, in seeking to obtain assistance or representation in putting his position before the court.

[6] *RG* v *Glasgow City Council 2020 SC 1* per the Lord President (Carloway) at paragraph 27

Conclusion

[14] I accept the submissions made on behalf of the respondent. I consider that the current law in relation to the plea of *res judicata* was correctly stated and forms the proper basis upon which I should consider the plea in the present case.

[15] I am satisfied that the four tests set forth in *Durken* v *HSBC Bank* (*supra)* have been satisfied. Beyond that bare statement I would only add that the exercise, as conducted by counsel for the respondent during the course of his oral submission, of comparing the petitioner's averments in the present petition and the same party's pleadings in the 2018 proceedings demonstrates that the subject matter of what is sought to be litigated in the present petition has already been before this court and determined by binding decree in favour of the present respondent. I find myself unable to do other than agree with the proposition advanced by counsel for the respondent that comparison of the pleadings in the differing litigations demonstrates that this is "quite clearly" a matter where it is appropriate, and indeed necessary in the interests of justice, to uphold the plea of *res judicata*.

[16] I would only add that the court acknowledges the petitioner's longstanding and ongoing health issues. The court further acknowledges that the COVID-19 pandemic has, at least arguably, rendered it more difficult for a person such as the petitioner who has not, for reasons essentially out with his control, had the benefit in this petition of legal representation more difficult than might be the case in normal times. The court has however consistently sought to ensure that the petitioner was afforded all opportunities to enable him to properly present his position.

[17] Having regard to all the foregoing I shall uphold the respondent's first plea-in-law and give effect to that by refusing the prayer of the petition.