SHERIFF APPEAL COURT

[2021] SAC (Civ) 3
DUN-PD29-18

Sheriff Principal M M Stephen QC
Sheriff Principal C D Turnbull
Appeal Sheriff N A Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal in the cause

LM

Pursuer and Respondent

against

DG's EXECUTOR

Defender and Appellant

Pursuer and Respondent: MacColl, advocate; Whelan & Co
Defender and Appellant: LC Kennedy, advocate; Campbell Boath

23 December 2020

[1] This appeal is against the decision of the sheriff of 7 January 2020 (reported as *M* v *DG's Executor* 2020 SLT (Sh Ct) 11) to allow a proof before answer in an action by the respondent in which she seeks damages from the estate of her late stepfather.

The proceedings

[2] In the action, which proceeds under chapter 36 of the Ordinary Cause Rules ("OCR 36"), the respondent seeks damages from the appellant, who is the executor of the late DG. DG was the respondent's stepfather. The respondent avers that DG sexually abused her for a period of five years between 1981 and 1986. The respondent was aged between 11 and 16 at the time of the alleged abuse. The respondent made a complaint to Police Scotland regarding the alleged abuse in 1989. No further action was taken by Police Scotland at that time. The respondent made a further complaint to Police Scotland regarding the alleged abuse in 2002. No further action was taken by Police Scotland at that time. Further evidence subsequently came to light. DG appeared on petition at Dundee Sheriff Court on 16 March 2017, having been charged with the commission of certain sexual offences against the respondent. DG died on or around 24 March 2017.

[3] The respondent avers that she has been diagnosed with post-traumatic stress disorder; that she suffers from anxiety and depression, flashbacks and sleep deprivation; that she is reliant upon medication to function on a daily basis; that she has struggled to sustain employment as a result of the effects of the alleged abuse; and that she has required psychological and psychiatric help throughout her adult life.

[4] The respondent raised the present action in May 2017, some 31 years after the alleged abuse is averred to have ended and within months of DG's death. The appellant is DG's son and the respondent's step brother. He avers that at the time of the alleged abuse he was still a child, then living with his mother, who had separated from DG. The appellant avers that there is nothing in his personal knowledge to assist him to investigate the allegations made against DG. The appellant avers that he is unaware of any witnesses to the events complained of; and that, as a result of the death of DG, it is impossible to undertake the

steps necessary to have a fair hearing. These steps are averred by the appellant to include (a) putting the allegations to DG for his comment and response; (b) ascertaining and presenting DG's version of events; (c) obtaining DG's comments on his relationship with the respondent and the circumstances in which the allegations were made; (d) identifying the alternative explanations for the respondent making the allegations; (e) identifying potential witnesses to the alleged incidents and the surrounding circumstances; and (f identifying any further evidence with which to refute the allegations. The appellant avers that nothing can be done at proof to offset the prejudice caused to him by the delay and associated loss of the evidence of DG.

The hearing before the sheriff and the sheriff's judgment

[5] After sundry procedure, a hearing in the form of a debate proceeded before the sheriff. The respondent had offered a proof before answer. At the hearing the sheriff was invited by the appellant to dismiss the action on the ground that it was not possible to have a fair hearing under section 17D(2) of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). The appellant's submissions before the sheriff are to be found at paragraphs [5] to [10] and [16] to [20] of the sheriff's judgment; the respondent's submissions are to be found at paragraphs [11] to [14] and [21] to [22].

[6] For the reasons she gave at paragraphs [23] to [36] of her judgment, the sheriff *inter alia* allowed a proof before answer.

Sections 17A to 17D of the 1973 Act

[7] By way of section 1 of the Limitation (Childhood Abuse) (Scotland) Act 2017, new sections 17A to 17D were inserted in to the 1973 Act which have the effect of removing the

three year time limit provided by section 17 of the 1973 Act in certain circumstances.

Sections 17A to 17D are in the following terms:

17A Actions in respect of personal injuries resulting from childhood abuse

(1) The time limit in section 17 does not apply to an action of damages if—

(a) the damages claimed consist of damages in respect of personal injuries,

(b) the person who sustained the injuries was a child on the date the act or omission to which the injuries were attributable occurred or, where the act or omission was a continuing one, the date the act or omission began,

(c) the act or omission to which the injuries were attributable constitutes abuse of the person who sustained the injuries, and

(d) the action is brought by the person who sustained the injuries.

(2) In this section—

'abuse' includes sexual abuse, physical abuse, emotional abuse and abuse which takes the form of neglect,

'child' means an individual under the age of 18.

17B Childhood abuse actions: previously accrued rights of action

Section 17A has effect as regards a right of action accruing before the commencement of section 17A.

17C Childhood abuse actions: previously litigated rights of action

(1) This section applies where a right of action in respect of relevant personal injuries has been disposed of in the circumstances described in subsection (2).

(2) The circumstances are that—

(a) prior to the commencement of section 17A, an action of damages was brought in respect of the right of action ("the initial action"), and

(b) the initial action was disposed of by the court—

(i) by reason of section 17, or

(ii) in accordance with a relevant settlement.

(3) A person may bring an action of damages in respect of the right of action despite the initial action previously having been disposed of (including by way of decree of absolvitor).

(4) In this section—

(a) personal injuries are "relevant personal injuries" if they were sustained in the circumstances described in paragraphs (b) and (c) of section 17A(1),

(b) a settlement is a "relevant settlement" if—

(i) it was agreed by the parties to the initial action,

(ii) the pursuer entered into it under the reasonable belief that the initial action was likely to be disposed of by the court by reason of section 17, and

(iii) any sum of money which it required the defender to pay to the pursuer, or to a person nominated by the pursuer, did not exceed the pursuer's expenses in connection with bringing and settling the initial action.

(5) The condition in subsection (4)(b)(iii) is not met if the terms of the settlement indicate that the sum payable under it is or includes something other than reimbursement of the pursuer's expenses in connection with bringing and settling the initial action.

17D Childhood abuse actions: circumstances in which an action may not proceed

(1) The court may not allow an action which is brought by virtue of section 17A(1) to proceed if either of subsections (2) or (3) apply.

(2) This subsection applies where the defender satisfies the court that it is not possible for a fair hearing to take place.

(3) This subsection applies where—

(a) the defender satisfies the court that, as a result of the operation of section 17B or (as the case may be) 17C, the

> defender would be substantially prejudiced were the action to proceed, and
>
> (b) having had regard to the pursuer's interest in the action proceeding, the court is satisfied that the prejudice is such that the action should not proceed."

Submissions for the parties

[8] The appellant invited the court to recall the interlocutor of the sheriff and to dismiss the action. He submitted that the sheriff had erred in finding that evidence should be heard and by allowing a proof before answer. The sheriff ought to have held that it was not possible for the appellant to have a fair hearing under section 17D(2).

[9] The respondent invited the court to adhere to the sheriff's interlocutor and to refuse the appeal. The sheriff did not err in appointing the case to a proof before answer. The sheriff had correctly ruled that the defender has not been able, in the absence of hearing evidence, to discharge the onus of demonstrating that a fair hearing is not possible in the circumstances of this case.

Decision

[10] The action proceeds in accordance with the personal injuries procedure set out in OCR 36. The appellant's defences require to conform with the terms of OCR 9.6 (see OCR 36.E1(4)(d)), however, that requirement has to be viewed in the context of the terms of OCR 36.B1(1) which stipulates that the initial writ should be accompanied by a brief statement containing (a) averments in numbered paragraphs relating only to those facts necessary to establish the claim; and (b) the names of every medical practitioner from whom, and every hospital or other institution in which, the pursuer or, in an action in respect of the death of a person, the deceased received treatment for the personal injuries.

[11] The hearing before the sheriff was in the form of a debate. It is not immediately apparent that the procedure envisaged by OCR 36.G1 was followed in assigning that hearing, however, that is not of significance for present purposes. The appellant has succinct averments to support his case under section 17D(2). It is appropriate to note that those averments are either not known and not admitted by the respondent; or are denied by her. The respondent avers that there is nothing to prevent a fair hearing taking place; that any reasonable enquiries would make the position clear to the appellant or his agents; and that there is no prejudice to the appellant.

[12] The observations of Lord President Hope, set out at paragraph 13.02A of Macphail, "*Sheriff Court Practice*" (3rd ed.), are worthy of note:

> "The debate was, of course, taking place before any inquiry into the facts. The advantage of this procedure is that it enables points to be disposed of on relevancy without spending time and money on what would be a worthless inquiry, if it appears that, even if the party were to succeed in proving all his averments, he would nevertheless fail to make out his case. If this test cannot be satisfied, the proper course is to sustain the plea to the relevancy and to dismiss the action, repel the defences or exclude the averments from probation as the case may be. But it is a misconception of the procedure to go further and to assume that the party has proved his averments and, on the assumption, to grant him the remedy to which he would be entitled after proof. A debate on relevancy is not to be treated as a substitute for a proof of the averments. It is assumed as the test of relevancy that the party will be able to prove all his averments. But this is only an assumption and all decisions on the merits of the action which cannot be resolved on relevancy must be reserved until after the proof. In some cases it may be clear from the debate that the plea to relevancy is unsound and it may then be repelled. In others it may be clear that, since the test of relevancy has not been satisfied, the proper course is to sustain it. In cases of doubtful relevancy, where it is appropriate that the facts should be inquired into, a proof before answer will be necessary, so that the answer is given after all the facts have been established by the evidence."

[13] The appellant's argument, both before the sheriff and before this court, proceeded upon the misconception identified by Lord Hope. On the pleadings, the sheriff was not entitled to hold that it was not possible for the appellant to have a fair hearing. The

respondent's position was that there is nothing to prevent a fair hearing taking place. As a consequence, the facts relevant to that issue require to be admitted or proved. The sheriff was correct to refuse to dismiss the action at a hearing akin to a debate. There is no basis upon which this court would be entitled to dismiss the action, as we were invited to do by the appellant.

[14] We turn, therefore, to the sheriff's decision to allow a proof before answer. The sheriff's reasoning is to be found at paragraph [34] of her judgment in which she stated that:

> "[Counsel for the appellant] suggested it is illogical to require the hearing to take place before a decision on the fairness of the hearing is reached. However, in my view, to do otherwise runs the risk of making a decision in the abstract based on speculation and false prediction. In particular, I cannot properly and fully assess the significance of the police interview, nor the extent to which the evidence may be capable of being challenged by the defender, without assessing the evidence as a whole and the hearing overall. I accept, on the face of it, that the absence of DG may cause problems for the [appellant], but whether, as a consequence of that, the hearing becomes nothing more than a formal enactment of the process of hearing and determining the claim, cannot be objectively determined in the abstract and before any evidence is led."

[15] The cumulative effect of subsections (1) and (2) of section 17D is that if a defender satisfies the court that it is not possible for a fair hearing to take place, the court may not allow an action brought by virtue of section 17A(1) to proceed. Where pleaded, the issue of a fair hearing is one which requires to be dealt with *in limine*. It cannot be held over until the end of a proof. In reaching her decision as to further procedure, the sheriff allowed the action to proceed to a proof before answer on all issues in circumstances where a fair hearing may not be possible. To that extent, the sheriff erred.

[16] The sheriff was correct to conclude that a decision on the fairness of the hearing could not be made in the abstract and that evidence required to be heard. In the present case, it is appropriate that such evidence is heard by way of a preliminary proof to determine whether section 17D(2) of the 1973 Act applies. We shall remit to the sheriff to

proceed as accords. The appellant's averments on this issue are succinct. It may be that detailed pleadings on the application of section 17D(2) are preferable. As defences in actions proceeding under OCR 36 are to be in accordance with OCR 9.6 there is no reason why defences in an action which proceeds under OCR 36 could not contain detailed averments relative to this issue. The time limit within which application can be made to have the action withdrawn from OCR 36 has long since passed, however, a remit to Chapter 36A procedure remains open to the court, if, after considering the likely complexity of the action, the sheriff were satisfied that the efficient determination of the action would be served by doing so (see OCR 36A.1.(2)).

[17] Before the sheriff, reference was made to certain cases in which the court considered whether it should exercise its equitable discretion to allow an action to proceed in terms of section 19A of the 1973 Act (see paragraphs [6] – [7]); and to certain cases from Australia which considered similar issues to that raised by section 17D(2) (see paragraphs [18] – [19] and [33]). The court also drew to parties attention to the decision of Chamberlain J in *JXJ* v *Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB), in which the court reached certain conclusions on the proper application of sections 17A to 17D of the 1973 Act (at paragraph [101]). Having regard to the decision we have reached, and the argument we heard in the hearing of the appeal, these issues remain live for consideration by the sheriff, and accordingly we express no view.

Disposal

[18] We shall recall the interlocutor of the sheriff complained of and allow parties a preliminary proof upon the issue of whether section 17D(2) of the 1973 Act applies. The

appellant will be ordained to lead at the preliminary proof. The action will be remitted to the sheriff to proceed as accords.

[19] The decision we have reached represents divided success for the parties. We shall find no expenses due to or by either party in relation to both the hearing before the sheriff and the appeal. We shall certify the cause as suitable for the employment of junior counsel.