SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 65
P345/19
P517/19

Lady Dorrian
Lord Malcolm
Lord Woolman

OPINION OF THE COURT

Delivered by LORD WOOLMAN

in the notes of

(1) JOSEPH ALEXANDER SWEENEY, and (2) DONALDA THERESA SWEENEY

Noters

for orders in relation to

the winding up of WEST LARKIN LIMITED, a company incorporated under the Companies Acts (company number SC146651)

Noters: O'Brien; TLT LLP
Respondent: Sandison QC; Currie Gilmour LLP
Liquidator: Duthie QC; Shepherd and Wedderburn LLP

20 October 2020

Introduction

[1] A feud exists between the Sweeney and Urquhart families. It has lasted for many years. It centres on an area of land at Leachkin Brae, Inverness ("the land"). A company called West Larkin Limited ("WLL") holds the title to the land. WLL has had a chequered history and is now in liquidation. It was formerly owned by the Sweeneys.

[2] The Urquharts claim that they have occupied the land as agricultural tenants since 1990. The Sweeneys deny that claim. They contend that the lease has terminated, or that it is no longer an agricultural tenancy.

[3] Why does this matter? The answer turns on the "right to buy" legislation. If the Urquharts are the agricultural tenants, they are entitled to purchase the land for about £28,000. The Sweeneys believe that an open market sale will achieve a significantly higher price. They estimate its development value to exceed £1 million. Even without planning permission, they expect that a bidding war between the families would drive up the price.

[4] Ms Amanda Urquhart petitioned for the winding up of WLL. Subsequently, the liquidator agreed to sell her the land at its agricultural value. Two members of the Sweeney family have lodged notes in the liquidation. Their aim is twofold: to prevent Ms Urquhart from acquiring the land at what they see as a "knock-down" price, and to have a greater degree of influence in the liquidation.

[5] In the first note, Joseph Sweeney seeks an order requiring the liquidator to challenge the Urquharts' right to buy the land. He also seeks rectification so that his name is listed in WLL's register of members. In the second note, his mother, Mrs Donalda Theresa Sweeney, seeks the assignation of a debt from Ms Urquhart.

[6] Ms Urquhart opposes both notes, which came before Lady Wolffe ("the Judge") for debate. She dismissed Joseph Sweeney's note and granted Mrs Sweeney's note. The unsuccessful party in each action has appealed to this court.

[7] Although the two proceedings have not been formally conjoined, it is convenient to deal with them together. The factual background is the same, the legal issues overlap, the same counsel appeared, and they were heard together.

[8] We shall refer to the parties as "the Sweeneys" and "the Urquharts" as a convenient

shorthand. Where appropriate we shall also refer to named family members. Apart from the individuals already mentioned, others who feature in this opinion are Owen and Neil Sweeney (Joseph Sweeney's brothers) and the late Hugh Urquhart and Deanna Urquhart (Ms Urquhart's parents).

Background

[9] Vastlands Properties Limited ("Vastlands") formerly owned the land. By letter dated 29 October 1990, it agreed to lease the land to Ms Urquhart's parents. The letter specified that: (a) the period of let was 25 years, (b) the rent was £1,250 per annum, (c) it was an agricultural holding of 9½ acres, and (d) the tenants could use the land for cattle, sheep or horses.

[10] In 1993 Vastlands conveyed the land to Larkin Brae Horse Farm Ltd ("Larkin Brae"), a new private company. Its directors were Owen and Neil Sweeney, who each held one share. Larkin Brae was struck off the Register of Companies in 2001.

[11] In late 2002, Joseph Sweeney purportedly became a shareholder and director of the company in place of his brother Neil. Three years later Owen and Joseph Sweeney each transferred their share to Glenhaven Ventures ("Glenhaven"), a Gibraltar partnership set up by their parents.

[12] We now turn to the origins of the dispute. The land surrounds Woodside Croft, where the Urquharts formerly lived. Initially they maintained livestock on the land. The Sweeneys began living in the house in 1998. Since then tensions have existed between the families. The pleadings contain allegations and counter allegations. We see no profit in rehearsing them. The general position can be shortly stated. The Urquharts assert that the Sweeneys have used tactics of intimidation to exclude them from the land. The Sweeneys deny any such conduct and contend that the Urquharts ceased to use the land for

agricultural purposes in about 2005.

[13] There have been at least three earlier actions.

First Action

[14] In January 2001 the Urquharts raised proceedings in Inverness Sheriff Court. They sought to vindicate their rights in respect of the land. The sheriff granted summary decree, declaring that they had an agricultural tenancy. He also interdicted Owen Sweeney from interfering with their use and possession of the land. The sheriff principal upheld the declarator, but recalled the interdict. The Inner House dismissed the appeal as incompetent, because leave to appeal had not been obtained.

[15] The parties then became aware of two problems. First, as Larkin Brae had been struck off, it could not be a party to the action. Second, there was doubt over the validity of the Vastlands' conveyance. Both problems were ultimately cured. Larkin Brae was restored to the register and changed its name to "West Larkin Limited" (*ie* WLL).

[16] The litigation recommenced and the matter came to this court, which held that there was an agricultural tenancy. Lord Justice-Clerk Gill delivered the opinion of the court. He said that Owen Sweeney's case "has been conducted reprehensibly throughout", and with a "complete lack of candour": *Urquhart* v *Sweeney* 2006 SC 591 at para 34.

Second action

[17] The Second Division issued its opinion in March 2004. Subsequently both brothers (Joseph and Owen) were sequestrated. The date of Joseph's bankruptcy is unclear. In the pleadings there is mention of both 2007 and 2016, with a discharge two years later.

[18] Owen's sequestration is of more moment. It took place in 2006. Ms Urquhart contacted his trustee in bankruptcy and paid £5,000 to acquire Owen's rights in WLL. In

2010 she raised an action challenging the validity of the share transfer to Glenhaven. She claimed that Glenhaven did not exist and also that it was a sham transaction, conceived and executed in contemplation of bankruptcy.

[19] Ms Urquhart named four defenders in the action: Mrs Sweeney, Owen Sweeney, WLL and its company secretary. Mrs Sweeney was the only person to defend the action. None of the others entered the process or did anything to oppose the claims. On the day that the proof was due to commence (7 November 2017), Mrs Sweeney indicated that she no longer insisted on her defence. In consequence the court reduced the purported share transfer by Owen Sweeney and declared that Ms Urquhart held his share in the company.

[20] Ms Urquhart obtained a joint and several decree for the taxed expenses, which amounted to about £38k. She chose to enforce it only against WLL. It had no funds to pay the sum. That gave her the basis to bring the winding up petition.

Third action

[21] Despite then owning fifty per cent, Ms Urquhart's name was not listed in WLL's register of members. She raised another action to rectify the omission. She feared that Mrs Sweeney, who had purportedly been appointed by Glenhaven and was the sole director, might defeat or prejudice her rights. This third action had not been resolved before WLL was wound up in December 2018.

Note by Joseph Sweeney

The "right to buy" scheme

[22] To understand why the Sweeneys say that the liquidator should challenge the "right to buy", it is necessary to examine the relevant legislation. Section 1 of the Agricultural Holdings (Scotland) Act 1991 defines an agricultural tenancy as one where (a) the land is

used for agriculture, and (b) its use is for the purposes of a trade or business.

[23] The Agricultural Holdings (Scotland) Act 2003 contains the details of the scheme that applies to 1991 Act tenancies:

s 25(1)	tenants can register their interest in acquiring the subjects of let by sending a notice of interest to the Keeper of the Register of Community Interests in Land ("the Keeper")
s 25(8)	the landowner can dispute the registration
s 25(9)-(10)	if there is a successful challenge, the Keeper must rescind or amend the registration
s 25(11)	an appeal lies to the Land Court
s 25(12)	registration lapses upon termination of the tenancy or after five years, so a fresh notice must be lodged every five years
s 26	before selling the land, the landlord must notify a tenant who has registered a valid notice of interest
s 28	the tenant then has the option to buy the land
s 34	absent agreement, there is a valuation mechanism.

[24] We draw attention to three features of the scheme. First, if a lease ceases to be an agricultural tenancy, the lessee loses the right to buy. Second, the price to be paid disregards any development or "personal interest" value. Third, owners have no time limit within which to dispute a registration.

[25] The Urquharts registered notices of interest in respect of the land in 2006, 2011 and 2016. After his appointment the liquidator decided not to challenge the last notice. In February 2019 he agreed to sell the land to Ms Urquhart in terms of the scheme. The conveyance was scheduled to take place in April 2019. These events provoked the Sweeneys to lodge their notes.

Insolvency Act 1986

[26] Chapter VII of the Insolvency Act 1986 regulates the powers of liquidators. They can (a) bring or defend any action or other legal proceeding, and (b) sell any of the company's property: section 167(1)(b) and Parts 1 to 3 of Schedule 4. But liquidators do not act untrammelled. Under section 167(3) they are:

> "subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers"

[27] Mr Sweeney invites the court to use its control here, by requiring the liquidator to challenge the notice of interest, because (a) there is a strong case, (b) an offer of funding has been made, and (c) a successful challenge would result in a significant financial return to the creditors and contributories of WLL.

[28] Mr Duthie appeared on behalf of the liquidator at the reclaiming motions. He informed us that the liquidation costs now stand at £25,635, together with unquantified outlays, and that the liquidator adopts a neutral position in respect of both notes.

[29] In his written answers, however, the liquidator explains that he did not regard a challenge to be in the interests of the general body of creditors. He mentions the following factors: (i) the Keeper will not generally rescind a notice of interest without a court order; (ii) the outcome of any challenge is uncertain; (iii) the parties' history suggests that any court proceedings would be robustly defended; (iv) the cost of any litigation would be significant, and (v) the land was only valued at £27,000.

[30] The Judge held that there was no warrant to disturb his decision. In essence she concluded that the liquidator's decision was reasonable, taken in good faith, and one open to him in the exercise of his powers.

Submissions

Mr O'Brien

[31] Mr O'Brien submits that the Judge (i) applied the wrong test; (ii) failed to consider the strength of the case and the offer of funding; and (iii) wrongly placed reliance on the content of the written answers. He contends that the note is relevant and specific, even if the case is periled on the higher test adopted by the Judge. Accordingly, she ought to have remitted it for a proof. At the least, she should have allowed the rectification claim to proceed.

Mr Sandison

[32] Mr Sandison invites us to uphold the Judge's decision. He submits that she identified and applied the correct test. The case is therefore irrelevant and bound to fail. The assertion that the liquidator has a strong challenge is a questionable one. In any event other factors impinged upon his decision.

The test

[33] When will a court interfere with a liquidator's decision? That question lies at the core of the first note. Nourse LJ set out the general rule in *Re Edennote Ltd* [1996] BCC 718, at 722 C-D. He stated that, absent fraud and bad faith, a court will only review a liquidator's decision if it is

> "so utterly unreasonable and absurd that no reasonable man would have done it".

[34] The scope of the test was examined in *Mitchell* v *Buckingham International plc* [1998] BCC 943 at 960G-H. Robert Walker LJ, who delivered the only opinion, said that the *Edennote* test was:

> "concerned with practical decisions (albeit important ones) as to

valuation and disposal, not decisions involving the exercise of judgment as between different creditors' competing claims".

[35] Significantly, however, he reiterated that:

> "When liquidators are exercising their administrative powers to realise assets, the court will be very slow to substitute its judgement for the liquidators' on what is essentially a businessman's decision… All the cases referred to by Nourse LJ on the point … are concerned with decisions as to the disposal of assets." (961A-C)

[36] We regard the present case as clear-cut. The liquidator's decision concerned the disposal of assets. He had to determine how best to realise the company's sole asset. It was a businessman's decision that required the exercise of his practical judgment. Accordingly the *Edennote* test applied. We shall now examine the factors relied on by Mr O'Brien.

(1) The prospects of success

[37] Mr O'Brien submits that there is a strong argument that the agricultural tenancy has been abandoned. He founds on a slew of reports from professional surveyors covering the years 2006 to 2018. They indicate that the Urquharts have not occupied the land, or carried on any agricultural activity there, during that period.

[38] In response Mr Sandison referred to the liquidator's comment that the prospects of success were uncertain as a "dramatic understatement". He said that Ms Urquhart is adamant that she has not abandoned the agricultural tenancy. She would vigorously contest any challenge along the following lines:

> (a) Given the Inner House judgment, it would require "strong evidence" to show that she has abandoned agricultural activities: *Wetherall* v *Smith* [1980] 1 WLR 1290. Neglect alone may not be enough as diversification is permissible: Gill *Agricultural Tenancies* (4th ed) at paras 30-20 - 30-21.
>
> (b) A tenant prevented from carrying on agricultural activities may claim that the holding continues along principles drawn from personal bar: *Hickson & Welch Ltd* v *Cann* (1980) 40 P & CR 218.

(c) The registration of the three notices of interest had not been queried.

(d) Ms Urquhart, presently the company's only substantial creditor, does not wish the liquidator to make a challenge.

(2) Cost and funding

[39] The liquidator has no funds to mount a challenge. To address this problem Joseph Sweeney avers that his brother Owen is willing and able to fund the litigation. That offer first appeared in the pleadings in early July 2019. It therefore did not figure in the liquidator's decision-making process. Even if it can now be taken into account, its contours are blurred. Mr Sandison framed a series of questions which highlighted some of the difficulties. Does the offer amount to a guarantee? Does it cover an award of adverse costs? Who has the power to direct the litigation? If the challenge is successful, would Owen Sweeney become a preferential creditor? Mr Sandison said that none of these questions had been satisfactorily answered, either at the debate or before us. Further, no productions have been lodged to vouch that the offer is genuine.

(3) Financial return

[40] The liquidator had access to a professional report estimating the agricultural value of the land at £27,000. It is roughly comparable to one instructed by Ms Urquhart (£28,320). Mr O'Brien says that a sale on the open market would generate a higher price. He does not, however, specify an amount, or even a range of figures. Mr Sandison says that the price is a matter of conjecture. He points out that the planning authority refused an application for residential development in 2015. The only certain value is therefore the agricultural value.

Decision

[41] The liquidator, having regard to the whole picture, was entitled to determine that success was far from assured, the costs substantial, the funding problematic, and the financial return in doubt. It follows that Mr Sweeney's averments do not meet the *Edennote* test. The decision cannot be characterised as utterly unreasonable and absurd.

Three points

[42] We deal next with three other points raised by Mr O'Brien.

[43] First, he suggested that the liquidator should at least write to challenge the notice of interest. We discount that suggestion as serving no purpose. The Keeper is bound to leave the matter to the Land Court.

[44] Second, he urged us to take a strict approach to the written pleadings. He invited us to treat the averments in the note *pro veritate* and ignore the answers. It is unnecessary to rule on this point, given our decision on the principal issue. We incline, however, toward a less rigid approach. In many cases a costly proof can be avoided by an assessment of the whole pleadings, the productions, and the liquidator's reasons.

[45] Third, the note should not be dismissed in its entirety, because Mr Sweeney is entitled to be placed on the list of WLL's members. That argument has an initial attraction. As the Glenhaven transaction was void, Mr Sweeney retained his share in the company and section 148(1) of the Insolvency Act 1986 states:

> "As soon as may be after making a winding-up order, the court shall settle a list of contributories, with power to rectify the register of members in all cases where rectification is required."

[46] But there are two powerful arguments against adopting that course of action. The note now serves no useful purpose. It had been intended as a precursor to give Mr Sweeney title and interest in the main application, which we have refused. Further, a contributory

can only make an application in a liquidation if he is able to establish that there are substantial prospects of assets being available to him: *Re Rica Washing Co Ltd* (1879) 11 Ch D 36. That cannot be said here.

[47] As an addendum to this branch of the case, we refuse Mr O'Brien' motion to amend the pleadings to add Mrs Sweeney as a noter to her son's application. It fails for the same reasons. We add this observation. The first note does not aim to improve the position of creditors or contributories. Instead it attempts to secure a private advantage to the Sweeneys.

Note by Mrs Sweeney

Introduction

[48] Mrs Sweeney wishes to be recognised as a creditor of the company. In the second note, she asks the court to grant an order assigning her the judgment debt in terms of the Insolvency (Scotland) (Receivership and Winding Up) Rules 2018:

> "**7.21 Liabilities and rights of co-obligants**
> Where a creditor has an obligant bound to the creditor along with the company for the whole or part of the debt, the obligant is not freed or discharged from liability for the debt by [*various matters*].
>
> …
>
> (4) The obligant may require and obtain at the obligant's own expense from the creditor an assignation of the debt, on payment of the amount of the debt and on that being done may in respect of the debt submit a claim, and vote and draw a dividend, if otherwise legally entitled to do so.
>
> (5) Paragraph (4) is without prejudice to any right, under any rule of law, of a co-obligant who has paid the debt…"

[49] Mr O'Brien's argument is straightforward. Mrs Sweeney has paid the judgment debt of £38k. The necessary condition having been met, she is entitled to an assignation. No

further considerations come into play. In particular Ms Urquhart has no right to object. She has been paid.

[50] Mr Sandison advances a number of lines of argument to refute this contention. We are not persuaded by any of them. That is because they all involve departing from the clear language of the Rule. We see no foundation to follow that course.

[51] The main thrust of Mr Sandison's submission involves a chain of propositions: (a) the proviso "if otherwise legally entitled to do so" applies to the whole of Rule 7.21(4), (b) it imports the common law, (c) Mrs Sweeney's claim is essentially a right of relief, which is based on recompense, (d) as she was responsible for incurring the expenses award, she has no right of relief because there has been no unjustified enrichment, and (e) Ms Urquhart is therefore not obliged to grant an assignation.

[52] In our view Rule 7.21(4) neatly divides into two parts. The first part specifies that the obligant who pays the debt (here Mrs Sweeney) is entitled to an assignation. The second part stipulates that, equipped with the assignation, she has the right to make a claim etc. in the winding up. The proviso only qualifies the second part. We regard that as the natural construction of the wording.

[53] We believe that approach also squares with equity. The assignation is the counterpart for payment. It would be odd if the creditor had a right to take with one hand and refuse with the other. In addition if a creditor can oppose any application, an obligant may have to establish matters twice. These would be unfair results. Our preferred construction also squares with common sense. It allocates to liquidators, who have the relevant information, the task of determining the listed matters.

[54] We wish to say a word about two other issues. First, Mr Sandison submitted that Ms Urquhart could refuse to grant an assignation as it is likely to cause her "annoyance or

trouble". To vouch that proposition he referred to a line of case law and McBryde, *Contract* 3rd ed. at paras 12-101 to 12-103. In our view, those authorities do not apply in this context. Not only would this principle derogate from the wording of the rule, it would also create uncertainty. Creditors could have a wide field of objection.

[55] Second, Ms Urquhart chose to seek a joint and several decree. We are not satisfied that she can elide its consequences. Such a decree conclusively establishes *pro rata* liability: *Wick & Pulteneytown Steam Shipping Co Ltd* v *Palmer* (1894) 21 R (HL) 39, Lord Watson at p47. It is now impermissible to look behind the decree to explore the issue of unjustified enrichment.

Conclusion

[56] For these reasons we shall refuse the reclaiming motions and adhere to the Judge's interlocutors dated 28 January 2020.