



**SHERIFF APPEAL COURT**

**[2017] SAC (Civ) 4  
ABE-CA30-15**

Sheriff Principal D L Murray W.S.(Chair)  
Sheriff P Arthurson Q.C.  
Sheriff Principal Dunlop Q.C.

**OPINION OF THE COURT**

Delivered by SHERIFF PRINCIPAL D L MURRAY WS

In Appeal by

FIRST TIME LTD

Defender/Appellant

Against

ALEXANDER IAIN FRASER AS LIQUIDATOR OF DENMORE INVESTMENTS LTD

Pursuer/Respondent

**Appellant: Bartos**

**Respondent: Logan**

31 January 2017

[1] This appeal arises from a commercial action in which Alexander Iain Fraser as Liquidator of Denmore Investments Ltd, (Denmore) (hereinafter referred to as “the respondent”) seeks reduction of a guarantee granted by Denmore in favour of First Time Ltd (hereinafter referred to as “the appellant”). The guarantee related to a loan made by the appellant to an associated company called Global Integrated Services Ltd (formerly called First Integrated Ltd), who is the principal debtor in the loan. The contention for the

respondent, reflected in his first plea-in-law, is that the granting of the guarantee was a gratuitous alienation and that accordingly it should be reduced in terms of section 242 of the Insolvency Act 1986. Craves one and two in the Initial Writ are for declarator that the guarantee was a gratuitous alienation and for production and reduction of that guarantee.

[2] As appears from the Initial Writ, Denmore granted a standard security in favour of First Construction Ltd, another company associated with the appellant. It is averred that a calling up notice has been served in relation to that security though no steps have been taken to enforce the same. The respondent avers that this was granted in security of monies advanced to Denmore by First Construction Ltd. He points to a provision in the standard security that it was granted by First Construction Ltd “for itself and as security trustee for itself and First Time” (referring to the appellant). It is then averred that the appellant has contended that that wording means that the sums covered by the standard security include the monies due by Denmore in terms of the guarantee. The respondent challenges that contention and seeks declarator in his third crave that “the sums due in terms of said guarantee (on the assumption that it is not reduced) are not secured by the standard security”.

[3] Defences were lodged by the appellant in which the principal contention was that the granting of the guarantee did not transfer any property of Denmore to the appellant (answer 3(a)) and that accordingly it was not an alienation challengeable in terms of section 242 of the Insolvency Act 1986. The terms of the standard security are referred to beyond which no admission is made.

[4] At a case management conference on 18 September 2015 the sheriff was persuaded to allow a debate on what parties had represented was the crucial primary legal issue in the case, namely whether the granting of the guarantee by Denmore can be considered a

gratuitous alienation. Having heard the debate he found the case of *Jackson v Royal Bank of Scotland* 2002 SLT 1123 to be in point and followed Lord Drummond Young's reasoning in holding that the guarantee in the instant case might amount to an alienation of property for the purposes of section 242. He accepted therefore that the respondent had pled a relevant case as to whether the guarantee did amount to a gratuitous alienation and accordingly repelled the appellant's second plea-in-law. As a consequence he excluded from probation answer 3(a).

[5] At the hearing of the appeal counsel for the appellant submitted that, on a proper construction of section 242 (and for that matter section 34 of the Bankruptcy (Scotland) Act 1985, the material provisions of which are in identical terms), the guarantee, which amounted to no more than a personal obligation, was not an alienation whereby part of the granter's property was transferred, or any right of the granter discharged or reduced.

[6] The appellant submitted that the granting of a cautionary obligation cannot be an alienation. It was submitted that there must be a transfer for there to be an alienation and there is no transfer at the point of merely granting a guarantee. This analysis was submitted to be consistent with what is said in para. 606 of *The Stair Memorial Encyclopaedia*:

"In common with other Civilian systems, Scots law makes a clear distinction in the transfer of ownership between, on the one hand, the conveyance, and on the other hand, the contract which in many cases precedes the conveyance.....  
The conveyance is the act of transfer itself, or in other words, the process or series of processes which in law is required to carry ownership from transferor to transferee. The contract is an agreement to grant a conveyance and has itself no effect on the location of *dominium*. The rule is *traditionibus non nudis pactis dominie rerum transferuntur*: ownership is transferred by delivery, (or other conveyance) and not by bare contract. On conclusion of the contract each party has a personal, contractual right against the other, and it is only on completion of the conveyance that ownership passes and the transferee has a real right."

[7] Counsel for the appellant submitted that the effect of a guarantee is simply to impose a contingent personal obligation on the guarantor. In the event of the debtor defaulting, the

suspensive condition flies off and there may then be a call by the creditor for the transfer of the cautioner's property in satisfaction of the guarantee. Until there has been such a transfer however there cannot be said to have been an alienation in terms of section 242. Reference was also made to *Accountant in Bankruptcy v Orr* 2005 SLT 1019 at 1023 in support of these submissions.

[8] In large measure counsel for the respondent did not take issue with these submissions. He conceded that a personal guarantee with nothing more did not constitute an alienation. How that concession squares with the terms of his first crave and first plea-in-law was not made clear. In similar vein he accepted that a demand for payment under a guarantee in normal course did not amount to an alienation. He submitted however that the position was different if the guarantee was underpinned by security whereby the creditor might effect a transfer of property. In *Jackson* it was the freezing of the monies sitting in the guarantor's account by the bank as a result of the guarantee having been given which together constituted an alienation. In the present case it was said the standard security underpinned the guarantee and the calling up of the standard security would entitle the creditor to seize and take possession of the assets of the cautioner with the result that there would then be a transfer which engaged section 242.

[9] Counsel for the respondent's essential proposition therefore was that alienation within the meaning of section 242 was in this case a two-stage process. The first stage was the granting of the guarantee and the related security, both of which were the act of Denmore. This grant became fully effectual on the calling up of the standard security, which was the second stage of the process. By this analysis, it was submitted, the cases of *Jackson v Royal Bank of Scotland* and *Accountant in Bankruptcy v Orr* could be reconciled and were supportive of the respondent's contention.

[10] The fundamental flaw in this approach however is that in the first place the respondent does not accept that the standard security applies to the sums due under the guarantee at all. Counsel for the respondent made clear before us that the respondent's primary position was that the standard security is not valid. Without the standard security the respondent effectively concedes the irrelevance of his pleadings in support of the first and second craves. In the second place he submitted that on the facts section 242 did not apply at all.

[11] The first and second craves in effect represent an *esto* position in the event the court is not persuaded to grant crave three. Crave three proceeds on the basis of the guarantee not being reduced and seeks for the court to find and declare that effect should not be given to the standard security. But this is logically inconsistent for only if the standard security is effective does it allow for calling up and subsequent disposition to complete what was argued to be the necessary second stage to effect transfer of property, thereby completing the alienation consequent on the granting of the guarantee. That is a position which is further coloured by the acceptance by counsel for the respondent that the first and second craves do not accurately express what is his true submission in relation to section 242: that the calling up of the standard security completes what was argued to be the necessary second stage to effect a transfer of property thereby completing the alienation consequent on the granting of the guarantee. In short the respondent's approach in the Initial Writ has put the cart before the horse and it has led to the unfortunate position of the parties apparently being at cross purposes as to the real issue that was being debated. We cannot help but draw the conclusion that, contrary to the apparent agreement of the parties, the case has been sent to debate in a precipitate manner on pleadings which were plainly unsatisfactory even allowing for the flexibility of the procedure in commercial actions.

[14] If the argument advanced by the respondent in the appeal was put to the sheriff it does not appear from his note that he has taken it on board. In his defence counsel for the appellant submitted that at no time had the respondent made it clear that the alienation only occurred at the point of serving a calling up notice under the standard security and the respondent's pleadings certainly do not make such a case clear. We observe that the sheriff appears to have been influenced in reaching his decision by the precise terms of the guarantee (see para 34 of his note) and in his summary of his reasoning in paragraph 43 this impression is reinforced by the absence of any reference to the effect of the standard security.

[15] Having heard substantial argument on the fundamental proposition from counsel for the appellant that a guarantee can never be an alienation and that *Jackson* was wrongly decided, we would make clear that we reserve our position on that point. There may be some force to the argument of a two-stage process adopting the analysis of Lord Drummond Young in *Jackson*. On the other hand we are not satisfied that there is adequate specification in the respondent's pleadings to have entitled the sheriff to have excluded from probation answer 3(a) of the appellant. We see some force in the argument as presented to us, but not as pled by the respondent, that the grant of a guarantee followed by subsequent events which have the effect of reducing the estate of the guarantor can be an alienation, although we would reserve our position on whether calling up of itself results in transfer.

[16] Accordingly we shall allow the appeal, recall the sheriff's interlocutors of 6 May 2016 and 16 May 2016, which dealt with expenses. We shall uphold the second plea-in-law of the appellant in so far as it relates to craves one and two and dismiss the first and second craves for the respondent. From the propositions put to us by Mr Logan we anticipate he will substantially adjust the respondent's pleadings to bring them into line with the argument

presented to this court. More developed and better-focused pleadings will allow the case to proceed more efficiently. If the point on the guarantee is to be reinstated it will of course still be necessary to consider whether the guarantee was given for value or valid consideration.

[17] Parties submitted that expenses should follow success. As the appellant has been substantially successful before us, we find the appellant entitled to the expenses of the appeal and of the debate before the sheriff. Both parties sought sanction for the employment of junior counsel in the appeal. We accept that this is a case where it is appropriate for such sanction to be given in light of the complexities involved.