SHERIFF APPEAL COURT

[2017] SAC (Civ) 5
ABE-SQ288-06

Sheriff Principal D C W Pyle
Sheriff Principal M W Lewis
Sheriff A MacFadyen

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M W LEWIS

in appeal by

THE ACCOUNTANT IN BANKRUPTCY

Applicant and Appellant

against

the decision of the sheriff at Aberdeen dated 23 March 2016 in respect of an application under section 63(1)(b) of the Bankruptcy (Scotland) Act 1985

Applicant and Appellant: Thomson, Advocate
Respondent: Abs

23 January 2017

The Issue

[1] This appeal is concerned with one issue – whether the Accountant in Bankruptcy ("AIB") has the necessary interest to make an application to the sheriff under section 63(1)(b) of the Bankruptcy (Scotland) Act 1985 ("the Act") for a declaration that the office of Permanent Trustee in the sequestration of Gordon Stephen has become vacant and for the re-appointment of the AIB as trustee in that sequestration.

[2] Section 63 provides that:

> "(1) The sheriff may, on the application of any person having an interest—
>
> (a) if there has been a failure to comply with any requirement of this Act or any regulations made under it, make an order waiving any such failure and, so far as practicable, restoring any person prejudiced by the failure to the position he would have been in but for the failure;
>
> (b) if for any reason anything required or authorised to be done in, or in connection with, the sequestration process cannot be done, make such order as may be necessary to enable that thing to be done."

The Facts

[3] Gordon Stephen was sequestrated on 22 September 2006. The AIB was appointed as trustee. The primary function of the trustee is to recover, manage and realise the debtor's estate and to distribute the funds so realised among the creditors (section 3(1)(a) and (b) of the Act). As trustee in the sequestrated estate of Gordon Stephen, the AIB implemented that function. Such estate as was identified was ingathered and distributed. On 22 September 2009 Gordon Stephen was discharged under section 54 of the Act. On 27 November 2009 the AIB was discharged. On a date, unspecified in the pleadings, but after the respective discharges, the Bank of Scotland sent to the AIB the sum of £8,378.30 representing sums due to Gordon Stephen under the PPI reimbursement scheme. The AIB had not previously been aware of the existence of such a claim.

[4] The AIB was faced with the prospect of returning the funds to the Bank of Scotland or retaining what is a substantial sum of the money, and seeking a means of managing and distributing the funds to the general body of creditors. The AIB chose the latter option and on 4 August 2015 applied to the sheriff in Aberdeen under section 63(1)(b) of the Act for the orders mentioned in paragraph 1 above.

The Procedure

[5] The application was not opposed for the debtor, Gordon Stephen, could not be traced. Nonetheless, the sheriff scheduled a hearing on the application because on that very day, he issued a decision in the case *AIB* v *Sadler SQ27/07*.

[6] The facts in *Sadler* are markedly similar to the facts in the present application. In each application the AIB was the applicant; the debtors and trustee had been discharged; the AIB sought re-appointment to enable ingathering and disbursement of monies due to each of the debtors under the PPI scheme; and the debtors had been discharged prior to the date on which the PPI reimbursement scheme became effective. *Sadler* had been opposed and the sheriff had heard detailed argument from counsel for the AIB and for the debtor. The sheriff refused to grant the *Sadler* application for a number of reasons, the first and foremost of which was that the AIB no longer had any interest for her interest had terminated at the point of her discharge.

[7] The Hearing relative to the present application took place before the sheriff on 23 March 2016. The sheriff was not persuaded by the detailed submission of the solicitor for the AIB. He considered that "In respect that the applicant had chosen not to appeal my decision in *AIB* v *Sadler* it would have been completely inappropriate for me to come to a different view on a case involving essentially similar facts. I accordingly elected to follow my decision in *AIB* v *Sadler* and dismiss the application." It is against that decision which the appeal lies.

Decision

[8] We begin by expressing our gratitude to the sheriff for providing his note at such short notice and also for supplying us with a copy of his decision in the *AIB* v *Sadler* case.

The problem of assets emerging post discharge as has arisen here is not new and has been considered by the courts over many years and under different bankruptcy regimes. The discharge of a debtor and of the trustee does not end the sequestration (unless there is a discharge on composition (McBryde on Bankruptcy 2nd ed at para 8-75). Filling in yet another gap in the pleadings, Mr Thomson explained that as the creditors of Gordon Stephen had not been paid in full nor had there been a discharge on composition, the sequestration of Gordon Stephen has not come to an end.

[9] We agree with his assessment that the basic purpose of sequestration, which is reflected in the primary functions of a trustee (section 3(1) of the Act), should not be ignored when an overlooked or unidentified asset emerges – otherwise a debtor, who is stripped of all of his assets at the date of sequestration and also of all property that may come into his possession prior to discharge, may obtain an unfair, unforeseen benefit. To deal with such a situation and to avoid such unfairness, the courts have tended to look favourably on applications for the appointment of a new trustee (McBryde on Bankruptcy 2nd ed at para 8-75).

[10] The question of who may make such an application vexed the sheriff in Aberdeen. He tended to the view that a trustee who has been discharged –

> "has no continuing interest in the sequestration. The discharge of the trustee has the effect of discharging him from all liability to the creditors and to the debtor in respect of any act or omission of the trustee in exercising the functions conferred upon him. After discharge there is nothing left for the trustee to carry out."

The sheriff concluded that a discharged trustee has no duty to investigate potential sources of recovery – to that extent we agree with the sheriff. However, the AIB did not go searching for funds – they fell into her lap.

[11] We agree with the sheriff that it would have been open to a creditor to make application for the appointment of a trustee in these circumstances (*Northern Heritable Securities Investment Company Limited* v *Whyte* (1888) 16 R (100) and that the Bank of Scotland fits neatly into that category. However, a trustee as opposed to a creditor may also make an application to the *nobile officium* (*Thomson, Petitioner*(1863) 2 M 325). Sheriff Holligan in his decisions in *Accountant in Bankruptcy* v *Grant* 2010 GWD 40-812, Edinburgh Sheriff Court and *Accountant in Bankruptcy* v *Croxford* 2015, Edinburgh Sheriff Court explored in depth the application of these cases to circumstances similar to those which have arisen here, and concluded that it is open to a former trustee to petition the *nobile officium*. He observed that an alternative remedy lies within section 63 of the Act.

[12] The sheriff in Aberdeen does not agree – he considers that section 63 has no relevance to the present circumstances for it is concerned with the correction of errors, acts or omissions on the part of the trustee. In his view there had been no acts or omissions requiring correction and in any event, returning to his primary point, the trustee had been discharged.

[13] We consider that the sheriff has fallen into error in taking such an approach. Section 63 is much wider in its scope for it also allows the sheriff on the application of a person **having an interest** to make such order as may be necessary to enable anything to be done that cannot otherwise be done in the sequestration process (section 63(1)(b) of the Act). The "interest" is quite simply a matter of circumstances (*Tinlin* v *Accountant in Bankruptcy* 2000 SLT (Sh Ct) 57) which relates to the sequestration.

[14] The funds now in the hands of the AIB are said to be an asset of the estate of Gordon Stephen. To our minds, the thing that cannot be done is the intromission with and distribution of those funds. The acts of intromission and distribution are connected with the

sequestration – indeed go to the heart of the sequestration for the distribution is for the benefit of the general body of creditors. The funds deriving from the PPI claim provide the basis upon which the AIB can assert an interest in terms of section 63. Despite much prodding, Mr Thomson provided limited information about the composition of the body of creditors – again the pleadings were lacking on this point. In future it would be helpful to the court to be advised as a minimum of the identity of the creditors, so that the court can be satisfied that there is at least one entity who will benefit from this process.

[15] We do not agree with the sheriff that there are no continuing duties on the trustee following discharge. Rather we prefer the more expansive view of Sheriff Holligan who said:

> "The office of trustee in sequestration is an important public office. I should be slow to hold that discharge from that office strips the former holder of all obligations of professional responsibility. …… I find it difficult to see how the AIB could simply have washed her hands of any responsibility and refused to have anything to do with the matter." *(Croxford).*

In *Croxford* the former trustee had been advised of the existence of the claim whereas in the present case the AIB had been sent the funds and was holding them. It would, in our view, be a dereliction of duty were the AIB to do nothing.

[16] It seems that a submission was made to the sheriff regarding the vesting of the funds, as a consequence of which the sheriff concluded that the funds did not vest in the AIB. It was not necessary for there to be discussion about and a decision on that matter. The proper forum for making such a determination is in the sequestration process itself, which may lead to further enquiry or even adjudication. We find ourselves attracted to Sheriff Holligan's notion that:

> "…an applicant, such as the AIB, requires to aver that there are funds belonging to the sequestrated estate but it is not necessary and may be undesirable that such an

> issue should be determined as part of the proceedings seeking the appointment of the trustee." *(Croxford).*

Put simply, the AIB requires to set forth a *prima facie* case for averring that the funds fall to the estate. In our view the averments in the present application are sufficient in that respect.

[17] The sheriff considered that the difficulty which had arisen was now resolved through section 58B of the Act. He relied upon the fact that this provision is not retrospective to bolster his opinion that no previous right of a trustee to seek re-appointment existed. We do not agree with the sheriff's interpretation. Sections 58B-D (now sections 152 to 154 of the Bankruptcy (Scotland) Act 2016), which were introduced through the Bankruptcy and Debt Advice (Scotland) Act 2014, offer a simple administrative procedure permitting, in certain circumstances, **the AIB** to re-appoint a trustee to intromit with assets, in excess of £1,000, found after the trustee had been discharged but before the expiry of a period of 5 years after the date of sequestration. This amendment does not plug a gap – it is a cheaper, faster administrative method, avoiding recourse to the courts.

[18] For the foregoing reasons we are satisfied that as a matter of law, the AIB does have interest to bring an application under section 63(1)(b) of the Act. Accordingly we allow the appeal, recall the sheriff's interlocutor of 23 March 2016 and thereafter grant the application.