



SHERIFF APPEAL COURT

**[2017] SAC (Civ) 9
LMD-A4-15**

Sheriff Principal M M Stephen Q.C
Sheriff Principal I R Abercrombie Q.C.
Sheriff Principal D L Murray

OPINION OF THE COURT

Delivered by Sheriff Principal D L Murray

In Appeal by

JOHN GRAY

Pursuer/Appellant

Against

RODERICK JOHN MacNEIL

as Executor Nominate to the Estate of the late Donald MacNeil

Defender/Respondent

Act: Mitchell QC

Alt: McLean

15 March 2017

Background to the Appeal

[1] This case is concerned with a chip shop located on the forecourt of the Burnside Petrol Filling Station, Daliburgh, South Uist ("the petrol station"). The late Donald MacNeil ("the deceased") who died in April 2015, was at the material time the owner of the petrol station. The respondent, Roderick John MacNeil, is the deceased's son and acts as executor nominate on the estate of his father. The appellant (and pursuer) is John Gray, who along with his wife, Michelle, (Mrs Gray) managed and ran the chip shop between July 2005 and

October 2012. Mrs Gray is the daughter of the deceased and accordingly the sister of the respondent.

[2] Following proof at Lochmaddy Sheriff Court the sheriff found that the appellant and the deceased verbally agreed the lease of what was then the forecourt shop of the petrol station. In finding in fact 8 the terms of the verbal lease are stated to be:

- “(i) that the parties were the pursuer and the deceased;
- (ii) that the property to be leased would be the forecourt shop;
- (iii) that the forecourt shop would be converted to a chip shop;
- (iv) that the rent for the forecourt shop would be that the pursuer would be responsible for the staffing and running costs of the petrol station business, save for the purchase of new fuel;
- (v) that the duration of the lease would be fifteen years from the date when the chip shop opened for business.”

The chip shop opened for business on 1 July 2005.

[3] This appeal focuses on that verbal lease and the agreement to convert the forecourt shop to operate as a chip shop. The appellant seeks delivery of moveable equipment installed at the chip shop, failing which payment of the value of the moveable equipment and secondly, payment of damages in respect of loss of profits said to arise from what the appellant pleads to be a breach of the verbal lease.

[4] The relationship between the deceased and the pursuer had been deteriorating for several years and by the end of 2008 was hostile. In or around 2012 the pursuer reported the deceased to the police for a number of sexual offences alleged to be committed against named persons. In October 2012 the deceased alleged to his daughter, Mrs Gray, the pursuer’s wife, a female who had previously worked in the chip shop was staying with the pursuer. Following a telephone call between Mrs Gray and the pursuer, the pursuer went to see the deceased to confront him about this allegation. On 20 October 2012, a day or so after the confrontation between the pursuer and the deceased, the deceased cut the electricity

supply to the chip shop and refused to let the pursuer into the chip shop. As a result, the pursuer was not able to manage the chip shop business or the petrol station business, and the chip shop business was forced to cease trading. The sheriff found the pursuer had been unable to operate the chip shop business since 20 October 2012.

[5] The sheriff was satisfied that the pursuer and deceased had reached a verbal agreement which covered the four essentials for a lease at common law: the parties, the premises to be leased, the rent and the duration of the lease. It was accepted that a lease for more than one year requires to be in writing. The sheriff identified the key issue in the case was whether the verbal lease falls within section (1)(2)(a)(i) or section (1)(2)(b) of the Requirements of Writing (Scotland) Act 1995. The sheriff found at para 77:

“In my view both the pursuer and Mrs Gray were of the view that the pursuer had verbally agreed a lease and that the clear intention of the parties to the lease was that possession and occupation of the chip shop would be taken by the pursuer on the faith of that lease. In other words, all the parties thought the verbal lease would create a real right in land. Accordingly, what we are left with is a single agreement which was, on the one hand, a contract for the creation of a real right in land (section 1(2)(a)(i)) and, on the other hand, was capable of creating a real right in land (section 1(2)(b)) In such circumstances, the verbal lease could not be described as creating purely personal rights...”

The Requirements of Writing (Scotland) Act 1995 (“the Act”)

[6] The terms of section 1 of the Act, as in force in 2005, when the verbal agreement was reached, provide as follows:

- “1. Writing required for certain contracts, obligations, trusts, conveyances and wills.
- (1) Subject to subsection (2) below and any other enactment, writing shall not be required for the constitution of a contract, a unilateral obligation or trust.
 - (2) Subject to subsection (3) below, a written document complying with section 2 of this Act shall be required for –
 - (a) the constitution of –
 - (i) a contract or unilateral obligation for the creditor for the creation, transfer, variation or extinction of a real right in land;

- (ii) a gratuitous unilateral obligation except an obligation undertaken in the course of business; and
 - (iii) a trust whereby a person declares himself to be sole trustee of his own property or any property which he may acquire;
 - (b) the creation, transfer, variation or extinction of a real right in land otherwise than by the operation of a court decree, enactment or rule of law; and
 - (c) the making of any will, testamentary trust disposition and settlement or codicil.
- (3) Where a contract, obligation or trust mentioned in subsection (2)(a) is not constituted in a written document complying with section 2 of this Act, but one of the parties to the contract, a creditor in the obligation or a beneficiary under the trust (“the first person”) has acted or refrained from acting in reliance on the contract, obligation or trust with the knowledge and acquiescence of the other parties at contract, the debtor of the obligation or the trustor (“the second person”) –
- (a) the second person shall not be entitled to withdraw from the contract, obligation or trust; and
 - (b) the contract, obligation or trust shall not be regarded as invalid, on the grounds that it is not so constituted, if the conditions set out in subsection (4) below is satisfied.
- (4) The condition referred to in subsection (3) above is that the position of the first person –
- (a) as a result of acting or refraining from acting as mentioned in that subsection has been affected to a material extent; and
 - (b) as a result of such a withdrawal as is mentioned in that subsection would be adversely affected to a material extent.
- (5) In relation to the constitution of any contract, obligation or trust mentioned in subsection 2(a) or (2A) above, subsections (3) and 4 above replace the rules known as *rei interventus* and homologation.
- (6) This section shall apply to the variation of a contract, obligation or trust as it applies to the constitution thereof but as if in subsections (3) and (4) for the references to acting or refraining from acting in reliance on the contract, obligation or trust and withdrawing therefrom there were substituted respectively references to acting or refraining from acting in reliance on the variation of the contract, obligation or trust and withdrawing from the variation.
- (7) In this section “*real right in land*” means any real right in or over land, including any right to occupy or to use land or to restrict the occupation or use of land, but does not include –
- (a) a tenancy;

- (b) a right to occupy or use land; or
 - (c) a right to restrict the occupation or use of land, if the tenancy or right is not granted for more than one year, unless the tenancy or right is for a recurring period or recurring periods and there is a gap of more than one year between the beginning of the first, and the end of the last, such period.
- (8) For the purposes of subsection (7) above “*land*” does not include—
- (a) growing crops; or
 - (b) a moveable building or other moveable structure.”

Submissions for the Appellant

[7] The appellant conceded, on the basis the sheriff found that the parties had entered into an agreement, which they had understood or intended to be a lease, the sheriff was correct in his finding that the statutory personal bar provisions contained in sub-sections 1(3) and 1(4) cannot be relied upon, because the verbal lease was not expressed as a contract for the creation of a lease.

[8] The appellant’s challenge is to the sheriff’s conclusion that the verbal lease could have no other effect. The appellant submitted “verbal lease” was simply a portmanteau to describe the agreement reached. The appellant submitted that although ineffective in constituting a lease, which creates a real right in land, as opposed to personal rights in land, the verbal agreement between the parties was effective to create purely personal rights and obligations between the pursuer and the deceased. On this analysis, the pursuer would have no right against any third party to whom the property was disposed, but would retain rights against the deceased for the breach by the deceased of his personal obligations, which would sound in damages. The defender is *eadem persona cum defuncto* so the pursuer’s personal rights transmit against him.

[9] The sheriff having found the agreement was reached in early 2005, the relevant version of the Requirements of Writing (Scotland) Act 1995 was the version as applied

between 20 November 2004 and 4 October 2006, as quoted above. The appellant highlighted the amendment to the terms of section 1 by virtue of the Abolition of Feudal Tenure etc. (Scotland) Act 2000, effective from 28 November 2004, which modified the terms of sub section 7 replacing “interest in land” with “real right in land”.

[10] Dissecting section 1 of the Act the appellant drew attention to the general proposition of subsection (1) that writing is not required for the constitution of a contract, unilateral obligation or trust, with subsection (2) providing for exceptions to the general rule that writing is not required, and subsection (2)(a)(i) specifying writing is required in order to establish real rights in land. It was however submitted that the verbal agreement may constitute a personal obligation which falls within section 1(1) and the generality that writing is not required. This because it is not an obligation specifically provided for within sub section 2. The appellant submitted that the amendment introduced by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 changing “interest in land” to “real right in land” narrows the effect of the section and it is only the creation of a right or obligation which establishes real rights which requires to be in writing.

[11] It was submitted by the appellant that the sheriff had fallen into error in failing to appreciate that what he required to determine was not a binary option with either a fully-constituted lease defensible against the world at large, or no agreement at all. Rather there might be a more nuanced position. This was recognised by Lord Drummond Young in *The Advice Centre for Mortgages v McNicoll* 2006 SLT 591. Significantly in *Gyle Shopping Centre General Partners Limited v Marks and Spencer plc* 2014 COSH 122 which proceeded in the basis of the amended section narrated above, Lord Tyre stated at para 16:

“I respectfully agree with Lord Drummond Young’s analysis. I agree in particular that the 1995 Act draws a fundamental distinction between the creation of personal

rights, where a party's actings may bar him from founding upon a failure to constitute the contract in a written document complying with section 2, and the creation of real rights, good against third parties, as regards whom a party's actings can have no such effect. As Lord Drummond Young explained, there are sound policy reasons for drawing such a distinction, and it respects the "personal" character of the doctrine of personal bar explained by Lord President Rodger in *William Grant & Sons Ltd v Glen Catrine Bonded Warehouse Ltd* 2001 SC 901 at paragraph 29."

[12] The appellant also noted that in *The Advice Centre for Mortgages* (supra) Lord Drummond Young identified that the distinction between the creation of personal rights and the actual creation or transfer of a right, is particularly blurred in the case of leases p 596 F:

"The distinction is clearest in the case of missives for the sale of land and the disposition of the land, but exists in other cases too, although it becomes very blurred in the case of leases."

[13] The appellant invited the court to delete the sheriff's sixth finding-in-fact-and-law:

"The verbal lease is accordingly invalid and the deceased was entitled to withdraw from it."

And to substitute the following finding in fact and law:

"[6] The verbal lease is accordingly invalid as a means of creating a real right in the subjects. However, it is effective in creating purely personal rights and obligations by which the parties were bound. Accordingly, the deceased was not entitled to withdraw from it."

[14] In the event of the appellant succeeding in the appeal senior counsel invited the court to grant decree in his favour for £141,177, this being the sum at which the sheriff had quantified damages. In relation to the sheriff's conclusion that had he so found he would have fixed a hearing to be addressed on the question of the date from which interest should run, senior counsel for the appellant conceded that interest was only sought from the date of citation.

[15] As far as the matter of expenses was concerned the primary position of the appellant was that in the event of success in the appeal any expenses of the cause including the appeal

should be awarded in favour of the appellant. Sanction was sought for the instruction of senior counsel for the appeal given the appeal was plainly of some difficulty and complexity. If the principal argument in the appeal was unsuccessful, the appellant's second ground of appeal was in relation to the sheriff's finding on expenses. It was submitted that the sheriff erred in making a finding of no expenses due to or by either party (save in so far as expenses had already been determined) having acknowledged that the length of the proof would not have reduced materially had the crave for damages for breach of contract not been part of the action and noting that the appellant was an assisted person.

Submissions for the Respondent

[16] The respondent adopted the sheriff's reasoning and invited the court to adhere to the sheriff's interlocutor and refuse the appeal.

[17] The respondent submitted that the appellant was now seeking to argue a new case, different from the case on record which the sheriff at first instance decided. It was noted that in the appeal the appellant no longer appeared to found on the personal bar provisions. The case at first instance was predicated entirely on the constitution of a lease and the alleged breach thereof, but the appellant now seeks to rely on what are said to be purely personal rights arising from what had been agreed. There was no evidence other than that the agreement constituted a lease. Witnesses had not been questioned about the nature of the obligations which were giving rise to what the appellant now submitted were personal obligations. It was too late for the appellant to change horses in the way in which he sought to argue the appeal. The respondent also submitted there was no basis on which to find there was consensus on the terms of an agreement constituting personal rights.

[18] On the question of expenses, the respondent submitted that, insofar as the appeal is concerned, expenses should follow success. In relation to the sheriff's award of expenses it was submitted that this was a matter for the discretion of the sheriff and there was no basis to interfere with what was a valid exercise of discretion.

Discussion and Decision

[19] We identify two key questions to be answered in this appeal. Firstly can there be personal rights and obligations between the parties to an agreement which are enforceable between them, but which are not such as to create a lease giving rise to real rights? Secondly if that question is answered in the affirmative, were the averments of the appellant sufficient to allow the sheriff to make findings to that effect?

[20] As is made clear by Lord Drummond Young in *The Advice Centre for Mortgages v McNicoll* (*supra*) the constitution of a lease may be blurred. It is particularly blurred in the present case, where the sheriff found the deceased did not want the agreement reduced to writing. (See finding in fact 9) We also agree with the analysis of Lord Drummond Young in *The Advice Centre for Mortgages v McNicoll para. 21*:

“A lease for a period in excess of a year is clearly an important transaction and if parties choose not to put it in a document that conforms to the very simple requirement of s 2, I cannot see that the law should be assiduous to help them.

However he also stated:

“The rights which the pursuers have under the lease are only good against Thomas H Peck Limited and not effective against the defender.”

The sheriff found that there was an agreement between the parties as to the critical terms, as narrated in finding in fact 8. He considered these were sufficient to fulfil the requirements

for a lease. The sheriff did not determine nor indeed did he consider whether the agreement of these terms was sufficient to establish personal rights and obligations between the parties.

[21] The approach of the Requirements of Writing (Scotland) Act is that, in general, agreements, if proved, do not require to be in writing in order to bind the parties.

Section 1(2) sets out the exceptions to that generality. These include real rights in land and subsection (7) specifies that a real right in land includes a tenancy for more than one year.

We observe it is well established that leases for more than one year, which may have an impact on parties beyond those to the contract, should be constituted in writing. We however agree with the submission made by the appellant that it is possible for the terms of the agreement as found by the sheriff to give rise to personal rights and corresponding obligations. That accords with Lord Drummond Young's view in *The Advice Centre for Mortgages v McNicoll* that the pursuer may have had a claim against Thomas H Peck Ltd, with whom they had contracted. We consider that the amendment to the Act modifying the reference to "an interest in land" to a "real right in land" adds further support to this conclusion. This recognises in our view that an agreement constituting only a personal right in land does not require to be constituted in writing. We therefore accept that a breach of the agreement on the terms as found by the sheriff may give rise to a claim in damages.

[22] This leads us to consideration of the second question. Were the appellant's averments and pleas sufficient to entitle the sheriff to grant decree in favour of the appellant on the basis of his personal rights against the deceased? It is not a matter of contention that such a right is enforceable against the respondent as executor of the deceased.

[23] The appellant made a focused argument for a personal right against the respondent before this court. This was first argued before the sheriff in the written submissions made,

following the request by the sheriff for further submissions after his having taken the case to avizandum, and only obliquely foreshadowed in the pleadings. The appellant sought to make a case before the sheriff that the agreement constituted a lease. The appellant's pleadings refer repeatedly to a "lease" and evidence was led with a view to establishing a lease between parties. Any such lease required to be in writing and we agree with the sheriff who rejected the appellant's argument that a lease was created. The appellant has not sought to amend his case and simply relies upon his second plea-in-law:

"The deceased having been in material breach of contract, decree should be granted in terms of crave 2."

The second crave is in the following terms:

"To grant decree for payment by the defender to the pursuer in the sum of £150,000 plus interest thereon at the rate of 8% per annum from the date of citation until payment."

The appellant submits the second plea-in-law and crave together with the averments are sufficient to give the respondent notice of the case made against him in respect of personal rights.

[24] The nature and function of pleadings is addressed at chapter 9 of *Macphail 3rd edition*.

Reference is made there to *Morrison's Associated Companies Ltd v James Rome & Sons Ltd*

1964SC 160, per Lord Guthrie at 190:

"It is a fundamental rule of our pleading that a party is not entitled to establish a case against his opponent of which the other has not received fair notice upon record. It follows that a defender cannot be held liable upon a ground which is not included in the averments made against him by the pursuer. These are not mere technical rules since their disregard would tend to create injustice, by imposing liability upon a defender for reasons which he had no opportunity to refute."

Further consideration is given as to what constitutes fair notice at paras. 9.27 – 9.30. In short a defender is entitled to sufficient specification so as to prepare their case.

[25] In *John G. Stein & Co. Ltd. v O'Hanlon* 1965 SC(HL) 23 Lord Guest at 42 approved what was said by Lord Justice-Clerk Thomson in *Burns v. Dixon's Iron Works Ltd.* 1961 SC 102 at 107:

"The court is often charitable to records and is slow to overturn verdicts on technical grounds. But when a pursuer fails completely to substantiate the only grounds of fault averred, and seeks to justify his verdict on a ground which is not just a variation, modification or development of what is averred but is something which is new, separate and distinct, we are not in the realm of technicality."

There the court accepted that while the Second Division's finding was to some extent a variation or modification of the respondent's case on record, it was based upon the same ground of fault and it related to the facts as found by the Lord Ordinary upon evidence properly before him. Accordingly the court concluded it did not amount to such a radical departure from the case averred on record as would justify the court in absolving the appellants from liability.

[26] Finding in fact 8 set out above substantially follows the averments of the appellant in condescence 2. In answer 2 the respondent denied these specific averments and averred they were irrelevant. Condescence 7 called upon the [respondent] to make reparation for breach of contract. We accept that the reference to breach of contract in condescence 7 and the terms of the second plea in law are such as entitle this court to be satisfied that the re focused case as presented to this court, of a breach of a personal obligation, is a modification of the case pled of breach of contract. We do not accept that there would have been any material difference in the evidence given or the challenge to that evidence had there been more express specification of the claim as founding on breach of a personal obligation as against a lease. We also accept that that fair notice was given of the terms of

the contract which the appellant claimed had been entered into and breached by the deceased.

[27] We conclude that the terms of the agreement established by the sheriff in finding in fact 8 give rise to personal rights and obligations between the parties even though they could not constitute a lease without being reduced to writing. We further conclude that breach of the terms of the agreement encompassed within finding in fact 8 is sufficient to give the appellant a right in damages for the sums calculated by the sheriff in paragraph 85 of the judgment. In light of senior counsel's concession that interest should run from the date of citation, we propose to recall the sheriff's interlocutor of 15 January 2016; substitute the findings-in-fact-and-law sought by the appellant and thereafter to grant decree in favour of the appellant in the sum of £141,117 with interest due from the date of citation until payment.

[28] We find some force in the respondent's submission that the arguments presented by senior counsel before this court have been more focused in relation to the claim founding on breach of personal rights than those presented to the sheriff. In these circumstances we are not prepared to interfere with the sheriff's decision in relation to expenses, which fell within his discretion and achieves a fair result between the parties. The appellant having been successful in the appeal we shall apply the normal rule that expenses follow success. We are satisfied the appeal raises points of law of sufficient complexity to warrant sanction for senior counsel and we will certify accordingly.