SHERIFF APPEAL COURT

[2019] SAC (CIV) 23
DUN-A234-16

Appeal Sheriff AL MacFadyen
Appeal Sheriff AG McCulloch
Appeal Sheriff W Holligan

OPINION OF APPEAL SHERIFF W HOLLIGAN

in an appeal in the cause

LEGAL AND EQUITABLE NOMINEES LIMITED, a company incorporated in England under the Companies Acts (Registered Number 01063532) and having its Registered Office at 1 The Lawrence Woolfson Partnership, 1 Bentnick Street, London, W1U 2ED

Pursuer and Respondent

against

SCOTIA INVESTMENTS LIMITED PARTNERSHIP, a limited partnership (Registered Number LP012520) and having its principal place of business at 7 John Street, London, WC1N 2ES, acting by its general partner, SCOTIA GENERAL PARTNER LIMITED, company incorporated in England under the Companies Acts (Registered Number 05243744), and also having its Registered Office at 7 John Street, London, WC1N 2ES

Defender and Appellant

Defender and Appellant: Garrity, advocate; MacRoberts
Pursuer and Respondent: Anderson, advocate; Brodies

10 May 2019

[1] This appeal concerns proceedings brought pursuant to the Conveyancing & Feudal Reform (Scotland) Act 1970 ("the 1970 Act") and in particular a certain notice or notices calling up a standard security secured over heritable property at St Andrews in Fife ("the

property"). There is an issue as to whether there was one notice and a copy or there were two notices – for convenience I will refer to them as "the notices". Put shortly, following the issuing of the notices the respondent raised a summary application seeking a declarator that the appellant had failed to comply with the notices and that the respondent has the right to enter into possession of the property together with an order for ejection. The action was defended. There followed a debate in which the appellant sought dismissal of the action. The sheriff refused to dismiss the action. He repelled the appellant's preliminary pleas, refused to remit certain averments to probation and allowed a proof on the remaining averments. Against that interlocutor the appellant now appeals.

[2] In view of the arguments presented in this matter it is necessary to refer to key parts of the relevant documentation the terms of which are not in dispute and were lodged as part of the appeal print.

[3] Documents 2 and 3 of the Appendix to the Appeal Print comprise two loan agreements recorded on notepaper headed "Legal and Equitable Nominees Limited" whereby the sums of £1,015,000 and £50,000 respectively were advanced. The addressee (which I take to be the borrower) in both documents is "Scotia Investments Limited Partnership" (I shall refer to this entity as "SILP"). The addressee is further designed "acting by its sole general partner, Scotia General Partner Limited" (we shall refer to Scotia General Partner Limited as "SGPL"). The loan documents make reference to the "loan owed to the nominee, acting for a syndicate of lenders".

[4] Document 8 is the title sheet in relation to the property. For present purposes the key points are the proprietorship section and the securities section. (1) Under the heading of proprietorship the proprietor is described as SGPL "as the General Partner of, and as such, Trustee for [SILP]". (2) Under the heading of securities is a standard security granted by

"said [SILP] …acting by its sole general partner [SGPL]" in favour of "Legal and Equitable Nominees Limited (as nominee for a syndicate of lenders)". Both entries in the Land Register have 3 May 2011 as the date of registration. (3) Document 1 is a copy of the foregoing standard security, dated 31 December 2010. It narrates that it is granted by SILP "acting by our sole general partner [SGPL]" in favour of "Legal and Equitable Nominees Limited (as nominee for a syndicate of lenders)". The wording of (2) and (3) above is accordingly almost identical. The proprietorship sheet is slightly different in that it refers to SGPL as a general partner and, as such, trustee for SILP.

[5] Two notices are lodged. The documents are too lengthy to quote in their entirety. They are each dated 13 June 2016. Document number 4 is addressed to SGPL; document number 5 is addressed to SILP. The addressee is unqualified in that there is no reference to acting either in a representative capacity or fiduciary capacity. With that exception both documents are identical to each other; they each contain the same mistake. The notices each require payment of different sums: in words the sum is stated as amounting to "ONE MILLION ONE HUNDRED AND SIXTY EIGHT THOUSAND THREE HUNDRED AND SEVENTEEN POUNDS AND EIGHTY FOUR PENCE". The sum stated in figures is "£1,168,417.84", a difference of £100. That figure bears to be the total of the two sums of £1,065,000 and £103,317.84 both of which appear earlier in the text and which are correctly stated. It is a matter of agreement between the parties that SILP is an English limited partnership registered in England in terms of the Limited Partnerships Act 1907 ("the 1907 Act"). SGPL is the general partner of SILP. Certain of the documentation refers to the respondent "as nominee for a syndicate of lenders". Before the sheriff and before this court there was no further information as to the lender or who the syndicate might be.

[6] Before the matter came to the hearing before this court, the appellant sought and was granted leave to lodge a minute of amendment which added in a plea to the competency of the action. That plea had not been argued before the sheriff but was pursued before this court.

[7] Much of the argument on behalf of the appellant relates to what the appellant says is a mismatch between certain parts of the documentation. In particular it is said that there is a mismatch between the proprietor sheet and the standard security. The former is correct. There is also said to be an inconsistency in the description of the grantor of the standard security and that similar inconsistencies afflict the notices.

[8] Before dealing with the arguments of counsel it is necessary to set out the relevant parts of section 19 of the 1970 Act which refer to calling up notices.

> "Section 19 (1) Where a creditor in a standard security intends to require discharge of the debt thereby secured and, failing that discharge, to exercise any power conferred by the security to sell any subjects of the security or any other power which he may appropriately exercise on the default of the debtor within the meaning of standard condition 9(1)(a), he shall serve a notice calling-up the security in conformity with Form A of Schedule 6 to this Act (hereinafter in this Act referred to as a "calling-up notice"), in accordance with the following provisions of this section.
>
> (2) Subject to the following provisions of this section, a calling-up notice shall be served on the person having the last registered or recorded title to the security subjects and appearing in the Land Register of Scotland or on the record of the Register of Sasines as the proprietor, and should the proprietor of those subjects, or any part thereof, be dead then on his representative or the person entitled to the subjects in terms of the last registered or recorded title thereto, notwithstanding any alteration of the succession not appearing in the Land Register of Scotland or Register of Sasines.
>
> …
>
> (4) If the proprietor be a body of trustees, it shall be sufficient if the notice is served on a majority of the trustees having title to the security subjects.
>
> (5) It shall be an obligation on the creditor to serve a copy of the calling up notice on any other person against whom he wishes to preserve any right of recourse in respect of the debt.

> …
> (9) Where a creditor in a standard security has indicated in a calling-up notice that any sum and any interest thereon due under the contract may be subject to adjustment in amount, he shall, if the person on whom notice has been served so requests, furnish the debtor with a statement of the amount as finally determined within a period of one month from the date of service of the calling up notice, and a failure by the creditor to comply with the provisions of the subsection shall cause the calling-up notice to be of no-effect".

Submissions for the appellant

[9] In Mr Garrity's submission, the action is incompetent. The defender is referred to as a limited partnership registered in England under the 1907 Act. It is not the registered proprietor of heritable subjects and is not a legal entity. The registered proprietor is the company SGPL. An English limited partnership is not a legal person distinct from its partners. (Contrast that with section 4(2) of the Partnership Act 1890 ("the 1890 Act") which provides that a Scottish partnership is a separate legal person). An action may only be raised against a person; natural or artificial (see Macphail *Sheriff Court Practice* 3rd Edition paragraph 4.02). As SILP is not a person the action is therefore incompetent. It is for the law of the foreign company to determine its correct designation.

[10] In relation to the mismatch issue, the proprietorship sheet is correct. The proprietor is SGPL. The standard security has been granted by SILP. There is no valid security because it has been granted by a party other than the proprietor. The entry in the securities section reflects what was contained in the standard security. The only way a limited partnership could hold title was for title to be taken by an entity as trustee.

[11] In relation to the notices, the sheriff considered that only one notice had been issued plus a copy. That is not correct. Article 4 of condescendence makes reference to "notices". The purpose of a calling up notice is to secure repayment of the debt failing which to exercise the power of sale and allied powers. Section 19(5) requires a creditor to serve a

copy of the calling up notice on any other person against whom he wishes to preserve any right of recourse in respect of the debt. An example of that would be a Scottish partnership where service of a copy notice is made upon the individual partners as well as the partnership. Mr Garrity put forward six propositions which he said derive from section 19(1) and (2): (1) There must be a valid standard security granted by the registered proprietor of the security subjects by reference to which the calling up notice is served. (2) The calling up notice must be served on the registered proprietor of the security subjects by reference to which the calling up notice is served. (3) The calling up notice must be served on the registered proprietor of the security subjects. (4) The calling up notice must be exclusively directed at the person due to receive it, namely the registered proprietor. Reference was made to *Hill Samuel & Co Limited* v *Haas* 1989 SLT (Sh Ct) 68 at page 70 E-I. There is a strict obligation to serve the calling up notice in accordance with the proprietor sheet. (5) If the party serving the calling up notice is acting in a representative capacity then that must be specified in the calling up notice. (6) If the registered proprietor holds title in a representative capacity then the calling up notice must be addressed to the registered proprietor in that capacity (*Gallagher* v *Ferns* 1998 SLT (Sh Ct) 79 at 80 F-G). The calling up notice must be accurate and precise. The calling up notice must not contain a patent error as to the sum due (*Gardiner Petitioner* 2001 GWD 38-1433, Lady Paton at paragraph [40]). Although the interlocutor of Lady Paton was recalled the dicta on this point were not commented upon by the Inner House. Whether or not the calling up notice is valid is a matter of statutory interpretation and in particular the interpretation of section 19. Reference was made to *Kodak Processing Companies Limited* v *Shoredale Limited* 2010 SC 113 at paragraph [25]; *Mannai Investment Company Limited* v *Eagle Star Life Assurance Company Limited* [1997] AC 749 at 767D-769B; *Hoe International Limited* v *Andersen & Another* 2017 SC

313 at [27]-[44]. The cases of *Mannai* and *Hoe* were not referred to in argument before the sheriff and were only dealt with when, after having taken the matter to avizandum, the sheriff referred counsel to them. That issue was dealt with by way of written submissions. So far as the "reasonable recipient" test is concerned it has no place in relation to notices served pursuant to section 19. The matter is one of essential validity of a statutory calling up notice. This is not a contractual matter. The sheriff accordingly erred in deciding that the matter should be determined by reference to the test of what would be understood by "reasonable recipients" of the two notices. The matter is one solely of statutory interpretation. The sheriff had effectively made findings in fact. The sheriff had concluded the notice addressed to SILP was a copy of the calling up notice, issued in order to preserve a right of relief as so provided in the 1970 Act. The sheriff was in error in finding that the two calling up notices constitute a single valid calling up notice. The two notices failed to specify that Legal and Equitable Nominees Limited issued them in a representative capacity, namely as a nominee or agent for a syndicate of lenders. The notice addressed to SGPL failed to specify that SGPL was being served as a representative of SILP as trustee for or as partner thereof. The notice addressed to SILP was not a notice addressed to the registered proprietor of the security subjects. Neither notice was exclusively directed at the person due to receive it in terms of the 1970 Act. Furthermore, each notice contains a patent error as to the sum. In the circumstances the appeal should be allowed and the sheriff's interlocutor recalled.

Submissions for the respondent

[12] The action is competent. The appellant had been convened in the same terms in which it had granted the standard security. It was not open to the appellant to question the

competency of the action. Reference was made to OCR 5.10 which relates to citation. For the appellant to argue incompetency is to derogate from its own grant. It is personally barred from doing so (*Ben Cleuch Estates Limited* v *Scottish Enterprise* 2008 SC 252 at paragraphs [87]-[93]). By entering appearance the appellant had waived any right to argue over designation (*Tarmac Trading Limited* v *Simpson* [2018] CSIH 46). Furthermore, by reference to OCR 5.7 the respondents were entitled to raise proceedings against the limited partnership by its name or indeed its trading name. An English limited partnership may only act through its general partner. Only legal persons may be partners. Here the general partner is a limited liability company, SGPL. In the present case the standard security was granted by the limited partnership over partnership property by its general partner acting as such. That a general partner may act for an English limited partnership has a basis in the wording of the primary legislation (reference was made to section 5 of the 1890 Act and section 7 of the 1907 Act). By contrast a limited partner has no such power (see section 6 of the 1907 Act). Beyond that, any arguments about the competence of an English limited partnership granting a standard security would have to be proved as a matter of fact. The *lex fori* applies to the instance (*Paton* v *Neil* 1873 10 SLR 461; Anton *International Private Law* paragraph 27.13). *Paton* v *Neill* is an example of an action being competently raised against an English partnership.

[13] In relation to the notices and the six points put forward by the appellant, there is a valid standard security granted by the registered proprietor. The calling up notice was served on the registered proprietor, namely the general partner. The wording in the standard security was "We SILP acting by our sole general partner [SGPL] hereby grant a standard security". It could as well have been written in the active voice namely: "We [SGPL] acting for and on behalf of [SILP] hereby grant". There is no difference between the

two. The calling up notice served on the general partner expressly designates the fiduciary capacity in which the general partner was acting, namely as general partner of the limited partnership. The proprietorship and securities section of the title sheet come to the same thing. The respondents offer to prove that the calling up notice was exclusively directed at the person due to receive it. The *Hill Samuel* case was distinguishable. The notice to the general partner was exclusively directed to the general partner and the notice to the limited partner was exclusively directed to the limited partner; but for the address panels the notices are identical. The notice served on the limited partnership must therefore be considered to have been served on it as a "firm" in terms of the 1890 Act against whom (and against whose members) the pursuer wishes to reserve a right of relief under section 19(5). "Copy" does not necessarily mean principal and copy. "Copy" is habile to cover the two notices in identical terms. The appellant's objection is wholly technical but it is not technically correct. The limited partnership would not be misled. The references in the heading to "Your home may be at risk" should be read as *pro non scripto* as there was no home which was at risk. (*Westfoot Investments Ltd* v *European Property Holdings Inc* 2015 SLT (Sh Ct) 201). In relation to the respondent acting in a representative capacity there is no plea of no title or interest. The only person with a registered title is the respondent. There is no other disclosed person. That the pursuer may have other contractual relationships in relation to the security or its proceeds is *res inter alios acta* in relation to the defender. Where a title to either ownership of heritable property or to a security over heritable property is held in an express trust, the trust can be effective without appearing on the register: *Heritable Reversionary Company Limited* v *Millar* (1892) 19R (HL) 43. Only the registered holder of the security would have title to serve a calling up notice. The reasonable recipient of a calling up notice from the respondent would understand that the calling up notice had been issued for and on behalf

of the heritable creditors. The respondent offers to prove that the calling up notice was addressed to the registered proprietor in a representative capacity. Again, service was effected on the registered proprietor namely the general partner. The other notice had been served in terms of section 19(5). (However, when asked, Mr Anderson was unable to explain why a second notice had been served.) The calling up notice clearly states the capacity in which the notice is served on the general partner. The formulation of a limited partner "acting by" its general partner comes from section 5 of the 1890 Act as applied to limited partnerships by the 1907 Act. *Gallagher* v *Ferns* was distinguishable. That the calling up notice was served on the general partner in its capacity as general partner of the limited partnership is a clear reference to the fiduciary capacity in which the calling up notice has been served. It is to be noted that there is no reference in the standard security to a trust. The Keeper refers to "and, as such, trustee for". Some of the dicta in *Gallagher* v *Ferns* are too wide. In relation to the accuracy and precision of the notice, errors do not necessarily render notices of no effect. Lady Paton's interlocutor in *Gardiner* was recalled. In relation to a discrepancy between words and numbers primary legislation makes express provision that words should prevail: section 9(2) of the Bills of Exchange Act 1882 and sections 146 and 221 of the Bankruptcy and Diligence (Scotland) Act 2007. Mr Anderson accepted that the 1882 Act does not, in terms, apply in the 1970 Act but a "reasonable recipient" may have understanding of the law in general. Reference was also made to section 19(9) of the 1970 Act.

[14] Turning to the issue concerning the "reasonable recipient" the wording of the calling up notices reflect the terms in which the appellant itself granted its standard security. Section 19(2) of the 1970 Act requires service on the proprietor. There has accordingly been compliance. Section 19 of the 1970 Act does not require all the information to be contained

in the address. It requires the notice to be served. It is difficult to understand how the pursuer could reasonably have been expected to disclose any more information than the address panel of the notice. (*Hoe International* paragraphs [16]-[17] and [27]). In relation to the appellant's complaint that it is not clear from the identical notices which is the principal and which is the copy, the argument is simply taking technicalities to the extreme. Following *Hoe International* a commercially sensible construction has to be adopted. On no analysis can it be said that the reasonable recipient would not have understood the content of the notices. The decision in *Hoe International,* dealing with contractual notices, is consistent with the decision in *Balgray Limited* v *Hodgson* 2016 SLT 839, particularly at paragraphs [23]-[24] and [32]-[33]. *Hoe International*, at paragraph [43] approved the dicta of Lord Clyde in *Mannai Investments* (referred to also in *Balgray Limited* at paragraph [23]). At paragraph [44], in *Hoe International* the Inner House endorsed the general approach of the Court of Appeal in *Newbold* v *Coal Authority* [2014] 1WLR 1288 at paragraph [70]. Applying *Newbold*, the notice was served on the general partner and limited partner and was sufficient and adequate. *Kodak Processing Companies Limited* v *Shoredale Limited* can be distinguished. In the present case it does not appear to be disputed that the notices were received by the appellant. It was not suggested that they were not understood or that the reasonable recipient would not understand them. The appellant's position before the sheriff was that the reasonable recipient test did not apply to a calling up notice. Such an approach is wrong. In these circumstances it is submitted that the notices were validly served. In his oral submission, Mr Anderson accepted that the reasonable recipient test can only apply once one has a notice which conforms as closely as may be to section 19 (see also section 53). In other words substantial compliance comes first. He accepted that *Balgray* may have proceeded upon a concession that the reasonable recipient test applied.

[15] In all the circumstances the appeal should be refused and the matter remitted back to the sheriff.

Reply

[16] Existing case law does not distinguish between residential and commercial premises. There are similar requirements for a valid notice. The intelligence and knowledge of the recipient is not the test. The test is whether there is a valid notice; it is not a question of asking whether the notice was clear. The registered title is held in a representative capacity. Mr Garrity repeated his submission that there is a mismatch between the title and the standard security. Whether there is a mismatch may be a matter of English law. In relation to *Paton* v *Neil* (which deals expressly with an English partnership) that case was decided prior to the 1890 Act and no longer applies: the *lex fori* does not apply. This action would have been incompetent under English law (Lindley & Banks, *Partnership* (20th edition) paragraph 14.06). The court is not called upon to assess the validity of the notice by reference to the understanding of the recipient. *Balgray* was not authority for the proposition that the reasonable recipient is the test. The case of *Hoe* deals only with contractual notices. The case of *Newbold* is not part of Scots law. The courts require precision and accuracy in relation to the amount of the debt and that includes the capacity of the creditor. All of this can be found in section 19. It follows that the action is irrelevant and should be dismissed.

Decision

[17] The appellant is an English limited partnership registered in terms of the 1907 Act. As such it must have at least one general partner and a limited partner. There is no

information on record as to the identity of the limited partner. SGPL is the general partner. Put very broadly the 1907 Act provides that a limited partner has no power to bind the firm and no power to take part in the management of the firm (section 6). A limited partner is obliged to contribute a sum to the capital of the firm but is not liable for the debts and liabilities of the firm beyond that amount. Section 7 of the 1907 Act provides that the 1890 Act and the common law apply to limited partnerships. It follows that, in the present case, a partnership may only act through its general partner. Under Scots Law a partnership may be sued in the firm name without the need to identify the individual partners (OCR 5.7; Macphail, *Sheriff Court Practice* (3rd edition) paragraph 4.94-5; *Paton* v *Neill Edgar & Co*). That is a matter determined by the *lex fori* (see *Paton* and *Anton* (supra)).The case of *Paton* involved proceedings raised in Scotland against an English partnership. The action was held to be competent. The 1890 Act does not affect the decision. The present action is raised against the named firm and its general partner. The action is competent.

[18] So far as the entries in the Land Register are concerned, we were not addressed in detail on the issue as to the taking of title and the granting of security by partnerships, Scottish or otherwise. It is sufficient to say that, prior to the enactment of section 70 of the Abolition of Feudal Tenure Etc (Scotland) Act 2000 the general view was that, as a matter of feudal conveyancing, partnerships could not take title to heritable property (*Problems in Partnership Conveyancing*: Professor Gretton (1991) 36 JLSS page 232). The solution to the problem was for title to be held by trustees for the firm who might, but need not, be partners of the firm (see Gretton & Reid, *Conveyancing* Chapter 27, 4th Edition). Whether the same issue applies to a standard security was perhaps less clear (see Gretton *Who Owns Partnership Property*? 1987 JR 163 at page 178). As a matter of wording, the proprietorship section and the securities section are not exactly the same. Read short they read respectively:

SGPL as the general partner of, and as such, trustee for SILP; SILP acting by its sole general partner SGPL. I do not consider that there is any significant difference between the text of the two entries. The first narrates who holds the title, namely the general partner; the second narrates who grants the security and that is ("acting by ") the general partner. Furthermore, there is also force in the argument for the respondent that the appellant is effectively seeking to impugn its own title and the security which it granted in favour of the respondent. It has represented to the respondent that it is the owner of the property and that it can grant the security. The respondent was entitled to rely upon that representation. In short the appellant is barred from asserting that its position is directly contrary to what it said it was. I also do not consider there is anything of substance in the point as to the designation of the respondent ("acting as nominee"). Whether it has an obligation to account to others (unspecified) is irrelevant to their title.

[19] Before considering the alleged invalidity of the notices it is appropriate to examine the provisions of section 19 of the 1970 Act. Section 19(1) sets out the purpose of a calling up notice. A calling up notice is required where the creditor intends to require discharge of the debt and, should the debtor fail to do so, notice is given that the creditor intends to exercise the power to sell the security subjects and other cognate powers. Subsections 19(2)-(5) set out who should receive the notice; special provision is made in the case of deceased debtors, dissolved companies and trustees. Section 19(5) makes specific provision for the serving of a "copy" of the calling up notice on "any other person" against whom the creditor wishes to reserve any right of recourse in respect of the debt. Subsections 19(6)-(8) provide how a calling up notice should be served. Section 19(9) deals with adjustment of the sum contained in the calling up notice. Subsections 19(10)-(10B) deal with shortening notice and subsections 19(11)-(12) deal with the lifespan of a calling up notice. Section 19 accordingly

constitutes a detailed code in relation to calling up notices. Put broadly, section 20 and the following sections deal with the exercise of the rights of a creditor on default by a debtor in complying with a calling up notice. Form A to Schedule 6 contains a style for a calling up notice. Section 53(1) of the 1970 Act provides that it shall be sufficient compliance with any provisions in this Act that (in this case) the notice "so conforms as closely as may be, and nothing in the 1970 Act shall preclude the inclusion of any additional matter which the person granting the deed or giving or serving the notice… may consider relevant".

[20] Turning to the authorities on notices to which we were referred, most of them do not deal specifically with calling up notices. They relate to notices of one sort or another: some involve statutory provisions; others involve contractual provisions. The cases of *Ben Cleuch Estates* and *Hoe International* both involve notices given pursuant to contractual provisions. Put very shortly, in *Hoe* the Inner House concluded that the construction of a contractual notice falls to be determined by reference to general principles that govern construction of commercial contracts and that the approach to be taken is to favour a "commercially sensible construction". At paragraph [44] the Inner House also approved certain dicta of the Court of Appeal in the case of *Newbold* which referred both to the interpretation of contractual notices and statutory notices. Read short, at paragraph [70] the Court of Appeal identified three possible approaches to a statutory (and contractual) provision requiring that notice be given: the statute may require strict, adequate or no compliance at all. In determining which of the three approaches is correct the court held that it is necessary to consider the words of the statute or contract in the light of its subject matter, the background, the purpose of the requirement, if that is known or determined, and the actual possible effect of noncompliance upon the parties. It should be assumed that Parliament would have intended a sensible result. The case of *Kodak* involved an irritancy notice the

validity of which the Inner House held fell to be determined as a matter of statutory interpretation (section 4(4) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985) and that involved determining the intention of Parliament (paragraph [28]). *Mannai* was distinguished as applying to contractual matters (paragraph [25]). The case of *Balgray* also related to a statutory provision but I do not detect from the opinion any specific direction given as to the correct approach other than the general proposition that there is a need for certainty. Having taken this matter to avizandum it came to the court's attention that there is a body of Scottish authority at sheriff court level dealing specifically with the content of notices involving heritable securities. The authorities are *Forbes* v *Pollock* (1900) 16 Sh Ct Rep 329; *Hay* v *McCrone* 1928 SLT (Sh Ct) 25; *Standard Property Company Ltd* v *McGregor* (1930) 46 Sh Ct 294; *McLachlan* v *McKinnon's Trustee* (1936) 53 Sh Ct Rep 69; *Christie's Trustees* v *Reid* 1952 SLT (Sh Ct) 50; *Strathclyde Securities Co Ltd* v *Park* 1955 SLT (Sh Ct) 79. Section 32 of the 1970 Act is also relevant. The attention of counsel was drawn to these cases and their comments, if so advised, invited. Supplementary written submissions from both counsel were received for which we are grateful. Both parties accepted that these authorities continue to have relevance. I will refer to them further.

[21] There are three significant challenges to the notices. Firstly, there is an error in the amount to the extent of £100. Secondly, there are two notices with no explanation as to why the notice to SILP was given. Thirdly, neither notice qualifies the addressee as acting in any capacity linked to the partnership inasmuch as SGPL is not referred to as a general partner nor is SILP referred to as a limited partnership: they are simply named, followed by their address.

[22] In my opinion, the correct approach to determination of the validity of the notices is one of statutory interpretation (*Kodak*). I am not persuaded that the reasonable recipient test

applies. Section 19 has gone to considerable length to set out the substance of a calling up notice and the procedure for its service upon prescribed persons. The notice procedure has significant consequences for those to whom it is addressed and by those on whose behalf it is sent. As Mr Garrity pointed out, picking up from the older sheriff court cases, the calling up notice may be of significance in a sale of the subjects. The sheriff court cases all dealt with notices which were, to some degree, defective. Most of the notices involved arithmetical errors, some of which were significant. *Strathclyde Securities Ltd* v *Park* contained errors as to the specification of the bond and its recording. The various dicta do not all use the same formulation as to the correct approach. Read together, the opinions did not require absolute compliance with the statutory code (much of which was very similar to section 19 of the 1970 Act). What were described as "trivial errors", "errors of calculation" and "technical objections" were held not to be a good ground of challenge. "Substantial errors" or "errors of magnitude" were not excusable. In my opinion a similar approach is appropriate. Furthermore, in enacting section 53 Parliament has acknowledged the acceptance of some departure from compliance with the terms of the statute. If one departs from the standard of absolute compliance and admits the presence of error then the determination of what is, and what is not, permissible becomes a question of fact and degree, dependent upon the circumstances of the particular case. A case of unacceptable error is easier to identify than it is to define. Applying that test, the error of £100, particularly in the context in which it appears alongside the other figures, does not, on its own, render the notice defective. I do not consider that the reference to the Bills of Exchange Act is helpful. It is an obvious and minor error in calculation. In relation to the notice served upon SILP, the only basis upon which it could have been served is in terms of section 19(5). Before the sheriff and in its written case before us, the respondent stated that the notice was served on account of

section 19(5). However, as I have said, quite why it was served upon the limited partner was not made clear. There is no information before us as to why the limited partner might have any liability to the respondent nor was there any substantive submission to that effect. There is nothing in the notice which makes reference to section 19(5) or the purpose of the notice. The use of the word "preserve" would tend to suggest action by the creditor in the future. A "copy" of the notice is served which suggests a copy of the original notice served pursuant to section 19(2). No sanction for failure to serve is set out other than the inference that, absent such service, the creditor may lose the right to pursue the debtor for the debt. Even if the terms of section 19(5) were not complied with, had the notice served upon SGPL been validly served, I am of the opinion that service of the notice upon SILP, however confused the procedure may have been, does not invalidate the notice served upon SGPL. That leaves the designation of the addressee in the notices. In my opinion there is a difficulty. It is significant that, in the deeds referred to and in the various entries in the Land Register, the partnership structure is consistently referred to throughout. It is only in the notices themselves that the reference is absent. SGPL is the heritable proprietor of the property but "as General Partner of, and as such, Trustee for [SILP]".The notice does not so specify. SGPL may hold the title but it does so in a particular capacity and, contrary to section 19(2), that capacity is not made clear. In my opinion, the failure to specify the correct designation is an error which cannot be overlooked. The notice purports to follow Form A of Schedule 6 of the 1970 Act. It seems to me that the "To" part of the notice calls for a high degree of precision and in that the notice fails. That error also needs to be seen in the context of the arithmetical error. For my part I am not persuaded that the error can or should be overlooked. Accordingly, I would be minded to allow the appeal.

SHERIFF APPEAL COURT

[2019] SAC (CIV) 23
DUN-A234-16

Appeal Sheriff AL MacFadyen
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OPINION OF APPEAL SHERIFF A G McCULLOCH

in an appeal in the cause

LEGAL AND EQUITABLE NOMINEES LIMITED, a company incorporated in England under the Companies Acts (Registered Number 01063532) and having its Registered Office at 1 The Lawrence Woolfson Partnership, 1 Bentnick Street, London, W1U 2ED

Pursuer and Respondent

against

SCOTIA INVESTMENTS LIMITED PARTNERSHIP, a limited partnership (Registered Number LP012520) and having its principal place of business at 7 John Street, London, WC1N 2ES, acting by its general partner, SCOTIA GENERAL PARTNER LIMITED, company incorporated in England under the Companies Acts (Registered Number 05243744), and also having its Registered Office at 7 John Street, London, WC1N 2ES

Defender and Appellant

Defender and Appellant: Garrity, advocate; MacRoberts
Pursuer and Respondent: Anderson, advocate; Brodies

10 May 2019

[23] I would refuse the appeal. I have read the Opinion of Appeal Sheriff Holligan, and agree and adopt paragraphs [1] – [21] thereof. I accept that there are three significant challenges to the validity of the notices. The first is an error as between words and figures of

£100 regarding the sum due. The second is that there were two notices served, without explanation. The third is that neither notice, in its address (or "to" box), qualified the capacity of the recipient.

[24] I agree that the correct approach to determine the validity of the notices is one of statutory interpretation, rather than the reasonable recipient test. The sheriff court cases to which we were referred all dealt with notices said to be defective, to some degree. Most of the challenges related to arithmetical errors, some significant, some less so, or *de minimis*. The thrust of the dicta from these cases was that what could be described as "trivial errors", "errors of calculation" and "technical objections" were generally not considered as good grounds of challenge. On the other hand, "substantial errors" or "errors of magnitude" were not excusable. I adopt such an approach with regard to the three challenges to the notices.

[25] With regard to the first challenge, which argues that the notices are not valid as there is a material difference between the words and numbers of the amount due, to the extent of £100, I do not consider this to be significant, standing the total sum claimed to be due. This is not an unacceptable error. It is an obvious and minor typing error, which I do not consider renders the notices defective. The second challenge, that notices were sent both to SGPL and SILP, does not bear scrutiny either. Leaving aside for a moment the two other challenges, a valid notice has been served on the proprietor. That another notice is served on SILP, an entity which cannot, by itself, do anything in regard to the notice, does not affect the validity of the notice served on SGPL. Thus we are agreed that the first two challenges fail.

[26] Turning to the third challenge, the designation of the addressee in the notices. I do not consider that this presents a difficulty. In the context of the business between the pursuer, as lender, and the defender, as borrower there is no room for doubt as to the meaning of the notice served on SGPL. It is addressed to them, as required by the 1970 Act.

Whilst it might have been preferable to include the capacity in which they were acting, namely as General Partner of SILP, the absence in the address box does not render the notice invalid. The narrative of the notice so served makes it absolutely clear what is the basis for seeking payment. It refers, in full, to the standard security granted in the pursuer's favour by SILP, acting by its sole General Partner SGPL. In my opinion there is no room for doubt on whom the notice is served, and why, and from whom payment is required. The requirement on the creditor in terms of section 19 of the 1970 Act is to serve a calling up notice "on the person having the recorded title of the security subjects and appearing on the Land Register of Scotland as the proprietor". The standard security, in the Proprietorship section, has the proprietor as "SGPL as the General partner of and as such Trustee for SILP." For that reason, service on SGPL was correct. The challenge was that the address box on the calling up notice did not go on to specify the capacity in which SGPL might be liable. But that was sufficiently clarified in the narrative. There can be no doubt in the mind of SGPL what is being served upon them, leaving aside any argument that a reasonable recipient test should be applied. Even applying a test of statutory interpretation, the notice is valid. The only other relevant argument advanced in favour of challenging the validity of the notice was that on occasion a calling up notice may be of significance in a sale of the secured subjects. Even so, the identity of the proprietors is clear from The Land Register, and the notice served refers directly to the relevant entry. I see no scope for confusion, or conveyancing difficulty. Accordingly I am of the opinion that the third challenge also fails.

[27] Finally, it is necessary to consider the overall effect of three possible errors on the validity of the calling up notices. Each may be excused, or deemed irrelevant, on their own, but there might be circumstances where the effect of combined multiple errors would be to invalidate the notices. In the present case, the typing or drafting error of £100 is of little

consequence; in the circumstances of the relationship between SGPL and SILP, the service of a notice on both is inconsequential; and as the notice was served on SGPL, with its capacity fully narrated in the body of the notice, I see no necessity to invalidate the notice on some "totting-up" basis. Each challenge has failed, and in totality they fail as well. There has been substantial compliance with the statutory requirements.

[28] Thus I would refuse the appeal, and the matter should be remitted back to the sheriff for proof.

[29] The respondent is entitled to the expenses of the appeal and the appeal was suitable for the instruction of junior counsel.

SHERIFF APPEAL COURT

[2019] SAC (CIV) 23
DUN-A234-16

Appeal Sheriff AL MacFadyen
Appeal Sheriff AG McCulloch
Appeal Sheriff W Holligan

OPINION OF APPEAL SHERIFF A L MacFADYEN

in an appeal in the cause

LEGAL AND EQUITABLE NOMINEES LIMITED, a company incorporated in England under the Companies Acts (Registered Number 01063532) and having its Registered Office at 1 The Lawrence Woolfson Partnership, 1 Bentnick Street, London, W1U 2ED

Pursuer and Respondent

against

SCOTIA INVESTMENTS LIMITED PARTNERSHIP, a limited partnership (Registered Number LP012520) and having its principal place of business at 7 John Street, London, WC1N 2ES, acting by its general partner, SCOTIA GENERAL PARTNER LIMITED, company incorporated in England under the Companies Acts (Registered Number 05243744), and also having its Registered Office at 7 John Street, London, WC1N 2ES

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10 May 2019

[30] I have had the advantage of reading in draft the opinion of Appeal Sheriff McCulloch. I agree with it and, for the reasons he has given, I too would refuse the appeal, adhere to the decision of the sheriff and remit the action to him for proof.