SHERIFF APPEAL COURT

[2024] SAC (Civ) 2
EDI-A13-22

Sheriff Principal S F Murphy KC
Sheriff Principal G A Wade KC
Appeal Sheriff H K Small

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL S F MURPHY KC

in appeal by

THOMAS CAMPBELL MACLENNAN, as Trustee in the Sequestration of DEREK DRUMMOND

Pursuer and Respondent

against

DEREK DRUMMOND (AP)

Defender and Appellant

Pursuer and Respondent: Weir, solicitor; Shepherd & Wedderburn LLP
Defender and Appellant: I G Mitchell KC, Nicoll, advocate; W & AS Bruce

16 January 2024

Introduction

[1] The appellant appeals against the interlocutor of the sheriff dated 31 October 2022 in terms of which he sustained the second plea-in-law for the pursuer and respondent ("the respondent") and granted summary decree for recovery of possession of the property at 8 Northfield Drive, Edinburgh ("the subjects") and for removing of the defender and appellant ("the appellant"), his family, sub-tenants and dependants with his goods and

possessions from the said property. Separately, the sheriff found the appellant liable to the respondent in the expenses of the action.

Background

[2] On 11 April 2007, the appellant was sequestrated by an order of the sheriff at Edinburgh (the "First Sequestration"). The trustee in the First Sequestration was an insolvency practitioner (the "First Trustee"). The date of the First Sequestration was 7 March 2007 conform to the warrant to cite dated the same date. The subjects were vested in the First Trustee by virtue of section 31(1) of the Bankruptcy (Scotland) Act 1985.

[3] In 2011 the First Trustee raised proceedings against the appellant seeking to recover possession of the subjects to allow a sale to be made to satisfy the appellant's creditors. The appellant's mother paid £23,000 to the solicitors acting for the First Trustee to purchase the First Trustee's interest in the subjects on 20 May 2011. Following receipt of the payment, the proceedings raised against the appellant by the First Trustee in relation to the subjects were dismissed on 16 December 2011.

[4] On 23 January 2012 the appellant was sequestrated for the second time by an order of the sheriff at Edinburgh (the "Second Sequestration"). The trustee in the Second Sequestration was the respondent. The date of the Second Sequestration was 3 November 2011 conform to the warrant to cite dated the same date.

[5] The respondent raised an action seeking recovery of the subjects together with orders for the removal of the appellant and the expenses of the action. The action was initially raised as a summary cause for removing. On 10 January 2022, the action was remitted to the ordinary cause roll.

[6] The respondent avers that the appellant's estate included the subjects to which the action relates and that the appellant has refused to co-operate in its sale. The appellant denies that the property formed part of his estate as at the date of the Second Sequestration, namely 3 November 2011.

[7] On 19 April 2022, on the respondent's motion, a diet of debate was fixed on their first and second pleas-in-law, notwithstanding that the appellant had offered a proof before answer. The diet of debate proceeded on 26 July 2022. On 31 October 2022, the sheriff issued his judgment and found for the respondent.

[8] He rejected the appellant's argument that there was a formal requirement for the respondent to aver (i) how and when the First Trustee "abandoned" her interest in the subjects and (ii) how the First Trustee amended the Register of Inhibitions and Adjudications. In any event, based on the appellant's averments (as they then were before the sheriff), the sheriff held that the appellant had admitted that the First Trustee did give up her right, such as it was, to the property. That being so, there was no need to hear evidence on that issue. Both parties accepted that the First Trustee sold her interest in the property.

[9] A second line of defence was newly raised at the diet of debate, namely an argument that the appellant held the subjects in trust for his mother. The sheriff rejected that submission from the appellant for absence of record. No leave was sought to amend (at that stage). In any event, the sheriff considered the second line of defence, even had it been properly pled, was contradictory to the first line of defence. The first line was that the respondent had not averred relevantly or with sufficient specification the First Trustee's abandonment of her interest in the subjects and that the subjects were not vested in the appellant's estate as at 3 November 2011. The second line of defence was that the First

Trustee had disponed her interest in the subjects to the appellant's mother and therefore they were not part of the appellant's estate for the purposes of the Second Sequestration.

[10] In addition, the sheriff considered that even if the second line of defence had been properly pled, the decision of the House of Lords in *Heritable Reversionary Company Limited* v *Millar (McKay's Trustee)* (1892) 19 R (HL) 43 did not assist the appellant.

[11] As a consequence, the sheriff considered it was sufficient to sustain only the respondent's second plea-in-law. He granted decree.

Preliminary matter

[12] During the progress of this appeal, the appellant enrolled a minute of amendment. Averments were introduced in an attempt to cure the absence of record for the second line of defence. Initially, the receipt of that minute of amendment was opposed by the respondent; however, following discussion between the parties, at the procedural hearing on 28 August 2023 the procedural appeal sheriff was advised that the minute of amendment was no longer opposed. Accordingly, the minute of amendment was allowed and the pleadings were amended.

[13] The consequence of the amendment procedure, however, was that this court was being asked to consider the relevancy and specification of averments which had not been before the sheriff at the diet of debate. The question as to whether a new point will be entertained on appeal is not one of competency, but of discretion: Macphail; *Sheriff Court Practice* (4th edn) paragraph 18.14. Having considered the matter, the court decided to proceed to hear the appeal.

Submissions for the appellant

[14] The appellant submitted that the sheriff had erred in four respects in his note of appeal. At the appeal hearing this became distilled into three grounds.

[15] Firstly, the sheriff had erred and had misdirected himself in relation to the facts averred. The appellant argues that the sheriff failed to take account of the fact that the First Trustee gave up her right to the subjects to a third party, the appellant's mother, not to the appellant. When the appellant was sequestrated in the First Sequestration the First Trustee had acquired a *jus ad rem* rather than a *jus in rem* to the subjects: *Joint Liquidators of Scottish Coal Co Ltd* v *Scottish Environment Protection Agency* 2014 SC 372 at paragraphs [111]–[113]. The First Trustee had the ability to choose not to enforce their right. The First Trustee did not do so. They sold their right to the appellant's mother. There was no abandonment of the right to the subjects. Accordingly, the subjects were not vested in the appellant's estate as at 3 November 2011 and, in turn, the respondent's action seeking to remove the appellant from the subjects was irrelevant.

[16] Secondly, the appellant's *esto* position was that there was a constructive trust. It was argued that the First Trustee was holding the *jus ad rem* in a fiduciary capacity on behalf of the appellant's mother. During the course of his submissions, the court pointed out to senior counsel that there was an absence of record in both the pleadings and the note of appeal for his argument; nor was it foreshadowed in the note of argument or the written submissions for the appellant. As a consequence, senior counsel ended his submission in respect of this ground.

[17] Finally, although a subsidiary point, the appellant submitted the sheriff had erred in making a decision without allowing the parties to be heard in relation to the issue of expenses, particularly given the appellant was an assisted party. Senior counsel advised

that junior counsel had requested at the debate for a hearing on expenses to be fixed following the sheriff issuing his judgment. Had the sheriff done so, the appellant would have moved the court to reduce his exposure to an award of expenses to nil, as he is legally aided. As the sheriff had to proceed to deal with expenses in his judgment that opportunity had not been afforded.

[18] In the event the appeal was successful, the appellant sought sanction for junior counsel for their involvement in the proceedings in the sheriff court. With respect to the appeal, senior counsel made a motion to certify the appeal as suitable for the instruction of senior and junior counsel.

Submissions for the respondent

[19] Notwithstanding the addition of further averments by amendment during the appeal, the solicitor for the respondent submitted that the appellant's defence remained irrelevant.

[20] There was no error by the sheriff in holding that there was no requirement for the respondent to aver (i) how and when the First Trustee "abandoned" her interest in the subjects and (ii) how the First Trustee amended the Register of Inhibitions and Adjudications.

[21] Despite the submission made by senior counsel, the solicitor for the respondent maintained that the defence as pled contained three separate defences which were contradictory, notwithstanding that some of those defences were made on an *esto* basis.

[22] With regards to the main argument put forward by senior counsel, namely that the First Trustee had transferred the subjects to the appellant's mother, the solicitor for the respondent maintained that the appellant's averments remained deficient.

[23] Firstly, what the appellant now averred following the allowance of the minute of amendment was that his mother had paid the First Trustee for an interest in the subjects. It was not pled that she had purchased the subjects or a share thereof.

[24] Secondly, no reference was made to any disposition between the First Trustee and the appellant's mother nor had any such document been incorporated into the pleadings. As the subjects are heritable property, for any such transfer to be validly executed it would require to have been set down in writing: section 1(2)(b) of the Requirements of Writing (Scotland) Act 1995.

[25] Thirdly, the appellant has failed to aver that any form of writing was entered into between himself and his mother sufficient to allow the court to conclude that a declaration of trust was created, as required by section 1(2)(b) of the 1995 Act. In addition, no averments are pled as to when the declaration of trust was communicated to the appellant's mother. A "truster-as-trustee" trust is not created merely by a valid declaration of trust. Communication to the beneficiary under the trust is required: *Allan's Trustees* v *Lord Advocate* 1971 SC (HL) 45.

[26] Fourthly, no averments are pled nor any explanation offered as to how the First Trustee's interest in the subjects could be disponed to the appellant's mother whilst the subjects were burdened with a standard security. To have transferred the subjects without the consent of the holder of the standard security would have been a breach of the standard terms of a standard security.

[27] Fifthly, the registered owner of the property within the Land Register of Scotland as at 3 November 2011 was the appellant. At no point had the First Trustee converted their personal right into a real right to the subjects.

[28] Sixthly, as already noted, the contention that the subjects had been transferred to the appellant's mother was plainly in contradiction to the averment which remained despite amendment at page six of the Record, lines 7–8: "Said Subjects vested in the First Trustee and there had been no reversion to the Defender by the time of the Second Sequestration." In the same answer at lines 14 - 15, the appellant continues to aver and offer to prove that: "Explained and averred that the Subjects remained vested in the Previous Trustee as at 20 May 2011." Thus, although senior counsel for the appellant maintained that his position at appeal was that the First Trustee's interest had transferred to the appellant's mother, it remained the case that the pleadings of the appellant continued to aver contradictory lines of defence.

[29] Finally, under reference to *Joint Liquidators* (*supra*), it was submitted that a trustee in sequestration can only abandon heritable property to the bankrupt and not to a third party.

[30] On the issue of legal aid, the solicitor for the respondent submitted that at no point in the defences or at the debate was a request made by counsel for the appellant to have expenses reduced to nil as a result of the appellant being an assisted person.

[31] With respect to the issue of sanction in the event the appellant's argument was preferred, the respondent opposed the awarding of sanction for junior counsel in the sheriff court. The solicitor for the respondent referred to rule 5.4(6) of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019, namely that the court may only sanction work already carried out as suitable for the employment of counsel when satisfied that the party applying has shown cause for not having applied for sanction before the work was carried out. The appellant had instructed a solicitor from the outset (albeit agency had changed since the debate). Junior counsel had been instructed since March 2022. Senior counsel had been instructed since April 2023. Notwithstanding that, the first time any motion had been made

for sanction was at the appeal hearing. No explanation was proffered by senior counsel for the appellant as to why a motion had not been made at an earlier stage. In the absence of any explanation, this court was not in a position to consider whether or not there was in fact cause for the delay. For that reason alone, the motion for sanction of junior counsel at the debate should be refused.

[32] As for sanction for the appeal, the solicitor for the respondent moved the court to refuse the motion for sanction of both senior and junior counsel. It was submitted that the appeal was neither intrinsically difficult nor complex. Her *esto* position was that only sanction for junior counsel ought to be granted if sanction was considered merited.

Decision – "Abandonment"

[33] In terms of section 31(1) of the 1985 Act "the whole estate of the debtor shall vest as at the date of sequestration in the permanent trustee for the benefit of the creditors …". The effect of this was explained in detail by Lord Justice Clerk Carloway in *Joint Liquidators of Scottish Coal* v *Scottish Environment Protection Agency* at paragraphs [111]–[117]:

> "[111] It is central to a proper analysis of the powers of a trustee to grasp exactly what is the effect of property 'vesting' in a trustee. The short point is that, of itself, sec 31(1) [of the Bankruptcy (Scotland) Act 1985] does not have the effect of the trustee obtaining ownership of either moveable or heritable property, in the sense of conferring a real right in the property … All of this makes it tolerably clear that the vesting provision in sec 31(1) does not, of itself, result in the creation of a real right amounting to ownership. Instead, it creates a personal right in the trustee to acquire ownership of the property using the accepted methods of doing so (Goudy, *Bankruptcy*, p 268). If registration is required to complete title, then it must be carried out (*Morrison* v *Harrison*).
> …
>
> [113]…Meantime, however, he does not have ownership of the land. He has an unqualified right to complete title, but he does not require to do so. If he does not do so, what he retains is a personal right to acquire ownership, which he may elect to enforce or decline to do so ... If the decision is not to complete title, that does not

> involve any abandonment of property; rather, it is a decision not to proceed to enforce a personal right.
>
> [114] A number of cases were cited in which there has undoubtedly been judicial reference to a trustee 'abandoning' property … However, close analysis of these cases makes it clear that it is a personal right (and its counterpart obligation) that is being given up …
>
> [116] A trustee can elect not to enforce a personal right. If that right is to acquire ownership of land, it can (no doubt with the consent of the creditors) be given up and in that sense 'abandoned', leaving ownership (the real right) where it rests (with the bankrupt) … If, however, the trustee acquires ownership of land, in the sense of having a real right in it recorded in the appropriate register, he cannot divest himself of that simply by declaring it to be no longer his own. The land will remain recorded in his name until it is transferred from him, using the formal methods already described …
>
> [117] There is now an express provision whereby a trustee can 'abandon' heritable property, but he can only do so in favour of the debtor (1985 Act, sec 32(9A)). This is a statutory procedure which, again, requires appropriate documentation to be recorded in the Register of Inhibitions (see Bankruptcy (Scotland) Regulations 2008 (SSI 2008/82), Form 21; 1985 Act sec 32(9B), (9C)). Although the term 'abandon' is used in the statute, the land is not abandoned. What this involves is the abandonment of any 'claim to the debtor's share and interest … in the property' (2008 Regulations, Form 21). No transfer of ownership is envisaged. Rather, the trustee gives up what (as detailed above) is a personal right to acquire ownership of (that is, a real right in) the property. In a sense it may loosely be described as 'abandonment'; but of a right to the property, not the property itself."

[34] The appellant's position following amendment was that the cheque for £23,000 from his mother was issued to purchase the equity in the property so that the property, which was vested in the First Trustee, was sold to his mother subject to the secured debt incurred by the appellant. The registered title remained in the appellant's name; therefore it was held by him in trust for his mother.

[35] We agree with the respondent's submissions that this position does not stand up to scrutiny. The First Trustee at no time acquired a real right in the property, which remained in the appellant's name at all times. It follows that she could not sell the equity to the appellant's mother as she (the First Trustee) had no more than a personal right to acquire

ownership which she had not as yet taken up. The sheriff stated at paragraph [12] of his judgment: "Both parties accept that the first trustee sold her interest in the property." That interest was the First Trustee's right - her *ius ad rem* - so that the sheriff's further statement, within paragraph [15] of his judgment must be correct: "It is right that the defender's mother acquired the first trustee's personal interest in the subjects in May 2011, and paid the sum of £23,000 in order to do so." What follows is critical: "Nevertheless, it appears that she took no further steps thereafter to enforce her interest in the years since then – at least, I was not advised of any." Even after amendment the appellant's pleadings contain no averments that his mother took any steps to acquire a real right in the property. Accordingly the appellant's defence must rely on the subjects remaining vested in the First Trustee at the time of the second sequestration.

[36] In that regard the respondent has pled that the First Trustee abandoned her interest in the property on 20 May 2011 when the cheque from the appellant's mother cleared and the funds were received; and that the proceedings against the appellant in relation to the property were dismissed. The appellant answered those averments by indicating that no Notice of Abandonment was registered in the Register of Inhibitions and Adjudications by the First Trustee and that there was no reversion of the subjects to the appellant. The sheriff found (at para [12] of his judgment) that no legal requirement to do so was specified by the appellant and that aspect of the matter was not pursued in this appeal. In the present case the First Trustee gave up her right to acquire a real right in the property on receipt of the funds from the appellant's mother. This is akin to the position discussed in *Joint Liquidators of Scottish Coal* v *Scottish Environment Protection Agency*, at paragraph [116] *(supra)*. The First Trustee's right to acquire ownership was given up, and in that sense "abandoned", leaving ownership with the appellant unless or until some further conveyancing procedure and

subsequent registration was carried out; which in this case was never done. It follows that the sheriff was correct to find this limb of the appellant's case to be irrelevant.

Decision

Subjects held in trust

[37] The *esto* argument presented on the appellant's behalf was that he was holding the property in trust for his mother. The suggestion of constructive trust was not set out clearly in the appellant's amended proceedings and accordingly - and correctly - was not pursued before this court.

[38] In his written submissions the appellant sought to rely on the decision in the case of *Heritable Reversionary Company Ltd* v *McKay's Trustee* (1892) 19 R (HL) 43. The facts of that case are set out in the sheriff's judgment at paragraph [10]. In our view that case may readily be distinguished from the present one on its facts and the sheriff was correct to do so, for the reasons he indicates at paragraph [15] of his judgment. Mr McKay had been a trustee from the outset; the properties were purchased by him with funds provided by the company; and he issued a back bond or declaration acknowledging that he was a trustee. At no time did he personally possess a real right to any of the tenements which he had purchased. These circumstances are completely different from the present appellant's situation.

[39] The respondent drew the court's attention to the speech of Lord Reid in *Allan's Trustees* v *Lord Advocate* at page 54:

> "I think that we can now accept the position, as a reasonable development of the law, that a person can make himself a trustee of his own property, provided that he does something equivalent to delivery or transfer of the trust fund. I reject the argument for the appellants that mere proved intention to make a trust coupled with the execution of a declaration of trust can suffice. If that were so, it would be easy to

> execute such a declaration, keep it in reserve, use it in case of bankruptcy to defeat the claims of creditors, but, if all went well and the trustee desired to regain control of the fund, simply suppress the declaration of trust."

In the present case the appellant's averments do not contain reference to a declaration of trust and no such deed has been produced.

[40] The appellant's amended pleadings proceed on the basis that the registered title remained in his name and accordingly was held in trust by him for his mother. As the respondent pointed out, the creation, transfer or variation of a real right in land of such a kind requires to be made formally in writing in terms of section 1(2)(b) of the Requirements of Writing (Scotland) Act 1995. No averments of the existence of any such document have been made by the appellant and none has been produced; nor are there any such averments regarding any deed of trust and none has been produced.

[41] In these circumstances we consider that this line of argument is unsupported by sufficient averments and is also irrelevant.

[42] Accordingly we refuse the appeal on its substantive grounds and adhere to the sheriff's interlocutor of 31 October 2022.

Expenses

[43] We consider it to be unfortunate that the question of the expenses for the debate before the sheriff was not fully aired as no hearing took place and no legal aid certificate had been lodged. The appellant was an assisted person. As the respondent properly conceded, the omission to lodge the certificate is not fatal to an application to modify expenses (*Dobbie* v *Patton* [2019] SAC (Civ) 39, per the decision of the court at paragraph [12]. In these circumstances we shall uphold the appeal to the extent of remitting the question of the expenses relating to the debate to the sheriff to proceed as accords.

Expenses relating to the appeal

[44] In relation to the appeal procedure before this court, we shall award expenses to the respondent as the successful party and we shall certify the matter as suitable for the instruction of junior counsel on account of the limited degree of complexity and the importance of the matter for the appellant. However, as the respondent accepted in his submissions, we shall modify the award to nil as the appellant is in receipt of legal aid.