SHERIFF APPEAL COURT

[2024] SAC (Civ) 48
EDI-A337-23

Sheriff Principal S F Murphy KC
Appeal Sheriff B A Mohan
Appeal Sheriff P Mann

OPINION OF THE COURT

delivered by APPEAL SHERIFF PHILIP MANN

in the appeal in the cause

JENNIFER LAWSON RUSSELL OR WRIGHT

Pursuer and Respondent

against

PETER CRAWFORD WRIGHT

First Defender and Appellant

and

MARSHALL WRIGHT

Second Defender

and

GEORGE PIRIE

Third Defender

Pursuer and Respondent: McConnell, Solicitor, Gillespie Macandrew LLP
First Defender and Appellant: Upton, advocate, Davidson Chalmers Stewart LLP

27 November 2024

Introduction

[1] What happens to the debts of a limited company upon dissolution? Are its existing debts and obligations extinguished; or do they remain extant, but unenforceable until the limited company is restored to the Register of Companies? Those are the key questions at the heart of this appeal. The answers to them will determine whether or not the respondent (pursuer in the action) can enforce the standard security granted to her by the appellant (first defender) and the second defender.

Background

[2] The respondent married William Wright on 11 January 1966. They separated on 8 July 1999. The divorce proceedings were complicated by virtue of the fact that the Wright family operated a number of businesses, including the running of Whitehill Farm, Dalkeith. The respondent held a one-half pro-indiviso share in that property along with William Wright. In order to settle the divorce proceedings between herself and William Wright, a minute of agreement was entered into between the following parties on 9 February 2009:

(1) Jennifer Wright, the pursuer (now respondent);

(2) William Wright, her husband;

(3) Her son Peter Wright, the first defender (now appellant);

(4) Marshall Wright, the second defender (also the respondent's son);

(5) Marshall Wright & Sons Limited ("MWSL"); and

(6) Dalkeith Transport & Storage Co Limited ("DTL").

[3] The minute of agreement provided for the following:

i. the respondent, along with William Wright, would transfer their respective shares in Whitehill Farm to the appellant and the second defender;

ii. in return, the respondent was to receive a monthly payment of £2,000 until her death or remarriage; that sum was to be paid by DTL and payment of that sum was guaranteed by MWSL;

iii. the appellant and the second defender would grant a standard security over the property to secure DTL's obligation for payment of the monthly sum of £2,000; and

iv. in the event that either DTL or MWSL were liquidated, the respondent would be entitled to immediate delivery of a policy of insurance. The appellant contends that the purpose of this policy was to allow the respondent to make a claim to continue to secure ongoing payments in the event DTL or MWSL were liquidated.

[4] The appellant and the second defender granted the standard security over the property, in favour of the respondent, on 13 May 2009; the standard security was then recorded in the Register of Sasines on 17 June 2009. Payments to the respondent of £2,000 per month had already commenced on 26 March 2009.

[5] Subsequently, DTL was placed into administration on 4 September 2015. The administration took some years to conclude; however, the administrators gave notice to Companies House on 25 February 2019 that DTL would be moved from administration to dissolution; DTL was then dissolved on 25 May 2019. In the meantime, the guarantor for the payment to the respondent, MWSL, had continued to trade during DTL's administration. It too, however, was dissolved on 30 July 2019.

[6] The last payment of £2,000 was received by the respondent on 30 April 2018. By 30 July 2019, both the principal debtor and its guarantor were dissolved; no further

payments were made. In response, the respondent served calling up notices in October 2021 upon the appellant and the second and third defenders (the third defender was, by that time, an owner of part of the property).

[7] Following the failure to comply with the calling up notices by the appellant and his co-defenders, the respondent raised this action seeking:

i. declarator that the appellant and the second defender are in default of the standard security;

ii. declarator that the sum payable to the respondent under the minute of agreement was, as at 6 May 2024, £210,834.56; and

iii. to ordain the appellant and his co-defenders to vacate the property.

[8] The appellant challenged the competency and relevancy of the respondent's action at a diet of debate on 23 January 2024. He contended that, in order for a security right, in this instance a real security, to be enforced, the right in security depended on there being a debt (or obligation) in existence. The debt in question here had been owed by DTL to the respondent; however, upon dissolution, DTL's obligation to pay the respondent was extinguished. In turn, the standard security that had been granted to the respondent, being accessory to DTL's debt, had also been extinguished. The respondent could not enforce the standard security against the appellant.

[9] In the meantime, the respondent has, separately, raised a petition in the Court of Session to restore DTL to the Register of Companies. As at the date of this appeal hearing that action remained sisted, having been sisted on the motion of the respondent.

The sheriff's judgment

[10] In his judgment, issued on 6 March 2024, the sheriff disagreed with the appellant. He held that the obligation owed by DTL had not been extinguished upon its dissolution; instead, relying upon Lord Hoffman's speech in *Wight and others* v *Eckhardt Marine GmbH* [2004] 1 AC 147 at paragraph [27] and *Palmer's Company Law* at paragraph 15.511, the sheriff held that the debts or obligations of a company remained extant, but unenforceable until such time as a company is restored to the Register of Companies.

[11] The sheriff issued an interlocutor on 6 March 2024 fixing a procedural hearing in order to determine: (i) the disposal of the appellant's first and second pleas-in-law and the respondent's first plea-in-law; and (ii) further procedure.

[12] Prior to the procedural hearing, the appellant lodged a second note of basis of preliminary pleas; he intended to seek a further diet of debate. That second note sought to put forward two arguments: (i) standing the sheriff's judgment of 6 March 2024, even if DTL's debt had not been extinguished (which was not accepted by the appellant), the sheriff had held it was not enforceable until DTL was restored to the Register of Companies; as DTL had not yet been restored, the respondent's action against the appellant was incompetent and irrelevant; and (ii) that the respondent's right to payment under the minute of agreement had prescribed.

[13] At the procedural hearing on 27 May 2024, the sheriff found the appellant liable to the respondent for the expenses of the debate. No pleas were repelled; he instead fixed a second diet of debate, again on the first and second pleas-in-law for the appellant. On the basis of submissions made at the hearing, the sheriff considered that the appellant had misunderstood his judgment of 6 March 2024. The following day he issued a supplementary note to clarify what he had held, namely: (i) the obligations of DTL and MWSL had not been

extinguished; (ii) those obligations were not currently *directly* enforceable against DTL or MWSL due to them currently remaining dissolved; (iii) the standard security continued to secure those obligations; and (iv) the respondent was, in the circumstances, entitled to enforce the standard security.

[14] The appellant sought leave to appeal which was granted by the sheriff on 14 June 2024.

Submissions for the appellant

Scope of appeal

[15] The scope of the appeal was competent. Although the appellant had challenged the sheriff's interlocutor of 27 May 2024, it was clear from the note of appeal that a challenge was also being made against the sheriff's judgment of 6 March 2024. That judgment amounted to a 'decision' in terms of section 110 of the Courts Reform (Scotland) Act 2014 and was open to challenge, standing leave being granted.

[16] Leave had been sought from the sheriff to appeal his decision of 6 March 2024: section 110(2) of the 2014 Act. It was noteworthy that the respondent had, in the hearing for leave to appeal, also made the argument that only the interlocutor of 27 May 2024 could be appealed against. That argument had not found favour with the sheriff; he had granted leave to appeal to allow this court to consider whether he had fallen into error in his judgment of 6 March 2024. The respondent's criticism was without merit.

Supplementary note of sheriff

[17] The sheriff erred in issuing a supplementary note on 27 May 2024 in order to explain his judgment of 6 March 2024. Any judgment issued should be complete either in itself or

taken in conjunction with prior interlocutors. It was not competent to add to it thereafter: Lees, *Interlocutors*, at paragraph 34.

Effect of dissolution

[18] Given that MWSL was the cautioner for DTL, even if MWSL itself had not been dissolved, its cautionary obligation was extinguished on the dissolution of DTL. In any event, MWSL had itself also been dissolved, so it had no obligations secured over the appellant's property. The crucial issue for this court was the effect of the dissolution of DTL upon the debt owed to the respondent and, in turn, the consequence that had upon the standard security granted to the respondent.

[19] The dissolution of a debtor extinguishes his debts. A debt is an obligation. An obligation is a relation between at least two persons: Stair, *The Institutions of the Law of Scotland*, 4th ed, Book I, Title III, paragraph 1; MacCormick, 'General Legal Concepts', *The Laws of Scotland: The Stair Memorial Encyclopaedia*, Reissue, paragraph 29. It followed that where there was no obligant, there was no obligation owed: *Wight* (*supra*) per Lord Hoffman at paragraph [27]; and *Palmer's Company Law* at paragraph 15.511.

[20] DTL owed the debt to the respondent, including during the winding-up process, right up until the point of dissolution. The respondent's standard security was enforceable up to that point as well; however, upon the dissolution of DTL, its obligation to pay the respondent was extinguished. In the absence of an obligation, there was nothing for the standard security to secure.

[21] Given that the primary debt was extinguished, it followed that the appellant had no liability that could be enforced by selling the property under the standard security. On the respondent's averments, she had no right to serve calling-up notices; the appellant and his

co-defenders were not in default within the meaning of the Conveyancing and Feudal Reform (Scotland) Act 1970; and the respondent was not entitled to exercise any of the remedies of a creditor under a standard security. Her action was incompetent and irrelevant and the proper disposal was dismissal.

[22] Even if DTL's debt had not been extinguished, the standard security was not enforceable until such time as DTL was restored to the Register. That had yet to occur. A person who gives security for a debt cannot have any greater liability than the primary debtor: Erskine at III, 3, 64 and 66; *Aitken's Trustees* v *Bank of Scotland* 1944 SC 270; *Trotter* v *Trotter 2001 SLT (Sh Ct) 42*, Gloag & Irvine, *Rights in Security*, at p.846; and Gordon & Wortley (edited by Reid), *Scottish Land Law*, 3rd ed, Volume II, at paragraphs 19-7 and 20-03. It followed that where a primary debt was unenforceable, a party who has given security for it has no liability: Gloag & Henderson, *The Law of Scotland*, 15th ed, Volume I, at paragraph 16.04.

[23] The respondent's argument was untenable. If her position were to be accepted, then an obligation could exist even where only one party to the obligation was in existence. Furthermore, the respondent's position was that DTL's obligation to pay the respondent had become a "dormant obligation" upon dissolution. No authority had been provided to substantiate that proposition; it was, in any event, contrary to Scots law. The respondent had also failed to address when, under her understanding of Scots law, a company's debt was in fact extinguished.

[24] As to the respondent's contention that the minute of agreement provided for the standard security to remain enforceable, notwithstanding dissolution, that could not be given credence. It is fundamental to the common law that security obligations require a primary obligation. Even if it were competent to contract out of that position, it would have

to be done explicitly within any contract; that had not occurred here. If the respondent were correct, a mere agreement to provide a security would mean it was not accessory, in contradiction to the common law.

[25] The respondent's remedy, if any, was for the delivery of the insurance policy. That had been effected. It was for her to intimate a claim to insurers and thus take her payment that way. Otherwise, her remedy was to first restore DTL to the Register of Companies and then seek to enforce the standard security.

Expenses of debate

[26] The sheriff erred in awarding the expenses of the debate to the respondent. The appellant had been successful at debate. Further, the sheriff had issued no interlocutor sustaining or disposing of either parties' pleas-in-law by reason of the submissions made at the debate. On the contrary, he had fixed a further diet of debate. It was therefore premature and an error of law to hold the appellant had been unsuccessful.

Submissions for the respondent

Scope of appeal

[27] In his note of appeal, the appellant challenges only the interlocutor of 27 May 2024. That interlocutor, read short:

i. granted the appellant's minute of amendment (with expenses of the amendment procedure awarded to the respondent);

ii. assigned a further diet of debate; and

iii. awarded the expenses of the debate of 23 January 2024 to the respondent.

[28] Even if that interlocutor were recalled, that would leave the sheriff's judgment of 6 March 2024 standing.

Supplementary note of sheriff

[29] A sheriff could not affect an existing judgment by issuing a subsequent note or interlocutor; however, the sheriff's note of 27 May 2024 did not alter his judgment of 6 March 2024. The note clarified the sheriff's position in his judgment of 6 March 2024. That was competent standing the terms of Macphail, *Sheriff Court Practice*, 4th ed, paragraph 5.89.

Effect of dissolution

[30] Dissolution of a company does not extinguish its debts; it is a procedural bar to enforcement of a company's debts, as there is no legal entity to sue: *Wight* (*supra*) per Lord Hoffman at paragraph [27]; and *Palmer's Company Law* at paragraph 15.51. Dissolution does not extinguish the underlying substantive obligation owed by a company, nor does it prohibit a creditor from recovering against a standard security granted by a third party, such as the respondent sought to do here against the appellant and his co-defenders. DTL's obligation to pay the respondent became 'dormant' upon dissolution, until such time as it was restored to the Register of Companies.

[31] The appellant's analysis created two absurdities: (i) dissolution would have the effect of extinguishing a debt, only for it to be re-created were the company restored to the Register of Companies; and (ii) absent restoration, no standard security granted by a third party in respect of a company's debts holds any value if it can be defeated by the dissolution of the debtor company and the extinction of its debts. A further issue was that, even if it was the case that a company's debt was extinguished upon dissolution and then restored, it did

not necessarily follow that section 1032(1) of the Companies Act 2006 also restored a right in security that was an accessory to that debt. Furthermore, if it were the case that the company's debts were extinguished by dissolution then deemed to have continued in existence by reason of the company being deemed to have continued in existence as a result of restoration, prescription would have continued to run during a period when the creditor was powerless to stop it.

[32] It was the clear intention of the minute of agreement that the respondent was to receive a 'pension' payment until her death or remarriage. The standard security was to be enforceable, whether or not DTL was liquidated at some point in the future. If the position were otherwise, then the respondent had transferred her half-share in the property in return for no interest in the event of the dissolution of DTL.

Expenses of debate

[33] The respondent had succeeded at the debate on 23 January 2024. The main issue at that debate was whether DTL's obligation had been extinguished. The sheriff accepted the respondent's submission that it had not been. It was appropriate, therefore, for the sheriff to have awarded the respondent the expenses of the debate.

Further authorities

[34] Whilst at *avizandum* we identified the following authorities which were not placed before us during the appeal hearing but which we considered have a bearing on the issue of whether a company's debts are extinguished as a result of dissolution:

(1) Sir William Blackstone, in Book 1 at page 484 in his *Commentaries on the Laws of England* where he states that "The debts of a corporation either to or from it are totally

extinguished by its dissolution: so that the members thereof cannot recover or be charged with them in their natural capacities"

(2) the case of *Higginson & Dean Ex p. Attorney General, Re,* [1899] 1 Q.B. 325 (1898) in which Wright J, at pages 330 *et seq,* expressed doubt as to whether Blackstone's commentary extended beyond meaning that individual corporators are no longer liable.

(3) The case of *Russian and English Bank v Baring Bros & Co Ltd* [1936] AC 405 at p.427 where Lord Atkin discusses the two foregoing authorities.

We sought further written submissions from parties on the import of these authorities. Further submissions were duly received.

Further submissions for the appellant

[35] The appellant repeated much of what he said in the hearing before us and perhaps made further submissions beyond what was strictly invited. We shall ignore such further submissions. The appellant broadly argued that Blackstone's commentary that "the debts of a corporation either to or from it are totally extinguished by its dissolution" supported his position as stated at the hearing and that Lord Atkins in the *Russian and English Bank* case was correct to take it as an absolute statement of the law.

Further submissions for the respondent

[36] Again, in so far as the respondent strayed beyond what was strictly invited we shall ignore her further submissions. The respondent broadly argued that Wright J in the *Higginson and Dean* case was right to express the doubts that he entertained as to the meaning to be ascribed to Blackstone's commentary. The statement that "the debts of a

corporation either to or from it are totally extinguished by its dissolution" had to be read along with the qualifying words which followed it. Read in that light, it was clear that Blackstone could not have meant that a company's debts are extinguished for all purposes. The commentary did not undermine her position as argued at the hearing before us.

Decision

Scope of appeal

[37] Section 110(1) of the Courts Reform (Scotland) Act 2014 provides for an automatic right of appeal against a decision of a sheriff constituting final judgment and certain other decisions of a sheriff. Section 110(2) of the Act provides for appeal against any other decision of a sheriff in respect of which the sheriff grants leave to appeal. Appeals are thus against decisions rather than against interlocutors. This was noted and applied by this court in the case of *Finlayson v Munro* 2020 SLT (Sh Ct) 287.

[38] In his note of 14 June 2024, in addition to granting leave to appeal on the issue of the expenses of the debate on 23 January 2024, the sheriff granted leave to appeal to allow the appellant to argue that it was not competent for him to issue his supplementary note and further

> "to allow the first defender [now appellant] the opportunity, if the Sheriff Appeal Court allows, to argue whether I fell into error in holding that the standard security could be enforced despite the obligations in clause 1 of the minute of agreement being currently unenforceable against DTL and MWSL due to them currently remaining dissolved."

This was a clear reference to the sheriff's judgment of 6 March 2024 as explained in his supplementary note of 27 May 2024. The sheriff's judgment of 6 March 2024 falls within the definition of "decision" in section 136(1) of the 2014 Act which provides that "decision" includes, inter alia, "judgment".

[39] We are satisfied that the issue of the supplementary note, the issue of expenses and the issue whether the sheriff erred in deciding as he did in his judgment of 6 March 2024 (as explained in his supplementary note) are all competently before us in this appeal.

Supplementary note of sheriff

[40] At para 5.89 of Macphail, *Sheriff Court Practice*, 4th Ed, it is stated:

> "At any time before extract the sheriff may correct any clerical or incidental error in the sheriff's own interlocutor or note. A clerical error is an error made in copying or writing. An incidental error is thought to be one the correction of which would not alter the interlocutor in substance such as an error in expression, or an inadvertent failure to record part of the sheriff's decision. ….. However, it is submitted that the power to correct incidental errors does not enable the sheriff to correct errors of judgment whether of fact or law or to have second or better thoughts, but does enable the sheriff to give true effect to first thoughts or intentions. …"

In his judgment of 6 March 2024 the sheriff decided that

> "the obligations in clause 1 had not been extinguished. Rather, those obligations remain but were currently unenforceable due to DTL and MWSL currently remaining dissolved. In such circumstances I considered that the standard security continued to secure those obligations."

In his supplementary note the sheriff rehearsed what he had said in his judgment but went on to add that "the pursuer [now respondent] was, in the circumstances, entitled to enforce the standard security." In our opinion the sheriff was merely seeking to explain what might have been considered to be obvious, namely that a standard security which continued to secure obligations was enforceable. He was simply correcting an incidental error of expression. He was not correcting an error of judgment or expressing second or better thoughts. This ground of appeal falls to be refused.

Effect of dissolution

[41] The sheriff decided that the dissolution of a company does not result in the debts or obligations of the company being extinguished but rather that the debts and obligations remain extant but are unenforceable whilst the company remains dissolved; and further that a third party standard security granted to secure those obligations remains enforceable. It is these decisions with which this appeal is mainly concerned.

[42] There is no doubt that dissolution of a company results in its extinction. Were that not so there would be no need for section 1032 of the Companies Act 2006 which provides that

> "The general effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register."

Unlike in the case of a natural person, whose estate remains liable for his obligations on his demise, there is no person who steps into the shoes of a dissolved company. There is, therefore, no person who can come under the obligations which bound the company as at and prior to its dissolution.

[43] In *Wight*, in a passage relied upon by the respondent, Lord Hoffmann said at paragraph [27]:

> "The winding up leaves the debts of the creditors untouched. It only affects the way in which they can be enforced. When the order is made, ordinary proceedings against the company are stayed (although the stay can be enforced only against creditors subject to the personal jurisdiction of the court). The creditors are confined to a collective enforcement procedure that results in pari passu distribution of the company's assets. The winding up does not either create new substantive rights in the creditors or destroy the old ones. Their debts, if they are owing, remain debts throughout. They are discharged by the winding up only to the extent that they are paid out of dividends. But when the process of distribution is complete, there are no further assets against which they can be enforced."

That is an accurate statement of the law but it is not in point. This case is dealing not with the process of winding up the company but with its dissolution. Lord Hoffmann went on to say:

> "There is no equivalent of the discharge of a personal bankrupt which extinguishes his debts. When the company is dissolved, there is no longer an entity which the creditor can sue. But even then, discovery of an asset can result in the company being restored for the process to continue."

It goes too far to suggest from these statements that dissolution of a company does not extinguish its debts. It has to be borne in mind that a bankrupt lives on after discharge and he during life and his estate after his death would continue as debtor absent statutory provision (now, in Scotland, section 145 of the Bankruptcy (Scotland) Act 2016) providing for discharge of debts upon discharge from bankruptcy. A company dies upon dissolution with no equivalent of an estate to assume ownership of assets or liability for debts. That resulted in the necessity for statutory provisions for restoration and the company being deemed to have continued in existence. In terms of section 1029(2)(i) of the Companies Act 2006, such an application can be made by, for example, any person who was a creditor of the company at the time of its dissolution.

[44] On the other hand, as long ago as the eighteenth century Sir William Blackstone, in Book 1 at page 484 in his *Commentaries on the Laws of England* stated that:

> "The debts of a corporation either to or from it are totally extinguished by its dissolution: so that the members thereof cannot recover or be charged with them in their natural capacities"

In the case of *Higginson & Dean Ex p. Attorney General, Re,* [1899] 1 Q.B. 325 (1898) Wright J, at pages 330 *et seq*, expressed doubt as to whether that commentary extended beyond

meaning that individual corporators are no longer liable; but such doubt was dismissed by Lord Atkin in his *obiter* remarks in the House of Lords in *Russian and English Bank v Baring Bros & Co Ltd* [1936] AC 405 at p.427:

> "The debts of a corporation either to or from it are totally extinguished by its dissolution: so that the members thereof cannot recover or be charged with them in their natural capacities: agreeable to that maxim of the civil law: 'Si quid universitati debetur, singulis non debetur; nee, quod debet universitas, singuli debent,'" cited from 1. Bl. Com., p. 484, by R. S. Wright J. in *In re Higginson & Dean* ….. I do not share the doubts of the learned judge in that case that Blackstone's proposition may mean no more than that the individual corporators are no longer liable. The principle is stated absolutely; and clearly if the corporators are not liable there is no one else who could be liable."

We take the same view of Blackstone's commentary as did Lord Atkin. Blackstone stated the principle that the debts of a corporation are extinguished absolutely by its dissolution. In our view, the comments which immediately followed that statement were made not to qualify the statement but to express a consequence of it.

[45] Blackstone's commentary sits easily with section 1029(2) of the Companies Act 2006 which provides that an application for restoration of a company may be made under paragraph (e) by "any person who but for the company's dissolution would have been in a contractual relationship with it" and under paragraph (i) by "any person who was a creditor of the company at the time of its striking off or dissolution". It must follow from paragraph (e) that whilst the company remains dissolved a person who would have been in a contractual relationship with it is not in a contractual relationship with it and there is, therefore, no contract. If there is no contract there can be no debt or obligation due under it. It is not obvious why the mere possibility of restoration would change that. Restoration of the company to the register must take place before it is deemed to have continued in existence with the result that its contracts and the debts and obligations thereunder are also deemed to have continued in existence.

[46] Section 11 of the Conveyancing and Feudal Reform (Scotland) Act 1970 provides that a standard security, once registered, provides a real right in security for the performance of the contract to which it relates. If there is no contract there is nothing to be performed. It follows that if there is no contract there can be no security. It would have been open to the appellant to call up the standard security or the guarantee from MWSL between the date of the last payment to her in 2018 and the dissolution of DTL a year later. Mr Upton's submission that the standard security, being accessory to the obligation which it secures, cannot be enforced when the primary obligation ceases to exist is sound. Unless the contract to which the standard security relates makes the security givers (the appellant and the second defender in this case) directly responsible for the obligations towards the creditor in the standard security, nothing remains to be secured. No such provision was prayed in aid by the respondent. The standard security is unenforceable whilst the company remains dissolved. The sheriff was in error in holding otherwise.

[47] The respondent argued that if it be the case that a creditor of a company is unable to enforce a debt whilst the company is dissolved because the debt has been extinguished yet upon restoration of the company the debt is deemed to have continued in existence, the prescription clock will continue to run during a period when the creditor is powerless to stop it. That, according to the respondent, is a powerful indication that the law must be that dissolution does not extinguish the company's debts. We express no view on the effect of dissolution and restoration on the issue of prescription since we did not hear full argument on that issue, it having been reserved for future debate before the sheriff. What we can say is that there is provision under the Insolvency Act 1986 – section 201(3) in the case of a voluntary winding up, section 204(5) in the case of early dissolution and section 205(5) in a winding up by the court – for the court, on an application by any person appearing to the

court to have an interest (which must include persons such as the respondent in this case), to defer the date of dissolution with the consequence that the company will continue in existence with all its debts and obligations undoubtedly intact and with no effect on the issue of prescription. The respondent clearly did not avail herself of the opportunity to make such an application to the court. Furthermore, although the respondent has made application to the court for restoration of the company in terms of section 1029 of the Companies Act 2006, which would have put beyond doubt her ability to stop the prescription clock ticking, that application has been sisted at her own behest. Further, whilst again expressing no view, there may be scope for the court to make provision as regards prescription when restoring the company to the register by employing the terms of section 1032(3) of the 2006 Act which provides:

> "The court may give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register."

We are therefore not persuaded by the respondent's argument on the prescription point.

Expenses of debate

[48] On the view that we have taken on the main issue in this appeal and our disposal of the appeal after noted we do not require to come to a concluded view on the matter of expenses. We incline to the view that the sheriff ought to have held over his decision on expenses until he had heard debate on all matters covered by the parties' preliminary pleas.

Other matters

[49] We decline to entertain the appellant's submissions relating to return of the insurance policy being the respondent's only remedy upon cessation of the pension payments. This issue does not appear to have been argued before the sheriff. In any event, standing the decision we have reached on the main ground of appeal, it is not necessary for us to consider this matter. We also decline to entertain the respondent's submissions relating to the standard security remaining enforceable in terms of the minute of agreement despite the dissolution of DTL. This does not appear to have been argued before the sheriff and there is no record and no plea-in-law to support that proposition. The closest the respondent comes to pleading this point on record (which is nowhere near enough) is in article 3 of condescendence where she says:

> "The Standard Security expressly provides that it has been granted 'in security of the obligations…contained in Clause One of' the Minute of Agreement. The secured obligation was of payment to the Pursuer [Respondent] of pension during her lifetime. Marshall Wright & Sons Limited and Dalkeith Transport & Storage Co Limited have failed to make payment under Clause One of the Minute of Agreement since 30 April 2018. The Pursuer [Respondent] is accordingly entitled to payment under the security."

Disposal

[50] We sustain the appeal on its main ground and recall the sheriff's interlocutor of 27 May 2024. As there is no obligation presently in existence, the respondent is bound to fail in her action and we therefore sustain the appellant's first and second pleas-in-law and repel the respondent's pleas-in-law. The second and third defenders have not lodged defences and so, technically, it would be open to the respondent to seek decree by default against them. However, the position of the second and third defenders is indistinguishable from that of the appellant. In these circumstances we dismiss the action *quoad* all of the defenders.

We find the respondent liable to the appellant in the expenses: (i) of the process before the sheriff; and (ii) of this appeal.