SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2017] SC GLA 44

SQ95/17

NOTE OF SHERIFF A F DEUTSCH

In respect of application under section 63(1) of the Bankruptcy (Scotland) Act 1985

of

KENNETH W PATTULLO

previously trustee in sequestration on the sequestrated estate of Mary Elizabeth Johnstone

Act: Crosbie

Glasgow, 3 July 2017. The Sheriff having resumed consideration of the cause refuses the application.

NOTE:

[1] Mary Elizabeth Johnstone ("the debtor") was sequestrated on 13 March 2009 when the pursuer was appointed as trustee. The defender has been discharged. The pursuer himself was discharged as trustee on 24 August 2015. Subsequent to both these discharges, the former trustee received a payment of £2817.91 from Clydesdale Bank in respect of a claim for refund of payments made by the debtor to the bank in respect of payment protection insurance. It is averred that the PPI claim predates the debtor's sequestration and forms part of the sequestrated estate. The existence of the claim was not discovered during the sequestration. The former trustee seeks reappointment because it is averred that neither he nor any other party is able to distribute the fund to creditors or otherwise deal with the monies.

[2] The decision of the Sheriff Appeal Court in *Accountant in Bankruptcy, appellant* 2017 SLT (Sheriff Court) 77 confirms that, in circumstances such as those above described, an application for reappointment of the former trustee may competently be brought in terms of section 63(1)(b) of the Bankruptcy (Scotland) Act 1985. The terms of section 63 clearly afford the Sheriff discretion over whether to grant or refuse such an application. That discretion was implicitly recognised by the Sheriff Appeal Court at paragraph [14]:

> "Despite much prodding, counsel for the appellant provided limited information about the composition of the body of creditors – again the pleadings were lacking on this point. In future it would be helpful to the court to be advised as a minimum of the identity of the creditors, so that the court can be satisfied that there is at least one entity who will benefit from this process."

[3] In February 2017 the former trustee presented an application which was placed before me for consideration of the grant of an appropriate first deliverance. Upon my instruction the original application was returned by the sheriff clerk to the former trustee's solicitors along with a letter referring to the above decision of the Sheriff Appeal Court which stated that it remained the case that the Sheriff had a discretion and that relevant to that discretion would be the likely costs, the anticipated dividend and whether efforts had been made to resolve the matter informally. The solicitors were invited to amend the note to deal with factors relevant to the exercise of the court's discretion.

[4] An amended application was presented on behalf of the former trustee on 30 March 2017 which contained the following additional averments:

> "It is anticipated that there will be a dividend to creditors as a result of recovery of the newly discovered assets forming part of the defender's sequestrated estate. A schedule of anticipated costs and the anticipated dividend to creditors is produced herewith, and is referred to for its terms, which are held to be incorporated herein *brevitatis causa*."

[5] The schedule referred to provides as follows:

	£
PPI refunds	2,817.91
WJM fee	300.00
VAT	60.00
Outlays	59.00
Begbies Traynor fee	900.00
VAT	180.00
Potential Agents Fees	704.48
VAT	140.90
Total	2,344.38
Dividend	473.53

[6] Having considered the amended note I instructed the sheriff clerk to write to the former trustee's solicitors. On 26 April 2017 the sheriff clerk sent a letter in the following terms:

> "The Sheriff considers that the schedule of anticipated costs and dividend lacks sufficient detail. There is no information as to the work in respect of which the various fees are to be charged. The reference to "potential agent's fees" requires explanation. Although the total sum available for dividend is brought out it is impossible to gauge whether any creditor is likely to receive a meaningful payment. The noter must have a record of which creditors lodged claims and the amounts adjudicated. The amended [note] is silent on effort is made to resolve matters informally. That issue takes on greater significance with the sums available for dividend of less than £1000. The Sheriff is not minded to grant the [note] without a hearing."

[7] A hearing was fixed for 17 May 2017 at which diet Mr Crosbie represented the former trustee. He explained that he had spoken with his clients upon the previous day to obtain further information. He had been informed that to date no dividend had been paid to creditors. There had been no adjudication, the former trustee did not know the number of creditors with a right to claim, and had not received any claims. It was not therefore possible to say who would benefit from the £473.53 available for dividend or to what degree.

[8] Mr Crosbie provided no information about how the fee payable to the former trustee's firm had been calculated. "WJM" referred to his own firm and the charge was in respect of the present application. The potential agents' fee was a provisional sum and was for the cost of instructing agents to trace creditors. There was no explanation as to how a figure precise to the point of stipulating pence was able to be given.

[9] Upon the information provided I concluded that no one was likely to derive any significant benefit from the reappointment of the former trustee other than the professionals involved. In the circumstances I did not consider it to be an appropriate exercise of the court's discretion to grant the application.

[10] Where does that leave the former trustee in relation to the funds which he continues to hold? Mr Crosbie informed me that the funds would be consigned with the Accountant in Bankruptcy as the supervising body. There are other options.

[11] The most obvious course would be for the former trustee to return the fund to Clydesdale Bank stating that he has never received any claims in the sequestration, is unaware of who the creditors might be and has no reason to believe, six years after sequestration was awarded, that any creditors will now emerge. On this basis he could go on to say that he has no objection to the fund being paid to the debtor. In circumstances where the creditor is unknown and there is no likelihood of significant benefit to any creditor, there is no risk of the unfairness which the Sheriff Appeal Court at paragraph [9] in the above decision considered should cause the court to look favourably upon applications for reappointment. Should it be that the former trustee considers the approach, which I have described, as one which is too risky then there is an alternative.

[12] Generally speaking the proper forum for dealing with assets of the estate in sequestration and the adjudication of creditors' claims is within the sequestration process

itself. Here, where the former trustee appears to be without basic information, claims could be dealt with more expeditiously and at much less cost by the former trustee raising a summary cause action of multiplepoinding. To take the matter to the first calling, at which the former trustee could expect in terms of rule 27.8 (2) to have the fund approved and to be held liable for it only in one single payment, would on the summary cause scale cost, inclusive of VAT and outlays, £397.50. Since the only person known to the former trustee as having an interest in the fund is the defender the court would almost certainly wish to advertise for claimants in terms of rule 27.11, however, that need not be expensive; advertisements in the Metro newspaper are free.