SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT FORFAR

[2018] SC FOR 65

SQ36/18; SQ47/18; SQ48/18

NOTE BY SHERIFF GREGOR MURRAY

in relation to

PETITIONS FOR SEQUESTRATION

by

ANGUS COUNCIL

seeking Warrants to cite JO, SP and JS

Forfar, 25 October 2018

The Sheriff, having resumed consideration of the Petitions, refuses to grant warrants to cite in each case.

Background

[1] Difficulties can result when public authorities use Summary Warrants as a basis to seek the sequestration of tax payers. Some of these were outlined by Lord Tyre in *Chaudhry* v *Advocate General* (2013) SLT 548. Though he concluded the process itself was competent, he described the result as a goal which "may not be offside, but the ball… has undoubtedly taken a deflection on its way to the net."

[2] Lord Tyre's comments come to mind when these three Petitions for Sequestration are considered. Outside agents for the Council seek warrants to cite the respondents following the grant of Summary Warrants for unpaid Council Tax and the expiry of Charges.

Although each expired Charge seeks payment of less than £3,000, the petitioners maintain they are qualified creditors for the purposes of s 7 of the Bankruptcy (Scotland) Act 2016 by virtue of other debts which they aver the respondents are due to the Council. As I was concerned that this raised a novel issue, the Petitions called before me on 17 October 2018, in advance of which agents helpfully provided written submissions. I then made *avizandum* in each case.

The Petitions and Productions

[3] Each Petition is supported by an Inventory of Productions containing the expired Charge, a Creditor's Oath and other documents.

[4] The preamble to each Charge narrates that on 4 May 2018:-

> "a Summary Warrant for recovery of Council Tax under the Local Government Finance Act 1992…was granted against you at Forfar Sheriff Court"

and charges the respondent to "pay the total sum due as set out below" within "14 days after the date of this charge" to the Sheriff Officer's business address.

[5] The Charges subsequently state:-

> "If you do not pay this sum within 14 days you are liable to have further action taken against you including arrestment, the arrestment of your earnings and the Attachment and Auction of articles belonging to you. If you have total debts amounting to £3,000 or more, you are also liable to be sequestrated (declared bankrupt)…"

In a pro-forma box below, the Charges also state "THE SUM NOW DUE BY YOU IS:" then make provision for the insertion of four possible figures – Arrears of Council Tax, a Surcharge, Payments to Account Made and Sheriff Officer Fees. At the foot, the words "TOTAL SUM DUE" appear before the sum of the possible figures is stated. In two of the Charges, the total sum due is said to be £2,331.22; in the other, it is stated to be £1,235.93.

[6] However, in the Creditor's Oaths, one solicitor employed by the petitioner's agents swears before another that each respondent is due significantly more to the petitioners by way of "Unpaid Council Tax/Water and Sewerage Charges" following the earlier grant of other Summary Warrants. In two cases, the figure is said to be £4,602.85; in the other, it is said to be £7,262.41.

[7] Based on these higher figures, the Petitions contain averments that the

> "the Petitioners are qualified Creditors of the Respondent to the extent of (the higher figure) as evidenced in the Oath by Creditors and supporting vouchers attached"

and

> "The Respondent has been rendered apparently insolvent by virtue of a Charge for Payment of Money and that within four months of the presentation of this Petition payment of the sums detailed therein have not been satisfied".

[8] Copies of the front pages of the other Summary Warrants granted by the court in earlier years are contained in the Inventories. As may be known, such Warrants are composite; though only one application is made to the court by an authorised officer of the Council, it commonly relates to a large number of Council Tax payers whose details are presented to the court in a Schedule attached to the application. In each of these cases, no details are provided in the productions to prove that each respondent's name is included in any Schedule or the amount of Council Tax said to be outstanding.

Relevant Law

[9] The following sections of the 2016 Act need to be considered:-

> ***s 1 Sequestration.***
>
> The estate of a debtor may be sequestrated in accordance with the provisions of this Act

s 2 Sequestration of estate of living debtor

(1) The sequestration of the estate of a living debtor is..

(b) on the petition of—

(i) a qualified creditor, or qualified creditors, if the debtor is apparently insolvent…

s 7 Qualified creditor and qualified creditors

(1) In this Act—

"qualified creditor" means a creditor who, at the date of the presentation of the petition… is a creditor of the debtor in respect of relevant debts which amount (or of one such debt which amounts) to not less than £3,000 …

s 13.— Further provisions relating to presentation of petitions

(2) A petition for the sequestration of the estate of a debtor…may be presented—

(a) by a qualified creditor or qualified creditors only if the apparent insolvency founded on in the petition was constituted within 4 months before the date of presentation of the petition…

s 16 Meaning of "apparent insolvency"

(1) The apparent insolvency of a debtor is constituted…whenever—…

(f) following the service on the debtor of a duly executed charge for payment of a debt, the days of charge expire without payment…

s 19 Creditor's oath

(1) Every creditor who is—

(a) a petitioner for sequestration,

must produce an oath, in the prescribed form, made by or on behalf of the creditor…

(7) The creditor must produce, along with the oath—

(a) an account or voucher (according to the nature of the debt) which constitutes prima facie evidence of the debt, and

(b) if a petitioning creditor, such evidence as is available to the creditor to show the apparent insolvency of the debtor.

Discussion

[10] There is no doubt that each proposed respondent is apparently insolvent for the purposes of ss.13 and 16 of the 2016 Act – evidence is produced to prove that an officer of court served a Charge on each person and the Petitions aver that each has expired without payment having been made within four months of it having been presented. However, the Council also requires to show it is a qualified creditor as defined by ss 2 and 7 of the 2016 Act. It is at this stage that two issues arise.

[11] The first, as noted above, is that no evidence has been produced to demonstrate that there is any other debt. I accept that each respondent's name must have been included in the Summary Warrant upon which the Charge was based, as a Sheriff Officer has certified that is the case. Unfortunately, the same cannot be said for the others. The only evidence produced is already known to the court – that Summary Warrants were granted on particular dates which confer an entitlement on the petitioners to recover Council Tax from a list of people. However, no evidence is produced to demonstrate that each respondent's name was included in the list in question; such evidence (for example a certified copy of the relevant page) could easily have been produced. Had it been, it might have been possible to attach weight to the declarations by the relevant Council Officer in each Summary Warrant Application that previous demand notices had been sent to the proposed respondent (*Council Tax (Administration and Enforcement) (Scotland) Regulations 1992, para 30*). Though a

Statement of Debt is produced, it appears to have been prepared by the petitioners for the purposes of the Petition and cannot be reconciled with the Summary Warrants. For these reasons, in my opinion, no *prima facie* evidence of the remaining debt is produced for the purposes of s 19(7) of the 2016 Act.

[12] The second issue relates to interpretation of ss 2, 3 and 7 of the 2016 Act. Put shortly, is it competent for a creditor to Petition for sequestration of an individual when the principal debt is less than £3,000? In their written submissions, the petitioners submit that is the case. It is said:

> "so long as the petitioner is owed a debt higher than £3,000 at the date of petitioning, they can Petition for the sequestration of the debtor, even where the charge for payment served was for less than £3,000".

[13] I disagree, for three separate but linked reasons. The first is the statutory purpose of a Summary Warrant to recover unpaid Council Tax. Paragraph 2 of Schedule 8 to the Local Government (Finance) Act 1992 provides:-

> "(1) … any sum to which this Schedule applies may be recovered by the local authority by diligence—
>
> (a) authorised by a summary warrant granted under sub-paragraph (2) below…
>
> (2) The sheriff, on an application by the authority accompanied by a certificate from them containing such particulars as may be prescribed, shall grant a summary warrant … authorising the recovery, by any of the diligences mentioned in sub-paragraph (3) below, of the amount of the sum remaining due and unpaid along with a surcharge of 10 per cent. of that amount.
>
> (3) The diligences referred to in sub-paragraph (2) above are—
>
> (a) an attachment;
> (b) an earnings arrestment;
> (c) an arrestment and action of furthcoming or sale."

[14] In *Chaudry* (paragraphs 23 – 25), Lord Tyre explained the detailed background to the (identical) statutory provisions for recovery of Income Tax by Summary Warrant. In brief,

since 1985 the procedures by which central and local authorities may recover all forms of outstanding tax through enforcement of Summary Warrants have been deliberately harmonised. As part of that process, on the recommendation of the Scottish Law Commission, the Scottish Parliament enacted various provisions in the Bankruptcy and Diligence (Scotland) Act 2007 designed to ensure that before any of the paragraph 2(3) diligences can be executed, a charge must first be served. The purposes of the 2007 Act provisions are first, to promote settlement of the debt and, second, to prevent further diligence being done unnecessarily.

[15] Construed in this way, the present Petitions do not provide evidence that the petitioners have attempted to promote settlement or prevent further diligence being done. As such, they do not comply with the underlying purpose of paragraph 2(3) of Schedule 8 to the 1992 Act.

[16] The second reason is identified by Professor McBryde in *The Law of Bankruptcy in Scotland (2nd ed, 1995*) at paragraph 4-59. Though he refers there to the equivalent provisions in the Bankruptcy (Scotland) Act 1985 as then amended, his comments remain relevant as the Drafter's Notes to the 2016 Act make clear:-

> "in the event of any uncertainty as to the meaning of a provision of any Act resulting from this Bill, a court construing the provision may have recourse to the provision of the 1985 Act (or other enactment) from which it was derived, the presumption being that there was no intention to change the law."

Professor McBryde explains that the reason behind the separate references in what are now ss 2(1)(i) and 7(1) of the 2016 Act to "qualified creditor" and "qualified creditors" and the definition of "relevant debts" in the sections is to permit two possibilities – (a) two or more qualified creditors with relevant debts which in total exceed £3,000 may competently combine forces to sequestrate a respondent or (b) one qualified creditor may competently

use another qualifying creditor's relevant debt as a basis for sequestration of a common respondent. On this analysis, the petitioner's submission is based on a false premise.

[17] The third reason is more simply stated – to the best of my knowledge, the petitioner's submission is entirely novel. In almost thirty years of personal experience, I have never come across a Petition in which this argument has been made. In that time, petitioning creditors accept they require to produce evidence of apparent insolvency in relation to a debt which exceeds the statutory limit. Looked at another way – why, if each respondent is due the petitioners a sum which exceeds £3,000, a sum which is evidenced in a number of Summary Warrants, was a composite Charge or a number of charges not served for the whole debt? Had that occurred, the matter would have been put beyond doubt. Each respondent would have been aware that sequestration was at least possible, arguably likely.

[18] However, any of these proposed respondents could be forgiven for thinking that sequestration was impossible – the total debt stated in the Charge did not exceed £3,000; moreover, as the wording contained in the Charges (at least) strongly suggested sequestration was impossible, they were not encouraged to consider taking any of a number of steps provided by the common law and the Scottish Parliament which are designed to prevent sequestration – the Debt Advice and Information Package given to each respondent with the Charge, a Time to Pay Order, applying to the Debt Arrangement Scheme, signing a Protected Trust Deed, low cost Debtor Sequestration or even contacting the petitioners to try and arrange a payment schedule. In these respects, the procedures undertaken in these cases were, in my opinion, wholly insufficient.

[19] In consequence, as the petitioners have not provided *prima facie* evidence of any debt apart from those disclosed in the Charges and, separately, as the procedures adopted by

them do not comply with either the underlying purposes of Schedule 8 to the 1992 Act or what are now ss 2 and 7 of the 2016 Act, I have refused to grant warrants to cite in each case.