SHERIFFDOM OF LOTHIAN AND BORDERS AT LIVINGSTON

[2019] SC LIV 44

LIV-A144/18

NOTE BY

SHERIFF DOUGLAS A KINLOCH

in the cause

JAMES BERNARD STEPHEN and SHANE MICHAEL CROOKS, as JOINT LIQUIDATORS OF PAYROLLER LIMITED (in Liquidation)

Pursuers

against

BEVERLEY THOMPSON

Defender

Livingston, 22 March 2019

The Sheriff, having heard parties on the pursuers' motion for summary decree no 7/2 of process, refuses same; *ex proprio motu* appoints the cause to call at a procedural hearing at Livingston Sheriff Court on a date to be afterwards fixed in order to determine further procedure; finds the pursuers liable to the defender in the expenses as occasioned by said motion, including the attendance of Counsel at the Options Hearing diet of 21 November 2018; certifies the motion for summary decree as being suitable for the employment of junior Counsel.

NOTE:

[1] The pursuers are the joint liquidators of a limited company called Payroller Limited. They have lodged a motion seeking summary decree against the defender, and their motion called before me at Livingston Sheriff Court on 19 and 28 of December 2018, and 8 February

2019. The pursuers were represented by Ms Gillies, Solicitor Advocate, Pinsent Masons LLP, Glasgow, and the defender by Mr Logan, Advocate, as instructed by Basten Sneddon, Solicitors. The factual background to the action is complicated and is set out in the most recent copy of the Closed Record, which is number 12 of process. Summarising the essential background in the simplest terms possible it is as follows.

[2] It is averred by the liquidators of Payroller Limited that Payroller was a company controlled by two individuals, ML and GC. It is averred that they perpetrated a very serious and significant VAT fraud, using Payroller Limited as a vehicle to do so. The nature of the fraud, according to the averments, was that Payroller Limited provided payroll services to a number of recruitment agencies, and although Payroller Limited was not registered for VAT they added VAT to the substantial sums which their clients paid to them. It is said that the VAT which they obtained was then fraudulently transferred to ML, GC, and other associates including the defender and her husband.

[3] No one has been convicted of any crime in respect of the alleged fraud, but it is averred that the liquidators of Payroller Limited have identified a number of transactions that involve substantial payments by Payroller Limited which were made without any apparent proper commercial reasons, including payments made directly or indirectly to the defender. In the action the liquidators seek payment from the defender of three separate sums said to be part of the proceeds of the VAT fraud, namely £40,581.78, £29,974.56, and £75,799.72, making a total of £146,356.06.

Law

[4] OCR 17.2 provides that summary decree can be granted if the defender's case has "no real prospect of success". The law relating to summary decrees has been helpfully summarised by the pursuers' Solicitor-Advocate in her written submissions. I take no issue

with all that is set out there. As I understand it, the rules which enable the court to grant a summary decree were put in place to prevent a party, in this case the defender, from delaying a decree being granted against them by, for instance, failing to make candid averments, or by seeking to obfuscate matters, or by relying on what might be called "technicalities". A summary decree could therefore be granted in this case if it is clear that no matter what the defender says in her pleadings, the pursuers actually have an unanswerable claim against her. In looking to see whether the pursuers' claim is unanswerable, I can try and "look through" the defender's pleadings, and can take into account documents and other information which may show where the truth lies. It is not enough, however, for the pursuers to show that the defender will probably not succeed with her defence. The pursuers have to show that it is almost certain that her defence will not succeed.

Preliminary point

[5] The defender does not admit any knowledge of any VAT fraud in her pleadings. At the outset of the pursuers' submissions I raised a preliminary question as to whether the defender is therefore entitled simply to put the pursuers to their proof of their averments that a VAT fraud had taken place. There are cases where the fact that the factual basis of the pursuers' case is not known by the defender is sufficient to prevent the pursuer from obtaining a summary decree. Thus, in the case of *Keppie* v *The Marshall Food Group* 1997 SLT 305, a case which I mentioned to the parties, the pursuer in an action of damages for personal injuries sought summary decree against her employers. She averred that she had injured her back lifting a container filled with double cream. The defenders resisted the motion on the basis that they had no direct knowledge of the circumstances in which the pursuer had injured her back, and were entitled to put her to proof that she had in fact

sustained injury in the way that she averred. It was held by the Lord Ordinary that the pursuer required to prove that she had sustained an injury in the way in which she averred, and the defenders were entitled to test the evidence led by her to that effect. The motion for summary decree was therefore refused. Lord Hamilton commented that the court "while being astute to repel purely dilatory defences, should not summarily preclude enquiry where it appears that there is a genuine issue to try".

[6] In relation to this point, Ms Gillies, for the pursuers, sought to persuade me by reference in some detail to a number of the pursuers' productions, that the pursuers had an almost unanswerable case in relation to the question of whether they could show that a VAT fraud and transfers of money to the defender had taken place, and that fairness to the defender did not demand that they were required to prove these averments prior to obtaining summary decree.

[7] She referred me first of all to productions 11 and 12 of the pursuers' first inventory of productions. Production 11 is a claim form from the High Court of Justice, Queen's Bench Division, against a number of defendants, including the defender's husband, made by the present pursuers as liquidators of Payroller Limited. In that action the liquidators seek payment of £1,053,120.12 from the defender's husband. It is said that he wrongfully received this sum from Payroller Limited. Production 12 contains the amended particulars of claim in respect of this action. Lengthy details are given there of the alleged VAT fraud. It is said that the defender's husband received, directly or indirectly, over £1.7 million in wrongful payments from Payroller Limited. I was told by Ms Gillies that the defender's husband did not defend the English action, and that decree was granted against him. I was also referred to production 14, which is a freezing injunction against the defender's husband for nearly £1.5 million. It was submitted to me that the English action was very strong, indeed almost incontrovertible, evidence of very substantial amounts of money being

wrongfully received by Payroller Limited, and subsequently dissipated to various people, including the defender's husband.

[8] I was referred also to production 2 for the pursuers, which is a petition presented by HMRC to wind up Payroller Limited. The basis of the winding up order which was sought was that Payroller Limited owed HMRC £7.8 million in unpaid VAT. It was submitted that this was again incontrovertible evidence that Payroller Limited had received very substantial sums by way of purported VAT to which the company was not entitled.

[9] Regarding this preliminary point, the defender in her pleadings simply denies knowledge of any VAT fraud. She does not seek to prove, or put forward any case at all, to the effect that a VAT fraud did not take place. She either admits or impliedly admits that she received money directly or indirectly from Payroller Ltd. If the defender had put in issue the question of whether a fraud had taken place, or whether she had received the relevant payments, then it seems to me that she might have been entitled to put the pursuers to their proof. However, having considered the submissions, and the productions to which I was referred, some of them being documents of public record, I have been persuaded that there can be almost no doubt that the pursuers will be bound to succeed in proving that Payroller Limited is indebted to HMRC in respect of unpaid VAT, and that the defender and her husband received very substantial sums of money directly or indirectly from Payroller Limited. I am therefore persuaded by Ms Gillies that, unlike the case of *Keppie*, this is not a case where even if it is true that the defender had no knowledge of her husband's alleged involvement in a VAT fraud she is entitled to ask the liquidators to prove their case. As the defender puts forward nothing whatsoever to contest the basis on which the English actions were brought, it seems to me that fairness to the defender does not require, before the granting of a summary decree, that the pursuers prove that a VAT fraud has taken place and that Payroller Limited made payments to the defender and her husband.

Pursuers' submissions

[10] That preliminary question aside, the pursuers' submissions are set out in some detail in written submissions which have been lodged in process, and which I therefore need not repeat at length. However it became clear during the course of the submissions made by Ms Gillies on behalf of the pursuers that the pursuers' primary position is that the pursuers are entitled to recover these payments because they can only be seen as gratuitous alienations as defined by section 242 of the Insolvency Act 1986. This position is perhaps not entirely clear in the pursuers' pleadings.

[11] Under section 242 a gratuitous alienation can be recovered by the liquidators if it is made within two years prior to the commencement of the winding up, unless the recipient of the alienation shows that the company was solvent at the time the alienation was made, or that, *inter alia*, the alienation was made for "adequate consideration". It was argued that the defender does not plead any case that she gave "adequate consideration" for these gratuitous alienations, or that the company was solvent, and the liquidators are therefore entitled to recover the payments from her in terms of section 242.

[12] In support of her argument that there was an unanswerable case on behalf of the pursuers that the defender has received gratuitous alienations, Ms Gillies referred me in some detail to account statements from Payroller Limited's bank account which are produced as production 28. These are said to show payments made to the defender and her husband. These payments are also to be seen (more easily perhaps) in productions 31 and 32, which are documents prepared by the pursuers and which are excerpts from the same bank account, and in which the payments are highlighted. Production 35 contains bank statements from the defender's joint bank account with her husband, and shows payments received by them. Production 43 is excerpts from the same joint account with the payments highlighted for ease of reference.

[13] It was submitted that I could consider the entries in these bank accounts without hearing any evidence about them, and that they amounted to self-evident evidence of payments being made by Payroller Limited to the defender's husband and the defender. It was argued that these payments had to be seen as gratuitous alienations. Ms Gillies sought to persuade me that the defender's response to the pursuers' averments and productions was either to make skeletal averments in answer, which had the stamp of a lack of candour, or to hide behind averments of "not known and not admitted".

[14] The liquidators have further averments which are relevant to the motion for summary decree, and these were founded on by Ms Gillies in her submissions. It is averred that the liquidators obtained a "freezing injunction" against the defender's husband (and others) in England on 16 February 2018, and that on 19 February 2018 a warrant to inhibit and arrest on the dependence was granted in the Court of Session on the basis of the freezing injunction. It is averred that the defender's husband received over £500,000 directly from Payroller Limited, and a further £885,000 indirectly from Payroller Limited through another company called Kellcon Construction Limited. There are also averments as to further sums, or items (such as expensive cars), being received by the defender's husband. It is averred that a similar VAT fraud had previously been committed using the vehicle of a limited company called Bravo Business Limited, and that the defender and her husband also benefited very substantially from this fraud. There are other averments regarding other alleged frauds of a similar nature in which it is said that the defender's husband was involved. It is averred that the defender's husband was sequestrated on 15 June 2018. It is said that ML has a conviction for dishonesty which resulted in a sentence of imprisonment of three years. There are further allegations of the defender's husband previously being involved in serious fraud perpetrated through the medium of another limited company called Bravo Business Limited. There are allegations that the defender's husband has in fact

been involved in serious fraud since 2010, resulting in the defender and her husband being disqualified from being directors of limited companies for periods of nine years and 10 years respectively. It is alleged by the liquidators that the defender must have known of her husband's fraudulent activity, and also that she benefited very substantially from it.

[15] On the averments and submissions summarised above Ms Gillies sought to persuade me that the defender had no hope of proving that the payments which she and her husband received could be anything other than gratuitous alienations. She submitted that there was nothing whatsoever in the defender's averments which set out any credible case that Payroller Limited had received anything of value for the payments made to her. In relation to all of this, Ms Gillies also founded on what was said to be incontrovertible facts that the defender and her husband had been disqualified as directors for lengthy periods. She also founded on the averments by the pursuers that the defender's husband was an associate of someone who had been convicted previously of fraud, and who had served a prison sentence. She submitted that this background of criminality ought to cause me to take a very critical look indeed at the defender's pleadings. An interview of C which is to be found as production 54 was also referred to as showing a lack of explanation put forward by GC for the payments made by Payroller Limited to the defender's husband. I was therefore asked to come to the conclusion that the defender's account of the position was likely to be incredible and unreliable. It is argued in the pursuers' written submissions that the "case asserted by the Defender is simply not made out on the basis of the documents that are before the court", and elsewhere in the written submissions that "the story lacks candour and judging this defence as pled presently the court should grant decree". It is said also that the defender has produced "no receipts for payment provided", and that there is "no vouching of money spent on materials". It is said that the "timing of payments is also peculiar and warrants explanation", and that the "story lacks credibility".

Defender's submissions

[16] The submissions on behalf of the defender are also set out in detail in written submissions lodged in process. In these submissions it is suggested that the correct analysis of the alleged VAT fraud is that it would not actually have been fraudulent for Payroller Ltd to add VAT to their invoices even though the company was not registered for VAT, as above a certain turnover every company has to charge VAT. It is suggested that where there might be a fraud is in failing to account to HMRC for the VAT which was paid to Payroller Ltd. Leaving this point aside, it is suggested that the liquidators do not have any right to recover the VAT on behalf of the general creditors of the company, it being the proceeds of crime. It is argued that this in turn means that the VAT was not company property which was given away and therefore cannot be recovered as a gratuitous alienation. It is suggested that given the necessity of the pursuers proving that the defender has no real prospect of establishing her defence "the court should tread carefully". It is stressed that it was not averred that the defender was party to any fraud. In relation to crave 1 it is argued that the defender offers a commercial purpose for the transaction which was consistent with the known facts. It is argued that it is not clear from the pursuers' pleadings on what basis the action is brought, and that on a natural reading of the pleadings the action appears to be based on the common law rather than the statutory law relating to gratuitious alienations. It is pointed out that a similar application for the equivalent of a summary decree in a similar case in England failed, the judge taking the view that there was an issue to try. In relation to crave 2, again a commercial purpose for the transaction is put forward. It is argued in relation to crave 3 *inter alia* that the pursuers will need to prove that the funds paid to the defender's husband were the source of the funds withdrawn by the defender.

Analysis and decision

[17] I agree with submissions made to me on behalf of the defender that it has to be said that it is somewhat strange that the allegations of a VAT fraud are given such prominence in the liquidators' pleadings and that the only mention of section 242 is at Statement of Fact 20, it not being mentioned in the ten pleas in law for the pursuers. Given that the primary ground of recovery was said in oral submissions to be section 242, it seems to me that the averments about a VAT fraud really have to be seen as simply being averments which set out in the factual background to the primary ground of recovery, and only indirectly provide the basis on which the liquidators seek repayment of the sums sued for from the defender.

[18] Gratuitous alienations occur under section 242 when "any part of a company's property is transferred". It seemed to me initially that as Payroller Limited was not registered for VAT, and therefore had no entitlement to the payments made to it in respect of VAT by its customers, then arguably the money said to have been transferred to the defender could not be seen to be part of the company's property, but was more properly seen as the proceeds of crime, to which the liquidators on behalf of the general creditors, had no claim. If that view is correct, then it would be HMRC who had an entitlement to recover the fraudulently obtained sums, as the proceeds of crime, rather than the liquidators who would not be entitled to recover that money for the benefit of the general creditors. This general point is taken by the defender in written submissions lodged on her behalf.

[19] In relation to this, I was advised that in this type of case the liquidator of a company would often work in conjunction with the HMRC or the prosecution authorities to seek to recover money which had been given to the company, and I can understand this and to my mind it may make practical sense. Their specialist accountancy knowledge may put them in a good position to try and recover the sums sued for.

[20] Having given this point some further consideration I am now persuaded that as the company had a legal obligation, as I understand it, to register for VAT and then to add VAT to its invoices and collect that money, the company should then have accounted to HMRC for this money. On that basis it now seems to me that the VAT which the customers of Payroller Ltd paid is to be seen as company property which the liquidators are entitled to seek to recover, but as that money ought to have been paid to HMRC the liquidators will have a duty to account to HMRC as a specific and preferred creditor. I no longer think that I was correct in my initial view that the money is to be seen simply as the proceeds of crime.

[21] Leaving this general point aside, in considering the pursuers' arguments it is necessary to consider each of the craves separately, as the circumstances in which these sums were paid to the defender differ.

Crave 1

[22] In relation to the sum first sued for the liquidators' averments are brief. It is simply averred that an initial investigation identified a number of payments to the defender from Payroller Limited totalling £40,581.78 and that there was no good commercial reason for the payments.

[23] In response to these averments the defender avers that the person mentioned above, GC, asked her husband to receive money from a company that GC was involved in called Newbain Services Ltd, and to pass this money on to another company called Catalyst Business Finance Ltd. The reason for this, according to the defender's averments, was that GC had granted a personal guarantee to Catalyst, and that at the time he was at risk of sequestration and so did not want any payments from him to Catalyst to be challenged as an "unfair preference". There are averments that GC had been entitled to "generous compensation" for the work which he did for Newbain Services Ltd, and was therefore

entitled to be paid by them. The defender avers that she had no reason to question GC's motivation in making payments to Catalyst Business Finance through her husband and herself.

[24] It is impliedly admitted by the defender that she received the sum sought in crave 1 from a bank account operated by Payroller Limited. The payments made to her totalling £40,581.78 must therefore, as I see it, be seen as an "alienation" by the company, and that alienation being admitted, the only question is whether the defender has any hope of proving that adequate consideration was given for these sums. The liquidators argue that her averments to the effect that she understood that GC was entitled to have this money transferred to her cannot in any sense be seen as something which amount to the defender showing that the payments were made for adequate consideration.

[25] There was no real discussion before me as to what in law might amount to adequate consideration, although there is a reference in the pursuers' written submissions to the suggestion in a well-respected textbook (St Clair and Drummond Young on the Law of Corporate Insolvency in Scotland) that adequate consideration means a sum that is reasonable in the circumstances as between parties acting in good faith and at arm's length. The defender offers a commercial purpose for the transaction. She avers that GC was entitled to use funds held by Payroller Limited in order to make payment of these funds to a third party (Catalyst Business Finance Ltd). The question as I see it is not whether the defender provided adequate consideration but whether the company transferred the money out of its bank account without adequate consideration. If she were to establish that reason as being true, then arguably the payment has been for adequate consideration. While the defender's explanation may sound improbable, her position is at least possible and consistent with the known facts, and it cannot therefore be said at this stage that she has no prospect of success in relation to this element of her defence. I am not prepared to deny the

defender the chance to give evidence on oath as to the reason for these payments, and where it is said that GC was entitled to use this money I cannot say that defence to crave 1 has no prospect of success.

[26] I would add that even if the payment to her was part of a scheme by GC to dissipate the proceeds of fraud, it is not averred, let alone proved, that the defender was part of that fraud, and as she has passed the money on she has an arguable case that she should not be required to reimburse the liquidators of Payroller Limited.

[27] In respect of crave one I am therefore persuaded by the arguments set out in detail in the written submissions lodged on behalf of the defender. I find all of those arguments to be persuasive, and I do not see that summary decree can be granted in relation to crave one.

Crave 2

[28] In relation to the sum second sued for, it is averred that payments totalling £29,974.56 had been transferred from Payroller Limited to a company called Kellcon Construction Limited and thereafter transferred to the defender.

[29] In response to these averments the defender avers that Kellcon is a "substantial construction company which continues to trade". She avers that she was involved in a transaction with Kellcon whereby she carried out some refurbishment works to a house which had been purchased by Kellcon. She avers that the payment made to her was to reimburse her for her time and costs in relation to the refurbishment project.

[30] The pursuers' solicitor in her submissions points out that the property in question was apparently a modest property and that the work which the defender says that she did for Kellcon was of a limited nature. It is said that the defender merely "picked a kitchen and tiles" for which she was apparently paid nearly £30,000. It is pointed out that there is no written contract between Kellcon and the defender, and no receipts are provided for the

payment made to the defender. It is said that the timing of the payments is "also peculiar and warrants explanation". It is also said that a "damning" point is that the property register shows that Kellcon never owned the property in question. It is thus said that the "story lacks credibility" and that the defender has no real prospect of success of proving it.

[31] These are all valid points to be made at a proof, but here, again, I am persuaded by the submissions put forward on behalf of the defender. I think that the defenders may be correct in arguing that it is necessary for the pursuers to establish first, that payments were made by Payroller Limited to Kellcon, secondly that the same payments were made to the defender, and thirdly that those payments were gratuitous. These facts, it seems to me at present, are facts which need to be established by proof. The defender also puts forward an explanation for the payments made to her, and however unlikely her explanation might seem it is not one in my view which can be dismissed as untrue without evidence being heard regarding it. There is also the additional point made by the defender that while it might be possible to follow the proceeds of crime which have been converted to heritable property, and accordingly for any disposition of heritable property to be reduced, matters become much more complicated in a claim for a fungible like money.

Crave 3

[32] In relation to the sum third sued for it is averred that Payroller Limited paid £515,915.03 into a joint account in the names of the defender and her husband, and that the defender withdrew the sum of £75,799.72 from that account, being the relevant sum now sought from her.

[33] In relation to these averments, the defender avers that the money in the joint bank account came from payments made to her husband for work done by him in connection with the company Newbain Services Ltd. She avers that the money was properly her

husband's money, and denies that she withdrew the sum of £75,799.72, being the sum sued for. She avers that, in any event, it was her husband's money even though it was in a joint account, and as her husband has been sequestrated the money ought to go to the trustee in bankruptcy of her husband. She avers that to pay it to the liquidators of Payroll would create an unfair preference to the detriment of creditors of her husband.

[34] Even if it is thought that the defender's explanation is unlikely in my view it would be wrong to deny the defender opportunity of seeking to establish it. In any event, I think that there may be force in the argument that even if the pursuers can prove that the sums paid to the defenders husband was a gratuitous alienation, as her husband has now been sequestrated the amount of money transferred to the defender by her husband from that gratuitous alienation is something for his trustee in bankruptcy to recover from his estate. The matter is complicated, perhaps, but that also means that it cannot be said that her defence has no prospect of success.

[35] Moreover, I also think that there is force in the defender's submissions that it appears to be necessary for the pursuers to prove that if the proceeds of a VAT fraud were paid to the defender's husband this was the source of the funds withdrawn by her. I agree that there is therefore a matter to try, and that summary decree is not appropriate.

Alternative basis for recovery

[36] There is, however, an alternative basis for recovery of these sums, which is said to be a common law rule of Scots law that no one can profit from another's fraud. While the oral submissions before me concentrated, I think it is correct to say, on what was said to be the primary basis of recovery, namely under section 242 of the 1986 Act, the basis of the common law rule is dealt with at some length, and under reference to authority, in the written submissions which Ms Gillies lodged.

[37] It is said that the rule allows funds paid away in breach of a fiduciary duty (and clearly the dissipating of the proceeds of a VAT fraud would be a breach of a fiduciary duty) to be followed and recovered, even if the recipient of the funds received them in good faith. The law is somewhat complex, but it is said in the written submissions that the recipient of the funds is deemed to hold them in constructive trust for those properly entitled to them.

[38] The defenders, however, argue in their written submissions that it is an "absurd proposition" to suggest that where, as here, it is not averred that the defender was in bad faith she will always be under an obligation to recompense the pursuers for any sums paid to her from the proceeds of a VAT fraud. It is suggested that the common law rule as contended for by the pursuers is far too wide, and cannot be correct.

[39] I would not be prepared to grant a summary decree on the basis of the common law rule which is said to give the pursuers the right to recover the sums paid to the defender. The exact nature and extent of any rule would need to be explored and established to a greater extent than was possible at the motion for summary decree. Moreover, recovery under the common law is based according to the pursuers' pleas in law at least partly on allegations of bad faith by the defender, and as I say later I would not be prepared to find bad faith established in the absence of proof.

Unjust enrichment

[40] It is maintained also by the pursuers that the defender has been "unjustly enriched" by the receipt of the payments concerned, but in my view the defender is correct to argue that as the pursuer's position is that she transferred the money on, this would give rise to a defence (namely that she has not been enriched), and it cannot be said that her position on this is doomed to fail. It is not necessary to deal further with this ground at this stage.

Summary

[41] In summary, and at the risk of repetition, the general position in regard to the motion for summary decree is as follows.

[42] The defender does not deny that a VAT fraud took place, and her position appears to be that she had no knowledge of it, but I agree with the pursuers that there seems to be no doubt that the pursuers will prove the VAT fraud, if they require to do so, and that the defender received sums of money from Payroller Limited. I also agree with the pursuers that the defender's position as set out in her averments ought to be looked at very closely and with a critical eye. But she puts forward explanations for the sums received by her which, however unlikely they may appear, could conceivably be true, and in my view it would be wrong for me to grant summary decree against her effectively branding her as a liar without giving her the opportunity of explaining her position in court and on oath. For me to decide, without evidence, that the defender "was prepared to engage in a scheme to assist GC … to deprive his creditors of his assets should he be sequestrated" (as it is put in the pursuers' written submissions) would be to do just that. It also seems to me that there are questions of law which arise as to whether the defender's explanations for having received money could properly be seen in law as adequate consideration. Although the submissions before me touched on this question, there was no detailed consideration of the definition of adequate consideration, and I think that to grant summary decree would foreclose any argument on this point where it appears that there could be argument to be had.

[43] I also agree with the defender's submission that the court ought to tread warily when being asked to grant summary decree. In denying a defender the opportunity to maintain a defence, the court has to be very clear that it has no real prospect of success. Even where, as perhaps here, it is thought that there may be very big question marks over the defence, if it

is realistically conceivable that it could succeed, then it cannot be said that it has "no real prospect of success". It has to be "almost certain" that the defence will not succeed, and I cannot say that that is the case at this stage in this case.

[44] Moreover, although I have said earlier that it appears that there is almost no doubt that the pursuers will succeed in proving that the defender received the sums sued for, it nevertheless seemed to me that the pursuers were wishing me to take on too much of an investigative role. Some time was spent taking me through bank accounts from Payroller Limited, and also excerpts from these accounts, with the aim of establishing that payments were made to the defender and her husband, without me having heard any evidence at all in relation to these bank accounts. While the case law makes it clear that it is competent, and appropriate in some cases, for the court to consider documentary productions, in my view it was really too big a step and too big a departure from normal long established practice for me to effectively carry out my own investigations into bank accounts, and what they might show. While on the face of it the bank account entries were clear, I had a real hesitation in taking the very substantial decision to grant summary decree on the basis of conclusions which I was asked to draw from my own perusal of bank accounts, unassisted by any evidence.

[45] All of this is in addition to the point that it is not clear from the pursuers' pleadings (as opposed to submissions) whether the claim for reimbursement is made on the basis of the payments being gratuitous alienations at common law, or gratuitous alienations under section 242. In her submissions Ms Gillies stated that recovery was sought on the basis of the statute. However, the position as set out in the pursuers pleadings cannot be ignored, and it is not entirely clear. As set out in the defender's written submissions, if the common law is being founded upon then the pursuers must show that Payroller Limited was insolvent at the time any alienations were made - see *The Law of Corporate Insolvency*, fourth

edition, by St Clair and Drummond Young at paragraph 10-02. This also suggests that summary decree is not appropriate.

Affidavit

[46] Finally, I was urged by Miss Gillies for the pursuers to ordain the defender in terms of OCR 17.2(4)(b)(ii) to provide an affidavit "in support of the facts asserted". I have considered this suggestion but take the view that it is highly unlikely that any single question or questions from me to be answered in an Affidavit would remove the need for a proof in this case, and do not see it as my role to frame a list of questions dealing with the many possible issues which might arise at a proof in relation to the explanations which she puts forward. That, I think, is really something for cross-examination at a proof.

Result

[47] The pursuers' motion for summary decree accordingly fails. While I have some sympathy with the desire of the pursuers to try and obtain an immediate remedy in this case, and while some of the arguments advanced by Ms Gillies were quite powerful, these arguments ultimately failed, and parties were agreed that in that event the pursuers should be found liable in the expenses of the motion for summary decree. I think that agreement was unavoidable. I therefore find that the expenses as occasioned by the motion for summary decree fall on the pursuers. They were also agreed that the motion for summary decree ought to be certified as suitable for the employment of junior counsel, and also for the employment of a Solicitor Advocate (although that latter finding becomes academic), and I will so certify.

[48] The one final matter with which I need to deal is that of the expenses of the Options Hearing of 21 November 2018. On that date the pursuers' motion for summary decree

called for the first time. Counsel were present for both sides in order to argue the motion. The motion could not proceed, as I understand it, because the pursuers had adjustments which they wished to move but which were late, and no adjusted Closed Record was available. The presiding Sheriff allowed the adjustments to be received late, but then continued the Options Hearing to 19 December 2018, and continued the motion for summary decree to the same date. On 19 December 2018 I closed the Record and the motion for summary decree proceeded. The defender now seeks the expenses as occasioned by the calling of the Options Hearing on 21 November 2018. In my view, it has to be seen as correct that counsel for the defenders attended at court needlessly on 21 November 2018 in order to argue against the motion for summary decree. I agree with the defender's written submissions that the hearing on 21 November was effectively wasted attendance and wasted expenditure, in that although the case was due to call on that date the motion for summary decree could not proceed. The needless attendance of counsel was caused, as I see it, by the unfortunate fact that the pursuer had late adjustments and had not been able to lodge an up to date Closed Record. I therefore do not see that the pursuers can escape liability for the attendance of the defender's counsel on 21 November 2018. I think that the appropriate finding is for me to make it clear in the interlocutor finding the pursuers liable for the expenses of the motion for summary decree that these expenses include the attendance of counsel at court on 21 November 2018.

[49] I have put the case out for a hearing so that further procedure can be determined. Parties will have to liaise with the Sheriff Clerk to identify a suitable date.