OUTER HOUSE, COURT OF SESSION

[2019] CSOH 91

CA105/19

NOTE BY LADY WOLFFE

In the cause

PROMONTORIA (CHESTNUT) LIMITED

Pursuer

against

(FIRST) THE FIRM OF BALLANTYNE PROPERTY SERVICES

First Defender

and

(SECOND) GILLIAN BALLANTYNE SMITH

Second Defender

and

(THIRD) THOMAS ALAN SMITH

Third Defender

Pursuer: Dunlop QC, Welsh; Addleshaw Goddard LLP
Defenders: Sandison QC, Gardiner; MBM Commercial LLP

8 November 2019

Introduction

Scope of debate

[1] This matter called before me on Tuesday for a debate on the defenders' seventh plea, which is *lis alibi pendens* ("the plea"). A further one-day hearing is set down in early

December before Lord Doherty, either for debate on other matters contained in parties' notes of argument or to consider the pursuer's motion for summary decree. The plea is taken in respect of a summary application in Edinburgh Sheriff Court ("the summary application"), one of two summary applications between the same parties.

This action

[2] In this commercial action the pursuer seeks payment of the sum of £1,180,742.49 said to be owed by the defenders (a partnership and its two individual partners) by virtue of a number of facility letters entered into between them and the Clydesdale Bank Plc ("the Clydesdale"). The pursuer relies on assignations in its favour from the Clydesdale of the creditors' rights under those facility letters ("the assignation"). In their defences the defenders maintain:

1) that the assignation is ineffectual itself to confer title on the pursuer and that the pursuer is obliged to produce other links in title (eg the sale and share purchase agreement ("the SPA") between the pursuer and the holding company of the Clydesdale, pursuant to which the assignation was granted);

2) that there was failure to purify a condition precedent of a payment condition in the SPA;

3) that there was ineffective intimation of the assignation;

4) that the standard securities granted by the defenders to the Clydesdale have not vested in the pursuer, on the basis of what is describe as the "section 14" line of argument; and

5) in any event, that the obligations on which the action is based have been extinguished by prescription.

In its note of argument the pursuer challenges the relevancy of these lines of defence.

[3] The nature of this action is an action for payment of sums said to be owed under a number of commercial agreements. The rights the pursuer seeks to enforce are personal (not real) rights arising from those commercial agreements. As the sums claimed are not admitted, the effect of the action, if successful, will be to establish that the pursuer has a valid legal title to the sums claimed, and, conversely, that the defenders are obliged to pay those sums to the pursuer. The legal ground is the enforcement of contractual obligations (see pursuer's second plea). The decree, if granted, will be for payment by the defenders (or any of them) of the sum found due by them. It may form the basis of enforcement in the form of diligence against the assets of the defenders (or any of them found liable).

The other action(s)

The summary application

[4] The *lis* said to be in *pendens* is the summary application brought by the pursuer under the Conveyancing and Feudal Reform (Scotland) Act 1970 ("the 1970 Act") *qua* creditor and holder of a number of standard securities granted at the time the facility letters were entered into. In the summary application, the pursuer relies on calling up notices served in respect of standard securities over six heritable properties ("the security subjects") situated within the Sheriffdom of Lothian and Borders at Edinburgh. The pursuer seeks authority under section 24 of the 1970 Act to exercise the creditor's powers as provided for in condition 10 of the standard conditions of the standard securities. Those powers include exercise of the classic rights of a heritable creditor to be authorised to sell the security subjects and to apply the proceeds in satisfaction of the debt secured by those securities. The specific issue is whether the pursuer *qua* creditor has complied with the statutory

requirements for the calling up notices and, as an ancillary matter, whether the court will exercise any discretion under section 20(4) of the 1970 Act.

[5] The nature of the summary application is therefore to realise the real rights in security over the properties. The rights the pursuer seeks to enforce are real (not personal) rights arising from the standard securities. The effect of the action, if successful, will be to confer certain rights on the pursuer in respect of the security subjects. The decree granted will authorise the taking of certain steps in relation to the security subjects, not against the personal assets of the defenders. Apart from potentially any award of expenses, no decree will be granted against the defenders. Decree in the summary application is the realisation of the real rights in security embodied in the standard securities. It will not found further diligence.

[6] In their defences to the summary application the defenders advance many of the lines of defence stated in the commercial action. I was advised that a proof was set down in the summary application for February 2020.

The second summary application

[7] For completeness, I note that there is a second summary application ("the second summary application") in a different sheriffdom. By that application the pursuer seeks powers to enforce standard securities it holds in respect of heritable subjects situated within that sheriffdom. (As the standard securities are for "all sums", it was not clear whether, that being a third action between the parties, any plea of *lis alibi pendens* is also advanced in that action in reliance on the summary application.)

Elements to establish the plea of lis alibi pendens

[8] Parties were agreed that to establish the plea, a party required to show:

1) there was a prior action "dependence", ie after service of the summons and before the action is finally disposed of (including expenses), even if the action were asleep;

2) that it was in another court in Scotland of competent jurisdiction;

3) that it was between the same parties in the same legal capacities or interest; and

4) in which the same question is raised.

At debate, the dispute focused on the fourth condition, namely whether the "same question" is raised in the pursuer's summary application in the sheriff court as is raised in these proceedings.

Parties' submissions

[9] I do not rehearse parties' arguments, which are set out in their notes of arguments. I have taken those into account and the file of cases lodged in support, together with their oral submissions and the further cases provided at the debate. I summarise parties' arguments in the next two paragraphs.

The defender's submissions

[10] Mr Sandison QC, who appeared for the defenders, advanced their position as follows:

1) Mr Sandison first invoked Lord Jeffrey's observation in *Denovan* v *Cairns* (1845) 7 D 378 at 381 of the "salutary rule, that a party shall not multiply

remedies for the same debt". (Mr Sandison also referred to the citation of *Donavon* in two late 19th century textbooks: (i) a passage in Mackay's *Manual of Practice of the Court of Session* (1893) at paragraph 17 on page 225, and (ii) footnote 1 at p 385 of Graham Stewart's *Law of Diligence* (1898). He rejected the pursuer's reliance on the formulation (derived from *Alston v Alston's Trustees* 1919 2 SLT 22 at 23 ("*Alston*") of the fourth element as the court answering "precisely the same question", as being in effect an invention of Lord Anderson and in which was also only *obiter*. Mr Sandison focuses on the identity between the defences in this action and that in the summary application and argues that these constitute "the same question", even if, as he argued, the summary application will address additional questions.

2) As a fall back, Mr Sandison suggested that the pursuer could avoid the plea by disclaiming or abandoning the summary application.

3) Looking at the specifics, he argued that the same issues in the defences to both actions will have to be addressed. The matter was one of substance. On his Venn diagram analogy, the issues in this commercial action were subsumed in the larger outlines of the summary application. That was why the "precisely the same question" test was inept. Every issue in this case was already in issue in the summary application. The fourth element of the plea was therefore satisfied.

4) Finally if the court were against him on the plea, the action should be sisted.

[11] Mr Dunlop QC, who appeared for the pursuer, replied as follows:-

1) Mr Dunlop relied on Lord Anderson's formulation of the fourth element in *Alston* as "raising for judicial determination precisely the same question",

emphasising the word "precisely". He noted that this was also applied in *Wilson* v *Dunlop, Bremner & Co Limited* 1921 1 SLT 35 at 37, a case upheld by the Inner House (1921 1 SLT 354 at 356). (Mr Sandison noted that Lord Anderson decided both cases at first instance and that there was no approval in terms by the Inner House of Lord Anderson's formulation.)

2) In the course of the debate Mr Dunlop produced *Roy* v *Hamiltons and Company* (1886) 6 R 422 (it having been noted that this case appears in a subsequent footnote at the same page in Mackay's *Manual*) as an example where the plea was repelled. (In his reply, Mr Sandison submitted that that case is readily distinguishable, as it related to a new claim (ie for wages other than those claimed in the ongoing action), and in any event, on the very peculiar facts of that case the court had simply reserved the plea.)

3) Mr Dunlop submitted that the issue could be tested by considering whether the plea would be sustained if the commercial action had been raised first and then the summary application. In his view, the answer was "plainly not". While linked the subject matter of each action was different.

4) Mr Dunlop notes that the creditor relying on a standard security is obliged to account to the debtor for any free proceeds after satisfaction of the debt secured (and sundry expenses). One purpose of a personal action against the debtor is in the event of a shortfall in the realisation of the security subjects.

Discussion

[12] In my view, the starting point for ascertaining whether "the same question" arises is to consider the nature, subject matter and remedies of the two actions as well as their

pleadings. (Mr Sandison's approach focused principally on the pleadings.) I have outlined the features of this action and the summary application, at paragraphs [3] and [5], respectively. *Prima facie* these actions have quite different legal bases and, if established, will result in decrees providing different remedies. The actions necessarily have different effects.

[13] It is correct that the defences to each action advance the same lines, as reflected in the pleadings. This was illustrated by the side-by-side comparison recorded in the defenders' note of argument, and which Mr Dunlop accepted. However, in my view, it is important to note how those issues arise and whether they can be conclusively determined in each action. In the commercial action, the determination of the issues stated in the defenders' defences is the primary question of that litigation. Those proceedings are in the forum most appropriate to determining those matters. More importantly, their determination will be conclusive as between the parties. By contrast, those issues in the defences to the summary application arise essentially as incidental questions. In response to a question from the court, Mr Sandison accepted that any determination in the summary application of those issues in the defences to those proceedings will not conclusively determine those matters between the parties. If those issues are determined in the defenders' favour in those proceedings, at most, it means that the defenders' collateral attack (eg on the pursuer's assignation or title, or other matters) has succeeded to the extent that the pursuer cannot obtain the powers it seeks by those proceedings. The standard securities themselves, and which provide the legal bases of the summary application, remain valid and subsisting. The lack of conclusiveness of the incidental questions in the summary application is, in my view, a significant additional factor militating against a finding that the two sets of proceedings involve "the same question".

[14] Under reference to *Donavon* Mr Sandison argued that the defenders cannot be subject to two actions (or "remedies", *per Donavon*) for the same debt. In my view, that is not a correct statement of the law. Nor does that correctly reflect the effect of possible outcomes of the two sets of proceedings. The commercial action is to establish that the pursuer is a creditor of the defenders in respect of the obligations in the facility letters. If established, the contractual (ie personal) rights will entitle the pursuer to a decree for payment in the sum found due, and which may be enforced against the assets of the defenders. The summary application is to confer certain powers on the pursuer *qua* holder of the standard securities and which are exercisable in respect of the security subjects as a means to realise the real rights of security already constituted by the standard securities. On that analysis, it is incorrect to describe the summary application as a separate action on the debt the pursuer asserts is owed by the defenders; it is the *means* to realise the real right in security *constituted to secure* that debt. Nor does that factor render these proceedings *other* (*ie alibi*) proceedings to which the plea can apply.

[15] This is clear from the case of *McWhirter* v *McCulloch's Trustees* (1887) 14 R 918 at 919, produced by Mr Dunlop in his reply (which was referred to in *Govan Commissioners* v *Clark* (1889) 5 SLR 156 , *Govan* being cited in a footnote in Stewart *'s Law of Diligence*). In *McWhirter*, the creditor of a bond and disposition in security simultaneously relied on the provisions for registration and enforcement of the disposition (for which three months' notice was required before any sale of the security subjects could be exercised) and he also charged the debtor immediately on the personal obligation in the bond. The Lord President, Lord Inglis, upheld the creditor's right to do so, observing that the "case is too clear for argument". While that case was a suspension of a charge *inter alia* on the grounds of

oppression, that does engage the same mischief to which a plea of *lis alibi pendens* is addressed.

[16] On Mr Sandison's approach, a creditor who holds two forms of security for the same debt and who seeks to enforce them at the same time (rather than sequentially) can be met with the plea of *lis alibi pendens*. The logic of that argument would necessarily preclude enforcement of the other standard securities in the second summary application, which cannot be correct.

[17] The litigations between the parties began with the pursuer's action in the summary application to enforce the creditors' rights flowing from the standard securities. Once that application was met with the defenders' lines of defences, arising as incidental questions, the pursuer raised these proceedings. There is therefore little force in Mr Sandison's submission that the pursuer is responsible for its own predicament by "choosing" first to enforce the standard securities. With respect, the effect of Mr Sandison's argument would be to deprive real rights in security of their commercial and practical significance. By reason of the defences advanced, the pursuer requires to establish its entitlement to the underlying debt obligation (ie by these proceedings) and the subsistence of which is necessary to the enforceability of any security granted in respect of it. Those are two different exercises.

[18] Indeed, this is expressly provided for in subsections 20(1) and 21(1) of the 1970 Act, to which I was not referred. Each of those provisions, which relate to the separate modes of proceeding (a calling up notice or a notice of default) available to a creditor, provides that the statutory rights or powers are in addition to or without prejudice to any other remedy (*per* section 20(1)) or power (*per* section 21(1)) available to the creditor in a heritable security. This reflects the common law position as illustrated by *McWhirter*. Accordingly, there is no risk of inconsistent outcomes that are binding on the parties. The mischief toward which the

plea is directed does not arise. The plea (however the fourth element is formulated) falls to be repelled.

[19] In relation to the parties' arguments about the formulation of the fourth element in the cases, it respectfully seems to me that these miss the point for the simple reason that the "question" presupposed in the fourth element must mean "the *legal* question". If it did not have that meaning, then the risk of inconsistent outcomes would not arise. That understanding would favour Lord Anderson's formulation, and which was not perhaps quite such an outlier as Mr Sandison implied. (He acknowledged that the court in *Longmuir v Longmuir* (1850) 12 D 926 at 931 phrased the question (albeit negatively), that the actions there under consideration were "not identical".)

[20] For completeness, I note that the foregoing analysis also accords with the view of the Inner House in *Hawkins* v *Wedderburn* (1842) 4 D 924, a Court of eight judges (the original division of the Inner House having consulted with four additional Inner House judges because of the division of opinion). The six judges in the majority, after referring to Stair and to other elements of the plea of *lis alibi pendens* (which are not disputed in this case), explained that the plea

> "rests on the reasons not only that a double litigation on the same claim is vexatious, but that it would be wrong to allow double decrees to be obtained, each constituting *res judicata*, and which must either be two decrees to do the same thing only once, and so one of them is utterly useless, or must be cumulative, to do it twice over, or contradictory or discordant, which is oppressive, or leading to confusion."

Having regard to the different decrees that may be granted in this action and in the summary application, there is no question of the defenders being asked to do the same thing twice or to do contradictory things. Having put in issue the pursuer's title to enforce the obligations in the facility letters (and, in light of the plea of prescription, its subsistence), those matter must first be resolved before any security predicated on the pursuer's title or

the subsistence of that underlying obligation may be enforced. (A standard security, like any security, is only ever accessory to the obligation it secures. If that principal obligation is no longer prestable (eg because extinguished), the standard security secures nothing.) These matters can only be determined conclusively in these proceedings.

Sist

[21] The considerations noted at the end of the preceding paragraph also lead me to refuse the defenders' alternative motion, for sist. If the further hearing before the court on 11 December resolves the issues in the defences, it will do so conclusively (subject to any reclaiming motion). If that is determined in favour of the defenders, then the summary application is bound to fail and it would seem unlikely that any further substantive hearing would be necessary in the summary application. If the other issues to be argued on 11 December are determined in favour of the pursuers, then, any forthcoming proof in the summary application is likely to be significantly shortened, to the extent that it encompassed the lines of defence which (on this hypothesis) will have been resolved in favour of the pursuer. On either of these hypotheses, the desire to avoid duplication of effort or inconsistent outcomes which prompted the defenders' motion in support of the plea will, in fact, be avoided by letting these commercial proceedings take their course in timely fashion.

Decision

[22] For the foregoing reasons, the defenders' plea of *lis alibi pendens* falls to be repelled and their motion for sist is refused. I reserve meantime all question of expenses.

Coda

[23] In submissions both counsel proceeded on the basis that a challenge to the calling up notices of the kind advanced in the defences to the summary application may be done in that process. I express no opinion on whether that accords with such limited case-law as there is on a debtor's challenge to the subsistence or amount of the underlying debt (eg see the observations of the Extra Division in *Gardiner* v *Jacques Vert plc* 2002 SLT 928, recalling the *interim* suspension granted by the Lord Ordinary) or the scheme of the 1970 Act (and the relatively limited grounds for challenge to calling up notices or notices of default).