OUTER HOUSE, COURT OF SESSION

[2020] CSOH 90

CA66/20 & CA67/20

OPINION OF LADY WOLFFE

In the causae

WILLIAM LINDSAY

Pursuer

against

OUTLOOK FINANCE LIMITED

Defender

Pursuer: MacDougall; Halliday Campbell WS
Defender: McIlvride QC, TLT LLP

28 October 2020

Introduction

The pursuer's two actions

[1] I heard this two-day debate in these two actions by WebEx. Collectively, the actions challenge two loan agreements (and associated securities over heritable or immovable property situated, respectively, in Scotland and in England) entered into between the pursuer's now deceased father ("Mr Lindsay") and the defender in respect of the Harperfield farm ("the reduction action") and the farm at Metal Bridge ("the action for declarator"). While the remedies sought in the two actions differ, the basis of challenge is

the same, namely that the loan facilities (and associated security or legal charge) were obtained by facility, circumvention and lesion.

Defender's grounds of challenge at Debate

[2] The defender challenges the relevancy of the pursuer's actions. In short, the criticisms are that looking at each specific factor of facility, circumvention and lesion individually, there were insufficient averments to plead a relevant case and the pursuer's actions were therefore bound to fail. Separately, it was argued that the pursuer was not offering *restitutio in integrum*; that that was an essential concomitant to a reduction and so, even if there were a relevant ground of reduction, the pursuer's case was still bound to fail. A further, albeit late, challenge was made to the competency of the action of declarator, essentially on the footing that it was irrelevant for want of a live issue.

Papers considered

[3] In considering these challenges and the defender's reply, I have had regard to parties' notes of arguments, their revised notes of arguments and other written and oral submissions, the bundle of authorities provided and the additional cases handed up during the debate, the joint minute and the productions and other items on parties' respective reading lists. I do not propose to rehearse those materials. It suffices to provide the substance of my decision.

Consideration of the reduction action

Facility and circumvention

[4] It is clear on the authorities that while the different elements of facility and circumvention must all be proved, the court does not take an overly particular or prescriptive approach to the circumstances that may satisfy these criteria. While the defender's senior counsel parsed these individual factors and argued that the pursuer's averments of each of these factors was wanting, that approach is inimical to the 'in the round' approach enjoined by the cases. Rather, the assessment of these factors is of their cumulative impact and effect. The strength of one factor (eg a high degree of facility) may permit a lesser degree of another factor (eg circumvention). Whether there was facility, circumvention and lesion is necessarily an intensely fact-sensitive assessment and is quintessentially a matter for proof. Rare indeed will be the case where the court can conclude on the averments alone that the case pled is bound to fail. This is not one of those cases. In my view, the pursuer has pled more than a sufficient basis to go to proof. I turn to consider the defender's particularised criticisms.

[5] In respect of facility, the defender's senior counsel's scepticism that this might be present in a man only in his late 50s did not persuade me that the many medical conditions and medications referred to, and their impact on Mr Lindsay's personality and circumstances, were incapable of proving facility on his part. Indeed, that observation reinforced the perception that such matters could only be assessed after proof and not on the pleadings alone.

[6] In relation to circumvention, the pursuer has detailed averments (eg in articles 7 and 8 of the reduction action, and which are repeated in the action for declarator) about the approach by the individual, Derek Fradgley (who stood behind the defender), with certain

proposals and the effect of which was, as senior counsel for the defender accepted, materially to increase Mr Lindsay's exposure (essentially as a guarantor of the debts of other family members and enterprises) to the benefit of the defender. These averments include Mr Fradgely creating a company (Metal Bridge Dairy Farm Limited ("MBL")), which was the vehicle for the earlier agreements that became rolled up or subsumed into those covered by the loan agreements under challenge, and which company it is averred Mr Fradgely thereafter "controlled entirely". This is further particularised by a number of actions attributed to Mr Fradgely, including his taking a 50% shareholding in MBL; establishing the defender's address as its registered office; appointing Mr Lindsay and his brother as directors; controlling all of MBL's finances; administering its bank account and being the sole signatory for cheques. While not pled explicitly in such terms, this kind of conduct is redolent of Mr Fradgely potentially acting as a shadow or *de facto* director of MBL and which may give rise to questions about whether he thereby owed fiduciary duties or had put himself in a situation of a conflict of interest.

[7] This passage is followed by averments of certain matters being concealed or "falsely represented"; of Mr Fradgely pressuring the directors of MBL at a time of financial stress and demanding that they sign the loan agreements which he (or the defender) had drafted. There are further averments to the effect that certain terms of the loan agreements were more onerous than Mr Lindsay had previously agreed to (eg the £200,000 limit to his liability was removed and his whole assets (of c £1 M) were at risk). While Mr Lindsay was not party to those earlier agreements entered into by MBL, this was all in the context of intra-family dealings and, most critically, in respect of which Mr Lindsay's exposure as guarantor was materially increased as a consequence of the loan agreements. It is further averred that Mr Fradgely "grossly" overstated the extent of Mr Lindsay's personal liability; he

threatened Mr Lindsay with legal action to recover the whole amount (ie that owed by the wider family) unless Mr Lindsay provided the standard security over his own property; and that Mr Fradgely "put extreme pressure" on Mr Lindsay. In my view, these cannot be described as weak, inspecific or irrelevant averments of circumvention.

[8] In respect of lesion, the defender's senior counsel levelled a number of criticisms at the pursuer's expert's report on quantum (eg he had not had regard to default provisions in the loan agreements; he had relied on certain statements of accounting practice etc). He submitted that, if one could not identify the precise baseline of what was in fact owed, averments of lesion were necessarily irrelevant even if the pursuer has averred that Mr Fradgely's representations of Mr Lindsay's liabilities were "grossly" overstated. It became clear in the course of the debate, that there is additional documentation potentially relevant to the issue of what was the actual liability at the point when the loan agreements were entered into, and against which the effect of the loan agreements may be measured. Having regard to the strength of the other factors of facility and lesion, I would be disinclined to uphold a challenge on the lack of specification of lesion. The difference between what was said to have been owed (at the time by the defender) and what is actually owed (as the pursuer asserts in these actions) is averred to be "grossly excessive" and is of such a magnitude that the defender can be in no doubt as to the kind of case the pursuer is making. It is not a matter of a fine difference of a few pounds and pence. Finally, in my view the nature of these criticisms reinforces the impression that all of these matters can only be resolved at proof, and not on the basis of the averments alone.

Restitutio in integrum

[9] A free-standing ground of challenge was that a decree of reduction required that parties be capable of being restored to their positions as they were before the impugned deed was entered into. Here, the pursuer was not offering to return certain cattle and equipment used in the dairy business, ownership of which had passed from the defender under the loan agreements, and therefore the (it was said) essential requirement of *restitutio in integrum* could not be satisfied.

[10] In my view, the approach the defender's senior counsel adopted is not supported by the cases cited, including those of high authority which are binding on me. *Spence* v *Crawford 1939 SC (HL) 52* is not authority for a rigid requirement of *restitutio in integrum*; rather the reverse. After a careful analysis of the earlier authorities (some also issuing from the House of Lords), in his speech Lord Thankerton affirmed the use of a compensatory payment where strict *restitutio* could not be achieved. The cases on reduction and the extent to which *restitutio in integrum* can be achieved, and which are analysed at paras 33 to 35 in *Somerville v 1051 GWR Ltd* [2019] CSOH 61, are replete with the language of pragmatism.

[11] In short, in the exercise of this equitable jurisdiction, the court exercises its discretion and powers flexibly and pragmatically to fashion a remedy in doing justice between the parties. The purpose is to achieve a state of affairs, broadly restorative of, if not precisely achieving, the parties' position prior to their entry into the now - impugned deed. On instructions, the defender's senior counsel affirmed that his clients wanted the return of the cattle and equipment. This might be an unusual stance for a no-longer-licenced finance company to adopt. Moreover, the defender does not propose to use these items to engage in dairy farming. The rationale, as I understood it, was that at least the defender could realise these items and get some funds. If that is the basis for the defender's stance, which is to insist in restoration of ownership of these items to it, this in truth appears to be as a form of

security for payment of sums the defender says are due (and for which other procedures or protections may be more appropriate). That stance does not, in my view, provide strong support for the necessity of requiring restitution of a thing – and, indeed, founding on that to preclude reduction - where the intention is not thereafter to use that thing but to convert it into ready money. This, it seems to me is, a more roundabout way to achieve precisely the kind of alternative compensatory payment discussed by the House of Lords in *Spence.*

[12] The defender's challenge based on its *restitutio* argument fails for another reason. The onus is on the defender to aver and prove this as a bar to reduction: see *Somerville* at para 37. The single averment that the defender points to, lately added, does no more than assert that the pursuer's averments anent this are inadequate. In my view, the defender's single averment is not sufficient to discharge the onus incumbent upon it.

The asserted incompetency of the action of declarator

[13] The competency challenge, which emerged only shortly before the debate, was directed solely to the action of declarator. In that action, the legal charge over Metal Bridge has already been realised and the farm sold. There would be no point in seeking reduction, where the subject matter of the impugned deed has been transferred to a third party in good faith and for value. For those reasons, the pursuer confines himself to a declarator that the loan agreement was obtained by facility, circumvention and lesion. Under reference to *Clarke* v *Fennoscandia Ltd No.3 [*2007] UKHL 56, 2008 SC (HL) 122, the defender submits that in these circumstances, there is no live issue. In my view that case is distinguishable: the action of declarator is not being used as a means to defeat a concluded action in a sister jurisdiction. I accept the explanation provided by the pursuer's counsel, that the two actions are interlinked: a declarator in favour of the pursuer, if granted, might be relevant to, and

be taken into account in, the overall assessment of what might be due by the defender to the pursuer, if the ground for reduction and declarator is established.

The challenge to the fifth conclusion in the reduction action

[14] Finally, in the reduction action, the defender challenges the relevancy of this part of the pursuer's case for want of an averment that a payment had been made in error. This seems to conflate the principles of restitution (or unjustified enrichment) with the requirements for repetition (narrowly understood as one of several restitutionary remedies). On this matter, I prefer the submissions of the pursuer. The defender's approach does not accord with that set out by the court in *Shilliday* v *Smith* 1998 SLT 976, which enjoins a broad and principled approach to the question of whether one party (here, said to be the defender) is unjustifiably enriched to the loss of another and without there being a legal ground to justify retention of that benefit. That is what I understand to be the basis of the pursuer's case, not the narrower ground of error (as the basis of the pursuer's actions) or the (formerly styled) remedy of "repetition" (which was understood to be the remedy for monies paid in error). If the pursuer establishes that the defender has been unjustifiably enriched – and which need not depend on proof of error, for here the ground the pursuer invokes is facility and circumvention—then the Court considers how restorative justice is best achieved. In that context, in light of *Shilliday*, the Court approaches the question of remedy with the utmost flexibility and pragmatism and untrammelled by the old rules or arcane categories that formerly bedevilled what is now described as "unjustified enrichment".

[15] For these reasons, I reject the defender's challenges to the relevancy of the pursuer's averments and find that these matters can only be resolved by a proof. It follows that I refuse the defender's motion and allow that of the pursuer.

[16] I shall meantime reserve the question of expenses and put the matter out shortly for a procedural hearing for discussion of preparation for a proof.