SHERIFF APPEAL COURT

[2017] SAC (Civ) 7
HAM-A160-14

Sheriff Principal C A L Scott QC
Sheriff P J Braid
Sheriff Principal R A Dunlop QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL SCOTT

in appeal by

JAVID IQBAL

Pursuer/Respondent

against

SAQID PARNEZ AND OTHERS

Defenders/Appellants

Pursuer/Respondent: Counsel: Dalgleish, Advocate; Solicitors: Freelands, Wishaw
Defenders/Appellants: Counsel: DD Anderson, Advocate; Solicitors: MacFarlane Young, Paisley

9 February 2017

Introduction

[1] This appeal was brought to challenge the sheriff's interlocutor of 18 March 2016 which, in substance, allowed a proof before answer. Various arguments had been advanced during the course of the debate before the sheriff. However, the terms of the Note of Appeal and the submissions put forward before this court focussed upon four issues.

[2] Firstly, the appellants contended that overall the sheriff had failed to provide adequate reasons for her decision. She had failed to explain the legal basis for holding that a

proof before answer was apt and for her disinclination to determine legal issues which were not dependent upon the leading of evidence.

[3] Secondly, the appellants maintained that the sheriff ought to have determined that the respondent's primary case was irrelevant because he sought to found upon a lease which had been granted by him at a time when he was, in fact, sequestrated.

[4] Thirdly, it was argued that the respondent's *esto* case (see Article 2.5 of Condescendence) also lacked relevancy. Whilst it purported to be a claim for recompense *quantum lucratus est*, it was the appellants' submission that the *esto* case did not proceed upon the hypothesis that there was no contract whatsoever between the parties but rather that there was merely no agreement as to rent. That was said to be an irrelevant basis upon which to plead a claim for recompense particularly with regard to what was said by the House of Lords in the case of *Dollar Land (Cumbernauld) Ltd* v *CIN Properties Ltd* [1998] SC (HL) 90.

[5] Fourthly, the respondent's claim for recompense was also said to be lacking in specification. His averments provided no fair notice concerning the case that the respondent was setting out to prove regarding the level of recompense demanded by him. The appellants maintained that the sheriff ought to have determined that the respondent's averments lacked specification. Moreover, contrary to what was required in connection with a claim for recompense, the respondent had also failed to aver the nature and extent of any alleged loss.

The sheriff's approach to the arguments. (The first issue)

[6] With regard to this issue, we have little difficulty in holding that the sheriff erred in failing to provide a proper analysis of the arguments before her together with reasons as to

why the issues of law explored before her in the debate could only be resolved by the leading of evidence. In such circumstances, we hold to the view that those questions of law which the sheriff failed to adjudicate upon are at large for this court to consider and to provide reasoned decisions thereon.

Can a sequestrated individual grant a valid lease? (The second issue)

[7] Both counsel provided the court with detailed notes of argument for which the court was, indeed, grateful. However, once properly developed, the submissions bearing upon this fundamental question of law tended to focus upon the provisions of sections 31 and 32 of the Bankruptcy (Scotland) Act, 1995 ("the 1995 Act").

[8] For his part, counsel for the appellants laid stress upon the wording of section 31(8) when read along with section 31(1). The latter sub-section provided for the "whole estate" of a debtor being vested in his trustee as at the date of sequestration. Section 31(8) and, specifically, section 31(8)(b) indicated that the "whole estate of the debtor" meant his whole estate at the date of sequestration, including:

> "the capacity to exercise and to take proceedings for exercising, all such powers in, over or in respect of any property as might have been exercised by the debtor for his own benefit as at, or on, the date of sequestration …"

[9] Therefore, at the heart of the argument for the appellants lay the proposition that following sequestration, the debtor was, in a real sense, "incapax"; as section 31(8)(b) demonstrated, his capacity to contract had been removed from him and had passed over to his trustee. Counsel for the appellants claimed that this argument was supported by a sentence at paragraph 9-03 within Professor McBryde's work on *Bankruptcy* (second edition). In considering the nature of vesting, the learned author commented that, "A permanent trustee is vested in the estate and a debtor is divested."

[10] In the course of the hearing, counsel for the appellants required to confront the import of section 32(8)) of the 1985 Act. That sub-section reads as follows:

> "Subject to sub-section (9) and (9C) below, any dealing of or with the debtor relating to his estate vested in the trustee under this section or section 31 of this Act shall be of no effect *in a question with the trustee*". (Court's emphasis)

[11] Moreover, counsel for the appellants was forced to recognise that where

> "… for example, a debtor were, subsequent to the date of sequestration, to grant a disposition or standard security in respect of subjects which vested in the permanent trustee, that deed would be challengeable by the trustee". (see *McBryde* at paragraph 9-07.)

In other words, in that situation the "dealing" or contract entered into by the debtor would not be void *ab initio*, rather it would merely be voidable.

[12] In an attempt to deflect the foregoing conclusion, counsel for the appellants appeared to suggest that a contract of lease fell to be distinguished from scenarios where land was disponed or made the subject of heritable securities. He referred to passages within *Paton & Cameron* on *The Law of Landlord and Tenant in Scotland*. In particular, he relied upon a short passage at page 46:

> "However, as the administration of a bankrupt's affairs passes on his sequestration to his trustee, a lease cannot be granted by the owner after the date of the first deliverance".

Whilst the authors of *Paton & Cameron* were no doubt dealing with the pre-1985 Act bankruptcy statutory regime, there is nevertheless no commentary upon the legal foundation for such a general proposition nor is it supported by authority. Indeed, as we understood his submission, counsel for the appellants was, himself, unable to reconcile his contention that leases should somehow be afforded special treatment with any established line of authority or statutory provision.

[13] Before the sheriff, the respondent had relied upon the provisions of section 17 of the 1985 Act. Section 17(4) provides that:

> "Subject to subsection (5) below the effect of the recall of an award of sequestration shall be, so far as practicable, to restore the debtor and any other person affected by the sequestration to the position he would have been in if the sequestration had not been awarded."

[14] Counsel for the appellants insisted that the recall provisions and, particularly, section 17(4), did not avail the respondent in the circumstances of this case. He submitted that, in so far as the appellants were averred to be tenants, it could not properly be said that they fell into the category of "… any other person affected by the sequestration … ". On behalf of the appellants, counsel argued that, properly construed, section 17(4) of the 1985 Act did not serve to "rewrite history". He submitted that the true effect of Section 17(4) was to restore matters to the pre-sequestration state of affairs. Any perceived injustice involved in the appellants not being held to account for their *de facto* occupation of the premises counsel maintained could be addressed by reason of the fact that the debtor ought not to have been usurping the function of the trustee.

[15] In so far as counsel for the respondent relied upon the decisions involving *Fortune's Trustee* (see *Fortune's Trustee* v *Cooper Watson/Medwin Investments* [2015] CSOH 139/140), counsel for the appellants submitted that these cases "didn't take matters very far". They did not concern the provisions of the 1985 Act nor did they involve leases. They were Outer House decisions which were not binding on this court. Instead, counsel for the appellants placed some reliance upon the case of *Alliance & Leicester Building Society* v *Murray's Trustee* 1995 SLT (Sh Ct) 77 where the pursuers *qua* creditors had brought an action for declarator to establish the validity of a standard security granted by the debtor after he had been sequestrated. As we understood his submission, counsel for the appellants

pointed to this case as being an example of a party other than the trustee entering into a contest over the validity of a deed granted by a debtor post-sequestration.

[16] Counsel for the respondent accepted at the outset of his submission that this issue largely fell to be determined upon a proper construction of sections 31(8) and 32(8) of the 1985 Act. The import of the sentence at paragraph 9-03 in *McBryde* was "fine so far as it went". However, counsel for the respondent submitted that the language used in this statutory provision was consistent with the trustee obtaining "various entitlements" following the sequestration of the debtor. Counsel stressed that in terms of these provisions, the trustee would not seek declarator that any dealing of the debtor was void. In contrast, the trustee would seek to reduce such a dealing out of recognition of its being merely voidable. The remedy of reduction had been granted by Lord Jones in each of the *Fortune's Trustee* cases.

[17] With regard to section 31(8)(b), counsel for the respondent argued that the wording did not exclude the retention of capacity by the debtor. In any event, counsel reiterated that a dealing of the debtor was only challengeable by the trustee; it was not challengeable by "the world at large". The 1985 Act had not vested the appellants with any form of title following upon the respondent's sequestration. For the appellants' argument to have any foundation, their counsel somehow required to distinguish leases (in contrast to any other form of dealing) as being special or unique in the way they required to be dealt with or regarded. He had singularly failed to do so according to counsel for the respondent. As a matter of principle, it followed that any voidable transaction had to be reduced. That proposition pertained precisely to the circumstances in the present case.

[18] In relation to section 17(4) of the 1985 Act, counsel for the respondent contended that the recall of an award of sequestration did not involve a pretence that the sequestration had

never taken place. The effect of the sub-section was to render a voidable transaction no longer voidable. In other words, following the recall, the dealing or transaction stood notwithstanding the award of sequestration.

Decision

[19] We consider that the respondent's argument as to the effect of sequestration is to be preferred. When read together and properly construed, the combined effect of sections 14(2), 17, 31 and 32 of the 1985 Act means that the lease averred to have been granted by the respondent would have been rendered voidable, not void. Such a dealing by the debtor in this case was "ineffective" only in so far as it was challengeable at the instance of his trustee.

[20] Whilst there can be no doubt that under section 31(8)(b) of the 1985 Act "capacity" etc is vested in the trustee (see section 31(1)) it does not follow that the debtor is thereby deprived of *any* capacity. Instead, as section 32(8) explicitly indicates, the debtor remains capable of dealing in relation to his estate but any such dealing "shall be of no effect" where it is challenged by the trustee. Therefore, in our view, there is no inherent contradiction as between sections 31(8) and 32(8).

[21] The observations of Lord Jones in the *Fortune's Trustee* cases concerning the effect of sections 14 and 31 of the 1985 Act may be *obiter* in the circumstances of those cases. However, we respectfully adopt his observations, particularly those made at paragraphs 5 and 18 in each opinion. Section 14 of the 1985 Act creates "the effect", as from the date of sequestration, of an inhibition and of a citation in an adjudication of the debtor's heritable estate at the instance of the creditors, ie "the prohibitory effect" referred to by Lord Jones.

[22] Section 31 of the 1985 Act may, indeed, vest the whole estate of the debtor in the trustee but the trustee has no more than a personal right to the debtor's heritable property. The "prohibitory effect of section 14(2)" means only that voluntary deeds granted by the debtor subsequent to sequestration (and while the prohibitory effect is still in force) are *reducible* at the instance of the trustee in sequestration. They are not void, and moreover, we can find no support for the proposition that the creation of leases somehow falls to be distinguished from the granting of other voluntary deeds.

[23] Whilst counsel for the respondent adhered to his argument with reference to section 17(4) of the 1985 Act, we do not consider that it adds anything to the respondent's overall contention that his case is relevant and habile to prove the existence of a lease between the parties notwithstanding the fact that it may have been granted at a time when the respondent was sequestrated. Our view concerning the validity of the lease is that it would stand subject always to its being reduced and that because, as we have already explained, it is voidable and not void *ab initio.* In relation to the effect of section 17(4), we do not accept the construction which counsel for the appellants sought to place upon it. Matters, in our opinion, are not merely restored to the pre-sequestration state of affairs as was contended. The effect of section 17(4) is that the sequestration falls to be regarded as never having been awarded and that, accordingly, any statutory consequence arising from the 1985 Act provisions has no bearing upon validity. The lease averred to have been entered into falls to be treated as valid unless otherwise successfully challenged. To that extent, in the present circumstances, the provision within section 17(4) might be described as a bit of a "red herring" since the application of the law to the respondent's principal argument is to virtually the same effect, viz. the lease averred to have been entered into is valid until reduced. It is merely voidable.

[24] Therefore, we are satisfied that the sheriff was correct to allow an inquiry *quoad* the respondent's averments concerning the existence of a concluded agreement for the lease of the premises, albeit that her rationale for doing so was unexplained. The respondent is entitled to a proof before answer in so far as his first plea in law is concerned.

Is the claim for recompense *quantum lucratus est* relevantly formulated? (The third issue)

[25] Leaving aside the relevance or otherwise of the respondent's primary case averring the existence of a concluded lease, counsel for the appellants also attacked the relevance of the respondent's averments said to support an *esto* case founded upon recompense *quantum lucratus est*.

[26] The criticism of the respondent's averments inevitably focussed on Article 2.5 of Condescendence. It is worth repeating the terms of that article:

> "The verbal agreement was that the premises be let to the Defenders on a quarterly basis at a quarterly rental payment of £3,900, from and after the termination of the tenancy of Mr Ong, that is from 2nd May 2010. Separatim esto, there was no concluded agreement as to quantum of the rent payable for the period the defenders were in occupation, as averred and craved, the sum of £3,900 per quarter for these premises is a reasonable rent. The Defenders are lucratus as they have benefited from occupation and use of the Pursuer's premises for nothing for the period averred. There was no intention by the Pursuer to gratuitously allow occupation. The pursuer has suffered loss and is disadvantaged in the absence of payment of any rent by the Defenders and is according (sic) entitled to recompense from them in the sums sought. No Solicitors were involved in relation to any contract by or on behalf of the Pursuer or his brother."

[27] Counsel for the appellants' principal contention was that the claim for recompense as pleaded was merely a modification of the respondent's principal claim based upon a concluded contract of lease. The *esto* case did not proceed upon the hypothesis that no contract existed between the parties but rather that there was no agreement as to rent. Counsel for the appellants maintained that the respondent was, in reality, purporting to seek

payment of a reasonable sum for what was claimed to be performance of the respondent's obligations under the alleged contract of lease. That, submitted counsel for the appellants, was an irrelevant basis on which to plead a claim for recompense.

[28] Counsel for the appellants maintained that a proper analysis of the Law of Scotland as it pertained to recompense *quantum lucratus est* was to be found in the case of *Dollar Land* (*supra*). Passages from the speeches of Lords Hope and Jauncey were said to support counsel's argument. In contrast to the scenario envisaged, for example, by Lord Jauncey at page 93A, counsel for the appellants asserted that the respondent's *esto* case involved the proposition that there was a contract but that given the averred lack of consensus *quoad* the quantum of rent, the court should imply a term as to the payment of rent. Counsel also emphasised, under reference to a passage in *Gloag, The Law of Contract* (second edition) at page 320, that any claim for recompense was excluded where an underlying contract was said to exist.

[29] For completeness, it was submitted that any *quantum meruit* claim was simply not open to the respondent standing the decision in *Gray* v *University of Edinburgh* [1962] SC 157.

[30] Counsel for the respondent sought to uphold the relevancy of the averments in Article 2.5. He maintained that a proper construction of the formulation committed to record ought to involve the court concluding that the respondent was pleading his *esto* case on the hypothesis that no lease had come into existence. As counsel put it, he was not seeking to uphold a form of lease with "dissected aspects". Initially, counsel was content to rest upon what he claimed was a sensible reading of Article 2.5. However, as the debate progressed, he appeared to recognise the scope for improvement of his pleadings in this respect. An adjournment to take instructions was sought and granted.

[31] Following the adjournment, counsel for the respondent confirmed to the court that no motion for amendment was to be forthcoming and that the relevancy of the respondent's *esto* case ought to be determined having regarding to the existing averments on record.

Decision

[32] We accept the force of counsel for the appellants' argument when it comes to the respondent's *esto* case. In our view, counsel for the respondent's approach to the manner in which article 2.5 is framed stretches the common use of language too far. Indeed, the formulation of these averments gives rise to the inescapable conclusion that the respondent's *esto* case is solely predicated upon the absence of agreement concerning the *quantum* of rent and not upon the broader and potentially relevant hypothesis of there being no agreement whatsoever between the parties. Plainly read, as counsel for the appellants submitted, Article 2.5 of Condescendence is concerned with some sort of peripheral attempt by the respondent to have the court fix a reasonable quarterly rent for the premises let under the contract said to exist between these parties. To our mind, that does not coincide with the proper legal basis for a claim for recompense *quantum lucratus est* as explained by the House of Lords in the *Dollar Land* case. Accordingly, the respondent's *esto* case is, in our opinion, irrelevant as a matter of law. It follows that his second plea in law must be repelled and the associated averments in Article 2.5 excluded from probation.

Specification of the respondent's claim for recompense (The fourth issue)

[33] The court having determined the relevancy of the respondent's *esto* case, the argument challenging the adequacy of the specification provided by the respondent's

averments in Article 2.5 is rendered academic. However, it is only right that we pronounce upon the competing submissions in that regard.

[34] Counsel for the appellants pointed to the averment regarding a quarterly sum of £3,900 as being rent. He submitted that the respondent's averment provided no proper notice of the evidence to be led in order to substantiate the proposition that such a sum was, indeed, reasonable. The averment suggesting that the appellants had benefited from occupation and use of the premises failed to advance matters when it came to specification. Similarly, the further averment concerning the respondent having suffered loss and having been disadvantaged was equally nebulous. Counsel for the appellants maintained that a bald assertion about what was claimed to be a reasonable rental figure meant that the respondent's *esto* case was also flawed through a fundamental lack of specification.

[35] Once again, the respondent's averments as formulated in Article 2.5 were defended by their counsel. He submitted that it was sufficient for the respondent to offer to prove that the sum of £3,900 per quarter was a reasonable rent for the premises in question. Counsel argued that that averment was apt to place the appellants on notice as to what the respondent was setting out to establish and that it would then be open to the appellants to elicit such testimony as they deemed appropriate in order to counter the respondent's position.

Decision

[36] In our view, in seeking to present his *esto* case on record the respondent required to go further than merely stating what, in his estimation, a reasonable rent for the premises would be. Relying upon that somewhat stark averment does not meet the need to explain the basis for the remedy sought with a tolerable degree of clarity and precision. Nothing is

said about the attributes of the premises in the context of the commercial letting environment in the Wishaw area from May 2010 onwards. Equally, there is no hint as to the performance of the local market when it came to the letting of similar commercial premises during the period in question. These are material facts which the respondent required to condescend upon in order to plead a case which was specific and, therefore, relevant. For example, the respondent ought to be able to aver that, absent the appellants occupying the premises *qua* tenants, the respondent would have been in a position to let out the premises to another interested party and that at the level of rental averred. Accordingly, we have also concluded that the respondent's second plea in law ought to be repelled for these reasons.

Outcome of the appeal

[37] In light of our decisions on the arguments presented, we have allowed the appeal in part. The sheriff's interlocutor of 18 March 2016 has been varied in order to reflect those decisions. In particular, the variation embraces the exclusion from probation of the respondent's averments in Article 2.5 together with an acknowledgement that the respondent's second plea in law has been repelled. Furthermore, counsel for the appellants conceded that, were his argument concerning the second issue to fail, the four sentences commencing with the words "*Esto* the parties agreed…" where they appear in Answer 2 at page 15 of the amended record (dated 2 December 2015) would fall to be excised from the appellants' averments. Therefore, the sheriff's interlocutor has also been varied in order to reflect that concession. At the conclusion of their submissions, both counsel invited the court to assign a hearing on expenses before remitting the case back to the sheriff and that is what we have done.