SHERIFF APPEAL COURT

2020 SAC (Civ) 15
FAL-A96/19

Sheriff Principal D L Murray
Appeal Sheriff A M Cubie
Appeal Sheriff W Holligan

OPINION OF THE COURT

delivered by APPEAL SHERIFF WILLIAM HOLLIGAN

in appeal by

Accountant in Bankruptcy, 1 Pennyburn Road, Kilwinning, Ayrshire, KA13 6SA, Trustee on the sequestrated estates of Glyn Brooks, 28 Battock Road, Brightons, Falkirk, Stirlingshire, FK2 0TT conform to award of sequestration granted by the Sheriff of the Sheriffdom of Tayside, Central and Fife at Falkirk dated 21st March 2018

Pursuer and Respondent

against

GLYN BROOKS, residing at 28 Battock Road, Brightons, Falkirk, Stirlingshire, FK2 0TT

First Defender and First Appellant

and

MARTHA BROOKS, residing at 28 Battock Road, Brightons, Falkirk, Stirlingshire, FK2 0TT

Second Defender and Second Appellant

Defenders and Appellants: Murphy, Advocate; instructed by Alexander Moffat
Pursuer and Respondent: Lloyd; Harper McLeod

15 October 2020

[1] In this appeal, the pursuer and respondent is the Accountant in Bankruptcy. He was appointed trustee on the sequestrated estate of the first defender and appellant by interlocutor of the sheriff dated 21 March 2018. The pursuer and respondent raised an

action against the defenders and appellants in Falkirk Sheriff Court seeking decrees for division and sale of what is accepted to be the family home of the defenders; for removing; and authority to sell the family home. The second defender and appellant is the first defender and appellant's wife. In this opinion we shall refer to parties as the pursuer, first defender and second defender.

[2] The action was defended and proceeded to debate upon the pleas of the pursuer, the principal focus being the pursuer's plea as to the relevancy and specification of the defenders' defences. On 29 January 2020 the sheriff repelled the pleas for the defenders and sustained the relevant pleas for the pursuer ("the sheriff's judgment"). He granted decree for certain of the craves of the pursuer, the remaining craves being consequential upon the decree for the division and sale. The interlocutor of 29 January 2020 could not be found but both parties were agreed that we should proceed upon the basis of the disposal set out at paragraph [32] of the sheriff's judgment in which he recorded his disposal. Against the sheriff's judgment the defenders now appeal.

The case on record

[3] There is little dispute between the parties as to the material facts. The defenders are the joint heritable proprietors of subjects in Falkirk in which they reside, together with their adult son ("the subjects"). The first defender's interests in the subjects vested in the pursuer following upon the award of sequestration. The pursuer wished to sell the subjects. In terms of section at 113(7) of the Bankruptcy (Scotland) Act 2016 ("the 2016 Act") the subjects are a "family home" as therein defined. Read short, section 113 prescribes that, before selling the family home, the pursuer must first obtain the consent of the second defender which failing, the authority of the sheriff. The second defender refused to give her consent

which necessitated the raising of the action. The answers for the first and second defenders are in identical terms. For reasons of brevity we shall refer to the answers of the first defender only. In answer 5 the first defender admits he was the one half *pro indiviso* proprietor of the subjects. He avers "admitted no agreement was procured with the pursuer due to excessive assertions of the first defender's debts and the pursuer declining to provide information on debts." In article 6 the pursuer avers as follows:-

> "The defenders are husband and wife. On the date immediately preceding the date of sequestration the defenders resided at the subjects. Believed and averred the defender's son, aged 46 years old, resides with them at the subjects. The subjects are accordingly a family home within the meaning of section 113 of the Act. The employment status of the defenders is unknown. Believed and averred the defenders have resided at the subjects since on or about 6th December 1982".

These averments are met by an admission. Article 7 sets out the value of the subjects (£200,000). After deduction of monies secured by two standard securities there is equity of approximately £94,777.09 in the subjects. The pursuer goes on to aver that he wishes to realise this for the benefit of the first defender's creditors. The first defender admits the amount of the monies secured on the subjects and further avers "*quoad ultra* unknown". In article 8 the pursuer estimates the first defender's debts as being approximately £20,893.38. The pursuer avers that he has been unable to identify any other assets belonging to the first defender from which payment of a dividend to the creditors could be made. Unless the subjects are sold there will be little or no dividend payable to creditors and accordingly it is in the interests of the first defender's creditors that the subjects are sold. Unless the subjects are sold the public purse will be required to meet the remuneration and outlays of the first defender's sequestration. The pursuer avers it is reasonable "that the orders for consent to sell the subjects be granted as craved." The first defender's averments in answer 8 are as follows "Denied the first defender's debts were around £20,894. The first defender was

discharged from bankruptcy on 4th March 2019". The pursuer admits the averment anent the first defender's discharge. In article 10 the pursuer avers that the second defender has been called upon to agree the sale of the subjects and has delayed or refused to do so. The first defender's averments in answer are as follows:

> "Admitted the second defender has not agreed to sale of said subjects since that would result in two elderly persons and their son being homeless and with incorrect assertions of (sic) first defender's debts an intended loan from other family members to permit payment to pursuer (sic) prior to first defender's discharge could not be obtained."

The sheriff's judgement

[4] The sheriff accepted the pursuer's submission that, as *pro indiviso* proprietor, he was entitled to insist upon an action of division of sale (*Upper Crathes Fisheries Ltd* v *Bailey's Executors* 1991 SC 30. In relation to the interpretation of section 113, the sheriff held (at paragraph [21]) that the court has an obligation to consider "all the circumstances of the case". That can only occur if the court is told what the circumstances of the case are; it is for the parties to bring to the court's attention the circumstances which they consider relevant and to which the court should have regard when considering the matter. Reference was made to the judgments of Sheriff Noble in *McLeod's Trustee* v *McLeod* 2007 Housing LR 34 and Sheriff Stephen, as she was then, in the case of *Accountant in Bankruptcy* v *Clough* [2010] 9WL UK 130 (unreported). Both these cases dealt with the predecessor to section 113 and whether the respective defenders had pled relevant cases as a defence to an action seeking authority to sell the family home. The sheriff went on to hold that the defenders gave no information about any income or capital which they or their son may have. Their averment as to being made homeless if the subjects were sold lacked specification and gave no fair notice to the pursuer as to the case he has to meet. There is no explanation as to why they

would be homeless or any averments relating to whether or not alternative accommodation had been sought and its availability. In short, there was a complete lack of specification. The record set out no facts which would permit proper consideration of the enumerated factors in section 113(2) of the 2016 Act as regards the circumstances of the defenders and their son. There are no averments by the defenders of any other circumstances to which the court should have regard. By contrast, the pursuer does aver circumstances to which the court should have regard particularly in relation to the creditors who are entitled to a dividend. The general public have an interest also in having the expenses of the sequestration met from the sale of proceeds rather than public funds. The sheriff accepted *dicta* by Sheriff Stephen that the public interest involves considerations such as expedition and recovery of costs. The sheriff considered that he had to balance all the circumstances, including the defenders' interests, the interests of creditors and the public interest that sequestrations are dealt with properly and effectively without undue delay and unnecessary cost to public funds (paragraph 28). The sheriff concluded (at paragraph [29]) that the pleadings of the defenders do not disclose a defence to the action and that there was no information in their averments which would assist the sheriff in dealing with the specific factors set out in section 113(2). The sheriff concluded that the defenders' averments lacked specification and that they would be bound to fail at proof.

Submissions for the defenders

[5] The defenders' arguments can be reduced to two broad issues (there was a third relating to intimation of the writ to the local authority but that was not insisted upon). Firstly, the sheriff should not have proceeded to hear the debate on the certified record lodged by the pursuer because the record omitted the pleas-in-law for the defenders. There

was no motion by the pursuer to amend the record to insert the pleas nor was relief sought in terms of rule 2.1 of the OCR. Secondly, the sheriff had made a number of errors in considering matters relevant to the application of section 113.

[6] As to the first point, it would appear that when defences were intimated on behalf of the defenders to the pursuer's agents, the pleas-in-law were omitted from the intimation copy of the defences. The principal defences lodged in process did contain pleas-in-law and were lodged timeously. The pursuer's agent did not include pleas-in-law in the record because the pursuer's agents were unaware that they were part of the defences. The sheriff presiding at the options hearing noticed and commented upon the omission but it went uncorrected. On the morning of the debate the pursuer's agent moved for decree, given the absence of any pleas-in-law to the defences. When it was pointed out these had been lodged the point was withdrawn. Nothing of substance appears to have been made as to the absence of the pleas from the record on the day of the debate. The absence of the pleas from the record is not mentioned in the sheriff's note nor in his disposal. The debate proceeded on the basis of the pleas in the defences. Counsel for the appellant conceded that there was no real prejudice to the defenders in the debate proceeding in the absence of the pleas in the record.

[7] In relation to the second point, the task the sheriff had to undertake was that of a balancing exercise and in that he failed. In his written note of argument counsel submitted that the defenders had "sketched a number of circumstances" which could be taken into account in the exercise of the sheriff's discretion as to whether to grant authority to sell the subjects. The factors were that for nearly four decades the second defender had resided in the family home; the defenders denied the accuracy of the figure as to the amount of the first defender's debts and that his discharge had extinguished some of them; the incorrect

and excessive statement of the first defender's debts was preventing a loan being secured which could be used to satisfy payment of the first defender's debts. Although not contained in the defences, in oral submissions the second defender's ill health together with a short doctor's letter had been tendered; the appellants were elderly and had residing with them an adult child. Counsel, rightly, conceded that some of the averments were "over skeletal in nature". However, he went on to criticise the sheriff for saying that there were no or any circumstances justifying the operation of the discretion under section 113. The sheriff completely ignored the admitted averment at answer 6 that the second defender had resided in the property as a family home for nearly 38 years. That was a statutory circumstance to which regard required to be had (section 113(2) (e)). That was a factor which required to be weighed in the balance as did the averment that the defenders are elderly. The elderly age of the defenders was not mentioned in the balancing exercise. The length of residence and the elderly ages of the defenders were clear averments needing no further specification. The sheriff was wrong to conclude that there were no circumstances advanced on behalf of the defenders and, by extension, that on the whole there was inadequate specification. In relation to prejudice and to public funds, the respondent was referring to his own expenses in administering the sequestration which were not quantified in the pleadings. The failure to state the amount of the administration costs justified the defenders' opposition to the action. The defenders were entitled at proof to challenge the extent of the debts. The issue of delay, referred to in the case of *AIB* v *Clough* was not an issue raised in the respondent's pleadings.

[8] Section 113 is the successor to section 40 of the Bankruptcy (Scotland) Act 1985 ("the 1985 Act"). One of the significant differences in the 2016 Act is the extension of the period during which a sale may be postponed from to twelve months to three years. That was a

matter to which the sheriff did not turn his mind. A three year period (or other period) nullifies issues of unnecessary delay and expense. In any event these issues would be satisfied at the end of the postponement period. The cases of *Clough* and *McLeod* to which the sheriff referred were not authoritative and were highly fact specific, especially with regard to matters of delay and cost to public funds. In the case of *Ritchie* v *Burns* 2001 SLT 1383 there was a seven year delay coupled with serious non co-operation by the debtor. Even then, the Lord Ordinary granted a postponement of some six months.

[9] In the course of argument, counsel accepted that the debts owing by the debtor had been the subject of adjudication by the trustee. The adjudication was the subject of an appeal which was refused. However, debts remain relevant to resources and the amount of the debts might well be a factor for the sheriff to weigh in the balance when considering whether to grant a postponement.

[10] Counsel for the defenders informed us that he had available a minute of amendment ready to lodge. However, he did not move us to grant the defenders leave to amend.

Submissions for the pursuer

[11] Although the solicitor for the pursuer did address us in relation to the matter concerning the missing pleas-in-law we do not think it is necessary to expand on what we said above. He conducted the debate which proceeded upon the basis that there were pleas in law for the defenders. The matter was a minor oversight of which nothing of substance was made on the day.

[12] In relation to the substantive matter concerning the application of section 113, the starting point was that the pursuer has an absolute right to insist upon division and sale of the subjects (*Upper Crathes Fishing Ltd* v *Bailey's Executors*). The consent of the second

defender to the sale of the subjects was required which failing the authority of the sheriff. The list of enumerated factors set out in section 113(2) which the court is to take into account is not exhaustive. The court is to have regard to all of the circumstances. Adopting the opinion of Sheriff Stephen in *Clough*, it was up to the defenders to place before the court such averments of fact which are material and which they wish the court to have regard to. The defenders' pleadings fall well below what is required to plead a relevant case in terms of section 113. The sheriff was therefore correct to reach the decision that he did. In relation to the specific arguments for the defenders, the period of the defenders' residence was not a positive averment on their behalf but merely a general admission of a number of averments made by the respondent in article 6. If the defenders wanted the court to take into account the period of residence in the subjects they ought to have made a positive averment to that effect, supported by further averments setting out the relevance of this factor to enable the sheriff to give proper consideration to such a factor and balance it against the competing factors (*McLeod's Trustees* v *McLeod)*. Their averment of residence for 38 years is not sufficient. As there was no dispute about the period of residence, there was no requirement to hear any evidence on it. Furthermore the issue of residency was one to balance against other interests, such as those of the creditors and the need to complete sequestrations expeditiously. The party relying on section 113 is still under an obligation to aver relevant factors. The pursuer is entitled to fair notice of the case which he requires to meet. The defenders' pleadings fall far below what would reasonably be expected of a party in order to plead a relevant and specific case. The defenders did not present the sheriff with any relevant factors which, had matters been allowed to proceed to proof, either taken together or on their own, were sufficient to have the sheriff find in their favour. The sheriff did not ignore the period of the defenders' residence.

[13] In relation to debts, the pursuer had averred the amounts of the debts owed by the first defender. If the defenders wanted to dispute that figure it was incumbent upon them to make appropriate averments of their own as to the amount of the debts. The defenders made no averments about the extent of the debts and the possibility of obtaining a loan to meet the debts. It was always accepted that there was a debt; that the subjects were the only asset in the sequestration; and that it would need to be sold. The defenders gave no details on record as to the defenders and their son, particularly in relation to health.

[14] In relation to the delay and the cost of public funds the sheriff was correct in asserting the need to balance the competing interests of the defenders, the creditors and the public interest that sequestrations are dealt with properly and effectively without undue delay and without unnecessary cost to public funds. At no time was it suggested that the first defender's sequestration had taken an excessive period of time. The sheriff was merely making the point that sequestrations should be dealt with properly and effectively. If there is no good reason for delaying the progress of a sequestration it should not be delayed. The case of *AIB* v *Clough,* although not binding, contained a correct statement of the law.

Decision

[15] As to the argument for the defenders concerning the record and the missing pleas-in-law we can be brief. We were referred to various authorities as to the status of the record which we need not set out. In short the matter was one of administrative error. It was minor. There were pleas in law in the principal defences. It did not feature on the day of the debate to any material degree. It is not even recorded in the sheriff's judgement. There was no prejudice to either party. However regrettable, it was not a significant issue. We reject this ground of appeal.

[16] As section 113 is key to resolution of this matter it is necessary to set out the relevant parts thereof:-

> "113 **Power of trustee in relation to debtor's family home**
> (1) Before the trustee in the sequestration…sells or disposes of any right or interest in the debtor's family home [the trustee] must-
> (a) obtain the relevant consent, or
> (b) where unable to obtain that consent, obtain the authority of the sheriff in accordance with subsection (2) or as the case may be (3)
> (2) where [the trustee] requires to obtain the authority of the sheriff in terms of subsection (1)(b), the sheriff, after having regard to all the circumstances of the case including –
> (a) the needs and financial resources of the debtor's spouse or former spouse,
> (b) the needs and financial resources of the debtor's civil partner or former civil partner,
> (c) the needs and financial resources of any child of the family,
> (d) the interests of the creditors, and
> (e) the length of the period during which (whether or before the relevant date) the family home was used as a residence by any of the persons referred to in paragraphs (a) to (c)
> may refuse to grant the application or may postpone the granting of the application for such period (not exceeding three years) as the sheriff may consider reasonable in the circumstances or may grant the application subject to such conditions as the sheriff may prescribe.
> (3) Subsection (2) applies to an action brought by [the trustee] –
> (a) for division and sale of, or
> (b) for the purposes of obtaining vacant possession of,
> the debtor's family home as that subsection applies to an application under subsection (1)(b).
> …
> (7) In this section –
> "family home" means any property in which, at the relevant date, the debtor had a right or interest (whether alone or in common with another person) being property which was occupied at that date as a residence –
> (a) by –
> (i) the debtor and the debtor's spouse or civil partner,
> (ii) the debtor's spouse or civil partner,
> (iii) the debtor's former spouse or former civil partner,
> in any of these case with or without a child in the family, or
> (b) by the debtor with a child of the family."

[17] There is no dispute that the trustee is vested in the interest of the first defender in the subjects. It is also not disputed that it is a "family home" within the meaning of section 113(7). In the present case the first defender is a *pro indiviso* proprietor along with

the second defender. In some cases the debtor may be the only heritable proprietor. The section caters for both eventualities (section 113(3)). Different remedies may be required depending upon the debtor's interest. In the present case the first defender is a party to the action of division of sale. His consent to the sale is not required; the right to refuse consent is vested in his spouse, the second defender. He is only a party to the action in relation to crave two which seeks decree of removing against both defenders. It follows that, insofar as his defences relate to the merits of section 113, (they are identical to those of the second defender) such averments are irrelevant. Indeed, standing his limited interest in the action it is doubtful whether his defences can be said to be relevant at all.

[18] Given that the defenders are *pro indiviso* proprietors, at common law a *pro indiviso* proprietor has, subject to any issue of personal bar, the right to insist upon an action of division of sale. So much is clear from the case of *Upper Crathes*. It is perhaps worth recalling that the reasoning which lies behind this is, to paraphrase the Lord President (referring to Paragraph 1079 of *Bell's* Principles), that no one is bound to remain in community with other *pro indiviso* proprietors. Whatever may be the reasons for a *pro indiviso* proprietor in bringing to an end the community of property he shares with others, the reasons for a trustee in sequestration are driven by the vesting of the debtor's interest in property in the trustee and the statutory obligation imposed upon the trustee to ingather and realise the assets of the debtor for the benefit of the creditors. As its heading makes clear, section 113 serves to inhibit the otherwise unfettered right of the trustee at common law to insist upon an action of division and sale of a family home. Section 113(1) provides that before the trustee can sell or dispose of an interest in a family home, he must first secure the consent of the debtor's spouse or civil partner or "obtain the authority of the sheriff". Although not said in terms the authority which the trustee seeks must be to the intended

sale or disposal. The section is buttressed by section 112 which, read short, provides that the trustee must act to realise the debtor's interest in the family home within three years. If he does not it will revert to the debtor.

[19] In deciding whether to grant authority, included within "all the circumstances of the case", section 113(2) (a) to (e) enumerates five factors. We raised with Mr Lloyd the question as to the correct test to be applied by a sheriff in granting authority in such actions. Accepting that the section is not entirely clear he referred us to *McMahon's' Trustee* v *McMahon* 1997 SLT 1090. That case primarily concerned the attachment of conditions to a sale and does not seem to us to assist on this particular point. Whether the decision reached by the sheriff on the application of section 113 is truly one of discretion as opposed to one of judgement was not argued and we reserve our opinion thereon. Returning to the section, the enumerated factors are not exhaustive; there may be other factors which could be relevant such as the behaviour of the debtor, his co-operation and delay in the conduct of the sequestration. That is not to say these factors will always be applicable and the weight to be attached to them in each individual case will vary. The powers of the sheriff are threefold: refuse the application; postpone the granting of the application for such a period not exceeding three years as the sheriff may consider reasonable in the circumstances (an increase from the maximum period of 12 months prescribed in section 40 of the 1985 Act); or grant the application subject to such conditions as the sheriff may prescribe. (For an example of an outright refusal see *Gourlay's Trustee* v *Gourlay* 1995 SLT (Sh Ct) 7 and for an example of the attachment of conditions see *McMahon's' Trustee* v *McMahon*). The qualification as to reasonableness relates to the duration of any postponement. Some of the reasoning for the introduction of section 113 (and its predecessor) is to be found in the arguments of counsel for the trustee in *McMahon's Trustee*. Parliament decided that the

family home of the debtor is an asset which calls for treatment different from other assets of the debtor vested in the trustee. Parliament recognised the potential consequences for the debtor's family of the sale of the family home. It is their interests rather than those of the debtor to which the section is directed. Parliament stopped short of excluding from the pool of assets available to a trustee a family home (sometimes called a "homestead provision"). Title to the family home does not transfer to a spouse/civil partner. Rather, the unfettered realisation of the debtor's interest is subject to the limitations contained in the section.

[20] Of the five factors, (a) (b) (c) and (e) all relate to the interests of the debtor's family members; only (d) relates to those of others, namely the interests of the creditors. Parliament recognised it is not possible, and probably not desirable, to provide a prescriptive list of factors, nor to determine the weight to be given to each of them. There are many permutations which can arise. The ultimate decision is entrusted to the court which must reach a conclusion having regard to the material put before it. In our opinion, read as a whole, the ultimate calculus for the court to undertake is one of reasonableness, judged in the light of the particular facts and circumstances of the case.

[21] Returning to the present case the matter was dealt with by the sheriff, at debate, as one of relevancy in which he applied the well-known formula, no doubt ultimately derived from *Jamieson* v *Jamieson* 1952 SC (H.L.) 44, namely that even if a party proved all of his averments he would be bound to fail. *Clough* and *McLeod* contain similar formulations. In applying that test it is important to be clear what test the court is applying in testing the relevancy of, in this case, the defenders' averments. It is a feature of these cases that the trustee will often have limited knowledge of the personal circumstances of the debtor and his family. It is not for him to look for reasons not to sell the family home. That information is within the knowledge of the debtor or spouse/ civil partner. That said, the trustee may

have information as to the interests of creditors which are relevant to the matter. For example, certain creditors may be particularly deserving and a delay in satisfying their claims may lead to hardship. He may also have knowledge as to the progress of the sequestration and the extent of the debtor's cooperation. However, it is up to a defender to aver with sufficient particularity the facts which the defender says will enable the court, if they are proved, to exercise its powers in terms of section 113(2). Each case is fact specific; the adequacy of averments fall to be tested on their own merits. There have to be sufficient averments to satisfy the court that, if proved, authority to the trustee to sell or dispose of the debtor's interest in the family home should be tempered in one of the ways set out in section 113(2).

[22] Returning to the present case the defenders' averments are very limited, especially in comparison with the averments in *Clough* and *McLeod* which nonetheless were held to be irrelevant. The defenders aver issues as to the amount owing by the first defender; a rather unusual admission as to how long the defenders have resided in the subjects (a fact one would have thought would have been a matter of express averment on the part of the defenders); and the prospect of homelessness for them and for their adult son. There is a vague averment as to debts without any adequate specification as to the significance thereof or the correct quantification. The discharge of the debtor is irrelevant; the trustee is not discharged and his duties continue. Proving those bald averments would not make it unreasonable for the family home to be sold. Nothing else is averred. Given what we have said as to the correct approach to section 113, on no view could these averments amount to a relevant case for the defenders. They are irrelevant both because on their own they do not go far enough and because they give no fair notice to the pursuer of what case he would have to meet. It follows that, in our opinion, the sheriff was correct in the conclusion which

he reached. We shall accordingly refuse the appeal and adhere to the interlocutor of the sheriff. As the pursuer has been successful in relation to the appeal he is entitled to his expenses.