SHERIFF APPEAL COURT

[2024] SAC (Civ) 35
PHD-SQ36-10

Sheriff Principal D C W Pyle
Appeal Sheriff D J Hamilton
Appeal Sheriff I M Fleming

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D C W PYLE

in the appeal in the cause

THE ACCOUNTANT IN BANKRUPTCY, as Trustee of the Sequestrated Estate of PETER DAVIES

Applicant and Appellant

against

KRYSTYNA SIEROSLAWSKI, as Executrix Nominate of the Sequestrated Estate of PETER DAVIES

Defender and Respondent

Applicant and Appellant: Heaney, advocate; Harper Macleod LLP
Defender and Respondent: Party

26 July 2024

Introduction

[1] This is the second opinion this court has issued this year about the proper construction of the statutory provisions that allow for the sale by a trustee in bankruptcy of heritable property owned by a debtor; the first was *GG's Trustee* v *GG* [2024] SAC (Civ) 19. As was stated in that opinion, a trustee has a duty to proceed diligently to protect the interests of creditors: *GG's Trustee* at para [8]. That had not happened in *GG's Trustee*; nor, unfortunately, has the trustee proceeded with diligence in the sequestration of Mr Davies.

Despite being sequestrated in 2010, resolution remains outstanding 14 years later and, even worse, 2 years after he died.

[2] The appellant raised a summary application seeking the consent of the court to sell the debtor's heritable property in terms of section 40(1)(b) of the Bankruptcy (Scotland) Act 1985. That was refused by the sheriff; the appeal is tabled against that refusal.

Background

[3] Peter Davies was sequestrated on 1 October 2010. The appellant was deemed to be vested in his estate on 20 August 2010. Mr Davies's estate included the heritable property at which he resided ("the property"). At that time, he resided at the property with his cohabitee, Ms Sieroslawski, and their son. As at 2010, their son was 26 years old; he is now 40 years old.

[4] The appellant appointed Invocas Business Recovery and Insolvency Limited to act as its agent to administer the sequestration. In June 2012 Invocas raised a summary cause action in the sheriff court to recover possession of the property with a view to selling it to recover funds for the creditors. However, Invocas, for whatever reason, was unaware that Mr Davies lived at the property with Ms Sieroslawski and their son. Mr Davies lodged a defence that the property was a family home. Invocas acknowledged on 17 October 2012 that, if it was to gain the consent of the court to sell the property, it would be necessary for it to abandon the summary cause action and, instead, raise a summary application against Mr Davies under section 40 of the Bankruptcy (Scotland) Act 1985 to seek the court's authority to sell the property. As an alternative, however, Invocas sisted the summary cause action to allow for negotiations between the parties to explore resolution.

[5] During this negotiation period, Mr Davies and Ms Sieroslawski submitted VAT returns to Invocas. As part of the submission of that documentation to Invocas, Mr Davies and Ms Sieroslawski contended that the figure due to HM Revenue & Customs (HMRC), who were Mr Davies's main creditor, was lower than the estimated VAT figure.

[6] Thereafter, it seems Invocas did little, if anything, to expedite matters. There is no evidence that Invocas submitted the information to HMRC to confirm whether they agreed with the figures supplied by Mr Davies and Ms Sieroslawski. The appellant ultimately disposed of Invocas's services and took over administration of the sequestration. It notified Mr Davies of this on 21 July 2017. Thereafter, despite correspondence between parties' solicitors, no resolution was achieved. The appellant proceeded to raise a summary application seeking the authority of the court to sell the property on 14 May 2019. The existing summary cause action that had been raised in 2012 was abandoned on 29 January 2020.

[7] Following sundry procedure, a debate was fixed. Mr Davies argued that the property had re-vested in him due to the failure of the appellant to re-register an inhibition over the property in 2016. The sheriff's judgment following that debate is reported in *Accountant in Bankruptcy* v *Davies* 2022 SLT (Sh Ct) 136. The sheriff repelled Mr Davies's preliminary pleas-in-law and fixed a proof to determine whether the court's consent to sell the property should be granted.

[8] Not long thereafter, Mr Davies's health began to fail. The action was sisted initially pending the preparation of a power of attorney for him. However, Mr Davies died before that was finalised. Ms Sieroslawski, now the respondent in this appeal, was appointed executrix of his estate. Following further adjustment of the pleadings, the proof proceeded on 10 August 2023.

[9] Only one witness was led in evidence by the appellant: David Crawford, the employee of the appellant dealing with the sequestration. No evidence was led by the respondent. A joint minute was lodged by the parties. There were two affidavits lodged in process by the respondent: one by the late Mr Davies and another by the respondent. However, neither was adopted nor spoken to.

The sheriff's judgment

[10] The sheriff refused the summary application and granted decree of absolvitor. She determined that the sale of the property was not justified. Her main basis for doing so was that the appellant was unable to state a precise figure as to the indebtedness of Mr Davies's estate. In the absence of confirmation of the debt owed, the sheriff considered the summary application was premature. The sheriff was reluctant to level criticism against a public official, such as the appellant, but she was baffled by the conduct of the sequestration. By the time of the proof, the appellant had had 13 years to calculate the debt owed. Standing his failure to do so, she refused the summary application and awarded the expenses to the respondent.

[11] In reaching her determination, the sheriff concluded that she could not consider the evidence contained within the affidavits lodged by the respondent as they had not been adopted or otherwise led in the evidence.

Legislation

[12] The relevant parts of the Bankruptcy (Scotland) Act 1985 are as follows:

"**Section 31 – Vesting of estate at date of sequestration**

(1) Subject to section 33 of this Act… the whole estate of the debtor shall, by virtue of the trustee's appointment, vest in the trustee as at the date of sequestration for the benefit of the creditors."

"**Section 39A – Debtor's home ceasing to form part of sequestrated estate**

(1) This section applies where a debtor's sequestrated estate includes any right or interest in the debtor's family home.
(2) At the end of the period of 3 years beginning with the date of sequestration the right or interest mentioned in subsection (1) above shall—
  (a) cease to form part of the debtor's sequestrated estate; and
  (b) be reinvested in the debtor (without disposition, conveyance, assignation or other transfer).
(3) Subsection (2) above shall not apply if, during the period mentioned in that subsection, —
  (a) the trustee disposes of or otherwise realises the right or interest mentioned in subsection (1) above;
  (b) the trustee concludes missives for sale of the right or interest;
  (c) the trustee sends a memorandum to the keeper of the register of inhibitions under section 14(4) of this Act;
  (d) the trustee registers in the Land Register of Scotland or, as the case may be, records in the Register of Sasines a notice of title in relation to the right or interest mentioned in subsection (1) above;
  (e) the trustee commences proceedings—
    (i) to obtain the authority of the sheriff under section 40(1)(b) of this Act to sell or dispose of the right or interest;
    (ii) in an action for division and sale of the family home; or
    (iii) in an action for the purpose of obtaining vacant possession of the family home;
  (f) the trustee and the debtor enter into an agreement such as is mentioned in subsection (5) below;
  (g) the trustee has commenced an action under section 34 of this Act in respect of any right or interest mentioned in subsection (1) above or the trustee has not known about the facts giving rise to a right of action under section 34 of this Act, provided the trustee commences such an action reasonably soon after the trustee becomes aware of such right…
(6) If the debtor does not inform the trustee or the Accountant in Bankruptcy of his right or interest in the family home before the end of the period of 3 months beginning with the date of sequestration, the period of 3 years mentioned in subsection (2) above—
  (a) shall not begin with the date of sequestration; but

(b) shall begin with the date on which the trustee or the Accountant in Bankruptcy becomes aware of the debtor's right or interest.

(7) The sheriff may, on the application of the trustee, substitute for the period of 3 years mentioned in subsection (2) above a longer period—
(a) in prescribed circumstances; and
(b) in such other circumstances as the sheriff thinks appropriate…

(9) In this section, '*family home*' has the same meaning as in section 40 of this Act."

"**Section 40 – Power of trustee in relation to the debtor's family home**

(1) Before the trustee or the trustee acting under the trust deed sells or disposes of any right or interest in the debtor's family home he shall—
(a) obtain the relevant consent; or
(b) where he is unable to do so, obtain the authority of the sheriff in accordance with subsection (2) below.

(2) Where the trustee or the trustee acting under the trust deed requires to obtain the authority of the sheriff in terms of subsection (1)(b) above, 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;
(aa) the needs and financial resources of the debtor's civil partner or former civil partner;
(b) the needs and financial resources of any child of the family;
(c) the interests of the creditors;
(d) the length of the period during which (whether before or after the relevant date) the family home was used as a residence by any of the persons referred to in paragraphs (a) to (b) above, may refuse to grant the application or may postpone the granting of the application for such period (not exceeding 3 years) as he may consider reasonable in the circumstances or may grant the application subject to such conditions as he may prescribe.

(3) Subsection (2) above shall apply—
(a) to an action for division and sale of the debtor's family home; or
(b) to an action for the purpose of obtaining vacant possession of the debtor's family home, brought by the trustee or the trustee acting under the trust deed as it applies to an application under subsection (1)(b) above and, for the purposes of this subsection, any reference in the said subsection (2) to that granting of the application shall be construed as a reference to the granting of decree in the action.

(3A) Before commencing proceedings to obtain the authority of the sheriff under subsection (1)(b) the trustee, or the trustee acting under the trust deed, must give notice of the proceedings to the local authority in whose area the home is situated.

(3B) Notice under subsection (3A) must be given in such form and manner as may be prescribed by the Scottish Ministers.

(4) In this section—
(a) '*family home*' means any property in which, at the relevant date, the debtor had (whether alone or in common with any other person) a right

or interest, being property which was occupied at that date as a residence by the debtor and his spouse or civil partner or by the debtor's spouse or civil partner or former spouse or civil partner (in any case with or without a child of the family) or by the debtor with a child of the family;

(b) *'child of the family'* includes any child or grandchild of either the debtor or his spouse or civil partner or former spouse or civil partner, and any person who has been brought up or accepted by either the debtor or his spouse or civil partner or former spouse or civil partner as if he or she were a child of the debtor, spouse or civil partner or former spouse or civil partner whatever the age of such a child, grandchild or person may be;

(ba) '*local authority'* means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c. 39);

(c) *'relevant consent'* means in relation to the sale or disposal of any right or interest in a family home—

(i) in a case where the family home is occupied by the debtor's spouse or civil partner or former spouse or civil partner, the consent of the spouse or civil partner, or, as the case may be, the former spouse or civil partner, whether or not the family home is also occupied by the debtor;

(ii) where sub-paragraph (i) above does not apply, in a case where the family home is occupied by the debtor with a child of the family, the consent of the debtor; and

(d) *'relevant date'* means the day immediately preceding the date of sequestration or, as the case may be, the day immediately preceding the date the trust deed was granted."

"**Section 49 – Adjudication of claims**

(1) At the commencement of every meeting of creditors (other than the statutory meeting), the trustee shall, for the purposes of section 50 of this Act so far as it relates to voting at that meeting, accept or reject the claim of each creditor.

(2) Where funds are available for payment of a dividend out of the debtor's estate in respect of an accounting period, the trustee for the purpose of determining who is entitled to such a dividend shall, not later than 4 weeks before the end of the period, accept or reject every claim submitted or deemed to have been re-submitted to him under this Act; and shall at the same time make a decision on any matter requiring to be specified under paragraph (a) or (b) of subsection (5) below.

(2A) On accepting or rejecting, under subsection (2) above, every claim submitted or deemed to have been re-submitted, the trustee shall, as soon as is reasonably practicable, send a list of every claim so accepted or rejected (including the amount of each claim and whether he has accepted or rejected it) to—

(a) the debtor; and

(b) every creditor known to the trustee.

(3) If the amount of a claim is stated in foreign currency the trustee in adjudicating on the claim under subsection (1) or (2) above shall convert the amount into

sterling, in such manner as may be prescribed, at the rate of exchange prevailing at the close of business on the date of sequestration.

(4) Where the trustee rejects a claim, he shall forthwith notify the creditor giving reasons for the rejection.

(5) Where the trustee accepts or rejects a claim, he shall record his decision on the claim specifying—

(a) the amount of the claim accepted by him,

(b) the category of debt, and the value of any security, as decided by him, and

(c) if he is rejecting the claim, his reasons therefor.

(6) The debtor or any creditor may apply to the Accountant in Bankruptcy for a review of—

(a) the acceptance or rejection of any claim, or

(b) a decision in respect of any matter requiring to be specified under subsection (5)(a) or (b).

(6A) The debtor may make an application under subsection (6) only if the debtor satisfies the Accountant in Bankruptcy that the debtor has, or is likely to have, a pecuniary interest in the outcome of the review.

(6B) An application under subsection (6) must be made—

(a) in the case of a review relating to an acceptance or rejection under subsection (1), before the expiry of the period of 14 days beginning with the day of that decision, and

(b) in the case of a review relating to an acceptance or rejection under subsection (2), before the expiry of the period of 28 days beginning with the day of that decision.

(6C) If an application under subsection (6) is made, the Accountant in Bankruptcy must—

(a) take into account any representations made by an interested person before the expiry of the period of 21 days beginning with the day on which the application is made, and

(b) confirm, amend or revoke the decision before the expiry of the period of 28 days beginning with the day on which the application is made.

(6D) The debtor or any creditor may appeal to the sheriff against a decision by the Accountant in Bankruptcy under subsection (6C)(b) before the expiry of the period of 14 days beginning with the day of the decision.

(6E) The debtor may appeal under subsection (6D) only if the debtor satisfies the sheriff that the debtor has, or is likely to have, a pecuniary interest in the outcome of the appeal.

(7) Any reference in this section to the acceptance or rejection of a claim shall be construed as a reference to the acceptance or rejection of the claim in whole or in part."[1]

[1] There are three versions of these sections, depending upon the period which is relevant, but for the purposes of this appeal nothing turns on that.

Submissions for the appellant

[13] The appellant did not receive a fair hearing. Fairness demanded that each party be afforded the chance to comment on the evidence and submissions made by the other. Party litigants are to be given no special advantages over those who are represented: *Barton* v *Wright Hassall LLP* [2018] 1 WLR 1119 at para [18]; and *AW Applicant* [2018] CSIH 25 at paras [13] - [15].

[14] The sheriff's findings in fact were not supported by the evidence. The only oral evidence she heard was from Mr Crawford. Certain matters were admitted in the pleadings. There was a joint minute in which certain facts were agreed. Some documents lodged were agreed to be "true copies of the documents they bear to be". However, there was no agreement that what was contained in the documents lodged was either true or accurate.

[15] The sheriff found that the administration of the sequestration was chaotic. However, the basis for that was not elaborated upon. During cross-examination Mr Crawford was not asked any questions by the respondent regarding the matters of which the sheriff was subsequently critical; nor were any of the respondent's productions put to him. If the respondent sought a finding as to the manner in which the sequestration had been conducted, fairness demanded that questions regarding the conduct of the sequestration ought to have been put to him: *Griffiths* v *TUI (UK) Ltd* [2023] 3 WLR 1204 at para [42].

[16] On the other hand, the sheriff found that the respondent created a very positive impression as a truthful person acting with integrity, even though she did not give evidence from the witness box. The appellant was afforded no opportunity to cross-examine her. Insofar as the findings in fact were drawn from productions, none of the documents referred to by the sheriff in her judgment was the subject of oral evidence. If the sheriff intended to make findings in fact on the basis of documents adverse to the interests of the appellant, she

ought to have invited further submissions from parties. Her failure to do so was an error of law: Macphail, *Sheriff Court Practice* (4th ed, 2022), para [17.13].

[17] The sheriff's primary reason for refusing the application was that the debt or its extent was not established. The sheriff failed to take into account the fact that the sequestration had already been granted. The dispute was about the amount owed, not the fact that the debt was owed in the first place. There is a statutory process of adjudication of claims on a bankrupt's estate under section 49 of the 1985 Act; however, in order for the quantification of the bankrupt's debt to begin, the appellant had to be placed in funds: section 49(2) of the 1985 Act. That meant that the property had to be first sold before any adjudication could proceed. As such, any concern over the debt being unquantified was not relevant. Counsel referred the court to the statement of affairs prepared by the appellant contained in the Appendix which quantified the debt, although he subsequently accepted that he was bound by the sheriff's finding in fact 18 that the debt due to the creditors, including HMRC, was less than contained in the statement of affairs.

[18] The appellant noted that the factors the sheriff relied upon in refusing the summary application were: (i) unexplained delay; (ii) hardship (which was not spoken to in evidence): (iii) the appellant's failure to administer the sequestration in an efficient and expeditious manner; and (iv) the appellant's attitude to settlement.

[19] The factors relied upon by the sheriff were not of a kind specifically listed in section 40(2) of the 1985 Act. As a matter of statutory interpretation it could be inferred that section 40(2) was intended to prevent hardship through hasty eviction of a family unit from their home whilst not unduly prejudicing creditors. That statutory discretion was not unfettered; it must be exercised with the statutory purpose in mind. The factors referred to by the sheriff were not relevant to that statutory purpose.

[20] The respondent had been favoured even though she herself was not a dependant contemplated as being entitled to protection under section 40(2). The only dependant thus entitled was the parties' son. Although he was their child, he was an adult and he worked in London.

[21] The sheriff had used the power to refuse the application as a means: (i) to force the appellant into a settlement with the respondent; and (ii) to discipline the appellant for their management of the sequestration. Those were illegitimate purposes.

[22] The consequence of the refusal of the application was that the sequestration process was left in limbo. The property remained vested with the appellant. He is unable to sell the asset for the benefit of the creditors. Statutory interest continues to accrue on the debts of the estate. Moreover, the sheriff failed to acknowledge that the respondent and her son had been able to live in the property for 14 years, whereas the creditors continue to await payment.

[23] The sheriff's decision caused major damage to the creditor's interests. That was not a reasonable exercise of her discretion: *McMahon's Trustees* v *McMahon* 1997 SLT 1090 at 1096F; and *Jackson* v *Dwyer*, unreported, 16 August 2013, at para [20].

[24] If the sheriff's determination was held by this court to be correct, then, at the very least, the court ought to recall her interlocutor to the extent of altering the disposal from decree of absolvitor to decree of dismissal.

[25] In the event the appeal was allowed, the initial position of the appellant was to seek the expenses of process from the date of the death of Mr Davies to the present date. However, counsel subsequently altered his position and simply sought a finding of no expenses due to or by.

Submissions for the respondent

[26] The respondent accepted that she had not cross-examined the appellant's witness on certain points. She accepted that this had been an error. She also accepted that she herself had not given evidence, nor had she been cross-examined. However, she submitted that the appeal should be refused. She made reference to the many procedural hearings prior to the proof, as well as a written document prepared by her for proof as to the evidence she relied upon. That was evidence which the sheriff could rely upon.

[27] She submitted that the maladministration of the sequestration by the appellant was a relevant factor for the sheriff to take into account, as was the fact that the appellant had failed to establish, as a matter of fact, the level of debt owed was that contained in the statement of affairs. Mr Davies and the respondent had made many attempts to try to confirm the figure owed and resolve the sequestration, all to no avail. The respondent agreed with sheriff's finding in fact 18 as to the level of debt owed. However, she was not in a position to pay that figure on behalf of the estate.

[28] In the event the appeal was to be allowed, she submitted that this court should have regard to the affidavits in determining the application. Due to personal circumstances, she did not wish for the matter to be remitted to the sheriff, as that would cause yet further delay.

Capacity of the respondent

[29] Prior to hearing the substantive appeal, the court was addressed on the capacity of the respondent to appear. She had not formally entered process by way of a motion and minute of sist. At no point between the death of Mr Davies and the appeal calling had the

appellant made any attempt to remedy the position. For understandable reasons, the respondent, as a party litigant, did not understand that she had to do so.

[30] At proof, the sheriff was unclear as to what capacity respondent had managed to enter proceedings; the pleadings had not been adjusted to reflect her involvement. Notwithstanding the lack of formality, the sheriff was content to allow her to appear, particularly as the solicitor for the appellant took no objection.

[31] The lack of formality in resolving the basis upon which the respondent was able to appear is yet another example of how this sequestration has proceeded in a haphazard fashion. Had the appellant made a motion prior to the proof to allow the respondent to be minuted into process as executrix nominate, the issue of capacity would have been resolved.

[32] Our having raised the issue, the appellant duly moved at the Bar to allow the respondent to be admitted as executrix nominate of Mr Davies's estate. She advised that she had no opposition. The motion was duly allowed and the appeal proceeded.

Decision

[33] In the absence of any evidence being led by the respondent at proof, it is difficult to understand what evidential basis the sheriff had for the findings in fact she made. Mr Crawford's evidence did not provide a basis for the findings in fact. We agree with the appellant that it is unclear whether her findings in fact were based on the evidence led by the appellant or the documentation lodged in process which had not been spoken to. Although the sheriff did have affidavits lodged by the respondent available to her, she considered she was not in a position to consider those, as they had not been spoken to nor adopted by Mr Davies (due to his earlier death) nor the respondent.

[34] In *Griffiths* v *TUI (UK) Ltd* [2023] 3 WLR 1204, Lord Hodge explained that there is a long-standing general rule in civil cases that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point if he or she wishes to submit to the court that the evidence should not be accepted. The basis for the rule was explained by *Phipson on Evidence*, 20th ed (2022) at paragraph 12-12: *Griffiths* at para [42] - [43].

[35] Applying that rule here, if the appellant wanted to submit to the sheriff that the respondent's defence should not be accepted, it had to challenge it by putting questions to her in cross-examination. As she did not give parole evidence, the appellant was not afforded that opportunity. The procedure adopted was unfair to the appellant. The appeal, accordingly, has to be allowed on the first, second and third grounds of appeal.

[36] The fourth ground of appeal concerns whether the appellant required to quantify the debt owed to Mr Davies's creditors at proof. The sheriff considered it was required; the appellant did not. Unlike the appellant, we consider that, in the circumstances of this summary application, the appellant did require to quantify the debt owed. That was because the respondent challenged the sums due. During the appeal hearing, counsel for the appellant initially stated that the total debt due to creditors was £61,357. However, standing the sheriff's finding in fact 18, counsel for the appellant conceded that the debt was £24,162.14. Therefore, the defence had led to a net reduction of the debt found to be due to the creditors. What that shows is that, in some circumstances, which would doubtless also include a resolution of settlement of the expenses of the sequestration, a defence to quantification of the debt of the debtor may open the door to resolution of the summary application or, if granted, for the sale of the property to be postponed to allow

payment. If the debt is lower than was originally estimated and the debtor can pay it, that is a relevant factor for the sheriff to consider in whether or not to grant the application.

[37] In his fifth and sixth grounds the appellant submits that the sheriff took into account irrelevant considerations and used her power to refuse the application to punish the appellant for the manner in which they had conducted the appeal. The appellant contends that certain factors referred to by the sheriff, such as the unexplained delay, hardship and the incompetent manner in which the appellant progressed the sequestration were not relevant to the determination of whether the summary application should be granted.

[38] This court has previously considered the terms of section 113(2) of the Bankruptcy (Scotland) Act 2016, the successor provision to section 40(2) of the 1985 Act. In *Accountant in Bankruptcy* v *Brooks* [2020] SAC (Civ) 15 at paras [19] - [20] it stated the following:

> "…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...
>
> 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."

[39] Those observations apply with equal relevancy to section 40(2) of the 1985 Act. The question, then, is whether the sheriff's judgment was reasonable based on the particular facts and circumstances of this summary application. While the delay in the sequestration and its management are deserving of criticism, the test before the sheriff was to consider the interests of the creditors as against those of the dependant and the prejudice they would

suffer should the property being sold. By considering irrelevant factors, the sheriff erred in law and her judgment cannot be considered to be reasonable; the appeal must therefore also be allowed on the fifth and sixth grounds.

[40] Standing that the appeal has been allowed, the appellant's seventh ground - the criticism of the granting of absolvitor rather than dismissal - does not arise.

Further procedure

[41] In the event the appeal was to be allowed, we asked parties whether the matter ought to be remitted to the sheriff for a new diet of proof. Neither party favoured that course. The appellant was keen to progress matters for the creditors. The respondent wished to avoid a remit as well; the bank which holds a standard security over the property was itself considering initiating proceedings to recover the property to satisfy mortgage arrears. She required a resolution in early course as a result. (It was not explained why this heritable creditor was not mentioned in the statement of affairs.)

[42] We asked whether the affidavits lodged by the respondent should be taken into account were any fresh appraisal required. The respondent requested that they should be. No opposition was taken to that by the appellant.

[43] As the appeal has been allowed, we will accede to the parties' wishes and consider the matter anew. Notwithstanding the lack of opposition, we consider below what regard, if any, is to be made of the respondent's affidavits.

Affidavits of the respondent

[44] The sheriff did not consider the affidavits lodged in 2021 by Mr Davies and the respondent, as neither was spoken to nor adopted in evidence. We consider the sheriff erred in that regard.

[45] As is noted in Macphail, *Sheriff Court Practice,* 4th ed (2022), at para [15.43], there are a number of conflicting decisions on whether the court has a discretion to refuse to accept affidavit evidence: cf *Ebrahem* v *Ebrahem* 1989 SLT 808; *Smith* v *Alexander Baird Ltd* 1993 SCLR 563; *McVinnie* v *McVinnie* 1995 SLT (Sh Ct) 81; *Lobban* v *Philip* 1995 SCLR 1104 and *Glaser* v *Glaser* 1997 SLT 456. Due to the passage of time and the changing of court rules, the editors of Macphail considered that these authorities had been superseded. As they note:

> "If any part of such evidence is of doubtful competency or relevancy it should be admitted under reservation of all such questions. The weight to be placed on such evidence is a matter for the court taking into account the difficulties in assessing the credibility and reliability of the maker of the statement and the fact that the evidence cannot be the subject of cross examination. Where there are contradictions between affidavits and no other evidence to compel a conclusion one way or the other, no conclusion can be drawn by the court…"

[46] As a consequence, we consider the sheriff erred in law in not considering the affidavits. Self-evidently, Mr Davies could not be cross-examined as he died prior to the proof. As it happened, the respondent was not cross-examined on her affidavit either. Those were both matters that the sheriff could take into account in assessing what weight ought to be given to the evidence contained in the affidavits.

[47] Mr Davies's affidavit sets out the chronology of his sequestration. He details his interactions with Invocas and the appellant, setting out the difficulties he faced. Mr Davies states that an offer was made to the appellant on 24 September 2020 for payment of the sum of £13,500 in addition to the sum of £9,837 that had already been paid; a sum total of £23,337 (para [22] of his affidavit). We would note in passing that this offer was only £825.14 short

of what the sheriff held was due in finding in fact 18. Mr Davies also set out his health difficulties. Paras [26] - [27] of his affidavit addressed his son's health difficulties and his need to reside in the property; however, it was acknowledged in the affidavit that his son was then residing in London and working there in a temporary role.

[48] The respondent's affidavit duplicates, in parts, evidence contained in Mr Davies's affidavit. She states that her son's contract had been extended to March 2022; before this court, she advised that her son remained in employment in London, albeit he returns during the holidays to the property and his possessions remain there. His current contract is up for renewal.

[49] As for herself, she advises in her affidavit that were she to be evicted, she would have to leave her job and find alternative employment. Due to the delay in the sequestration being finalised, she will find it difficult to secure her own mortgage to buy another property due to her age. The threat of eviction has affected her health. She advised that she was not in funds to allow her to pay off the net debt of the estate of £24,162.14.

[50] The test under section 40(2) requires the court to consider only the interests of the debtor's spouse, former spouse, civil partner, former civil partner or children - not that of the debtor or any other cohabitee. Nevertheless, in considering the needs of a child of the family, it may be relevant to consider those needs in the context of other occupants of the family home, including a cohabitee of the debtor. There may be circumstances, for example, where "a child" in terms of the Act is in fact a child in the sense of being under 16 years of age and is looked after by a cohabitee of the debtor. Or indeed where "a child" is in fact an adult and receives caring responsibilities from such a cohabitee. Each case will depend upon its own facts and circumstances. But the overall point is that a cohabitee, like the

respondent in this case, is not included in the list of parties whose needs of themselves require to be taken into account.

Determination

[51] We consider that the appellant should be granted authority to sell the property. Although the respondent's son returns to the property intermittently, the fact is that he has now been resident in London for at least 3 years in employment. Even if we considered that the respondent's needs and circumstances of themselves should be taken into account, which we do not, she has been able to reside in the property for a period of 14 years since Mr Davies was sequestrated. Although she has paid the interest payments on the mortgage, she has had the benefit of not having to source alternative accommodation elsewhere and paying for it. In our view, on the evidence available, reasonableness favours the interests of the creditors. The order should therefore be granted.

[52] There was some discussion before us about how the expenses of the sequestration would be assessed. It appears that this exercise is performed by another branch of the appellant's office. We do not know on what basis the assessment is done - it may simply be on a time and lime basis (or time and line basis as is commonly used in more recent times). In the context of the reprehensible conduct of the trustee, we would merely make the observation that the account of expenses should be scrutinised so as to exclude time spent performing tasks which would have been unnecessary if the trustee had discharged his or her duties diligently and with proper dispatch.

Disposal

[53] We allow the appellant's motion to allow the respondent to be sisted as a party *qua* executrix nominate of Mr Davies's estate. Thereafter, we allow the appeal; recall the sheriff's interlocutors of 22 December 2023 and 17 January 2024; grant the first plea-in-law of the appellant; repel the second plea-in-law of the respondent; and grant the second crave of the appellant. We find no expenses due to or by.