SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY AT DUMFRIES

[2019] SC DUM 16

DUM-SQ2-19

NOTE BY SHERIFF GEORGE JAMIESON

in the cause

SCOTTISH WATER BUSINESS STREAM LIMITED

Petitioner

against

MERVYN McMATH

Respondent

Act: Donnelly

Dumfries 23 January 2019

The sheriff, having further considered the foregoing petition, together with the productions, Grants warrant to cite the debtor by serving a copy of the petition, this warrant and a citation in Form 6.3-A and Appoints the debtor, if so advised, to appear within the Sheriff Court at Dumfries, Sheriff Clerk's Office, Buccleuch Street, Dumfries, DG1 2AN on 14 February 2019 at 10:00 to show cause why sequestration should not be awarded.

NOTE

[1] I have written this Note at the request of Mr Donnelly, petitioner's agent.

[2] On 21 January 2019, I heard from him in chambers on whether or not I should grant warrant to cite the debtor in light of Sheriff Murray's note in *Angus Council, Petitioners* [2018] SC FOR 65, 2019 SLT (Sh Ct) 14.

[3] Although that decision was in the context of summary warrant procedure, it appeared to me it might have wider implications for sequestration practice – I read the decision as holding *inter alia* that a charge for payment has to be for a sum of £3,000 or more (see paragraphs [17] – [19] of Sheriff Murray's judgment), otherwise it is not competent for the court to grant warrant to cite the debtor.

[4] My concern was that, in this case, the sum charged for was £1,997.36 and the debt referred to in the creditor's oath was £3,539.22, the increase being vouched by unpaid invoices issued subsequent to the sums due in terms of the charge for payment.

Submissions

[5] Mr Donnelly sought to distinguish this case from *Angus Council, Petitioners* on three grounds: (1) the current petition founded on apparent insolvency of the debtor constituted by sums due under a decree, followed by the expiry of a charge for payment, whereas *Angus Council, Petitioners* concerned summary warrants; (2) *Angus Council, Petitioners* involved a "conflating" of the ideas of apparent insolvency and "qualified creditor"; and (3) whether the petitioner's submissions were entirely "novel" as suggested by Sheriff Murray in *Angus Council, Petitioners*.

[6] The first of these three submissions constitutes an obvious difference between *Angus Council, Petitioners* and the present case and it was therefore unnecessary for Mr Donnelly to further elaborate this point.

[7] In regard to his second submission, Mr Donnelly referred me to section 2 of the Bankruptcy (Scotland) Act 2016 concerning the sequestration of the estate of a living debtor. Section 2(1)(b)(i) allowed for such sequestration (1) on the petition of a qualified creditor, if

(2) the debtor is apparently insolvent. He then referred me to the provisions of the 2016 Act dealing with these two concepts.

[8] As to (1), "qualified creditor" was defined in section 7(1) of the Act as a creditor who, at the date of the presentation of the petition, was a creditor of the debtor in respect of relevant debts which amounted to not less than £3,000.

[9] "Relevant debts" were defined in section 7(2) as including liquid and illiquid debts whether secured or unsecured. The amount of those debts was to be ascertained by reference to *inter alia* paragraph 1(1) of schedule 2 to the 2016 Act (section 7(4)) which states that a creditor is entitled to claim "the accumulated sum of principal and any interest which is due on the debt at the date of sequestration". "Date of sequestration" in relation to a creditor's petition means the date on which the sheriff grants warrant to cite under section 22(3) of the Act (section 22(7)(b)).

[10] As to concept (2), "apparent insolvency" was defined in section 16 of the Act and included the situation where a duly executed charge for payment of a debt was served on the debtor and the days of charge had expired without payment (section 16(1)(f)).

[11] Mr Donnelly accordingly submitted the concept of "qualified creditor" and that of "apparent insolvency" were quite distinct from each other. There was no requirement in section 16 of the 2016 Act that the charge for payment had to be for a minimum sum of £3,000; and there was *prima facie* evidence in this case, in the form of the decree and subsequent invoices, suggesting the petitioner was a "qualified creditor" as the total amount of the debts was over £3,000.

[12] Mr Donnelly then moved on to his third submission, distinguishing *Angus Council, Petitioners* from the present case – that of novelty. In this regard, he referred to the case of *Arthur v HMA* 1993 JC 57. Albeit a criminal case, it considered the concept of "accumulated

sum" in what is now paragraph 1(1) of schedule 2 to the 2016 Act. This was relevant to whether the first accused in that appeal had been correctly convicted of offences under the Bankruptcy (Scotland) Act 1985.

[13] This depended on whether his estates had been properly sequestrated under the provisions of that Act. The debt for which he had been sequestrated was constituted by (a) a decree for less than the amount in respect of which the creditor would be regarded as a "qualified creditor"; and (b) two other debts, which took the total amount of debts over that figure. The High Court found that the sheriff had been "well founded in holding" there had been sufficient evidence before the jury to justify the appellant being convicted of the charges (page 60D).

[14] Mr Donnelly then proceeded to make two supplementary submissions.

[15] The first of these was that section 22(3) of the Bankruptcy (Scotland) Act 2016 obliged the court to grant warrant to cite the debtor where it was *prima facie* presented to the court in accordance with the provisions of the 2016 Act. This subsection states that on the presentation to the court of a creditor's petition for sequestration the court *must* grant warrant to cite the debtor.

[16] Secondly, Mr Donnelly acknowledged that a petition for sequestration was meant to be a summary process and therefore if at the calling of the petition the debtor disputed the subsequent invoices, for which no decree for payment had been granted, the court might not be able to conclude that the petitioner was a "qualifying creditor" after all.

[17] He referred, in this regard, to section 13(6) of the Act. This states that where, before sequestration is awarded, it becomes apparent that a petitioning creditor was ineligible to petition, then "that person must withdraw"; accordingly, in those circumstances, the petitioner would be obliged to withdraw the petition at that later stage.

Decision

[18] In my opinion, Mr Donnelly's submissions were very persuasive in regard to distinguishing *Angus Council, Petitioners* from the present case. In particular, Sheriff Murray does not appear to have been referred to *Arthur v HMA*, which suggests there is no incompetency in the court awarding sequestration on the basis of an expired charge founded on a decree for payment by the debtor of a sum less than £3,000 and accumulated debts that take the sum to or over £3,000.

[19] The difficulty lies, in my respectful opinion, not in granting warrant to cite the debtor, but in the creditor establishing it is a qualified creditor where the part of the debt constituted by decree does not exceed £3,000. In this case there was *prima facie* evidence of a total debt in excess of £3,000 based on the decree, the subsequent invoices and the creditors' oath.

[20] The value to the creditor in having a decree constituting a debt of £3,000 or more is the debtor cannot challenge the amount of the debt in the sequestration process where the charge for payment has expired. It would give the petitioner a more certain basis for obtaining an award of sequestration.

[21] If , however, in circumstances where the creditor avers it is a qualifying creditor, has not constituted the whole debt by decree, and the debtor appears and challenges subsequent invoices and therefore disputes the creditor is a "qualifying creditor", the petitioner would be bound to withdraw the petition under section 13(6) of the Act, and the court to refuse sequestration.

[22] In my opinion, I am not entitled to refuse warrant to cite for the third of the reasons stated by Sheriff Murray in *Angus Council, Petitioners*. I note that in this case, the petition is presented with the usual productions and averments expected of such a petition; it is

presented within the relevant four month period; all productions are *prima facie* regular; the respondent is within the jurisdiction of the court; the petition is *ex facie* in the statutory form; and a copy has been sent to the Accountant in Bankruptcy. I have therefore granted warrant to cite.

[23] In doing so, I wish to emphasise that I have not reached a concluded opinion on the issue under debate. As far as I am aware, there was no binding authority of the Sheriff Appeal Court or Inner House that required me to refuse warrant to cite the debtor where the sum in the decree constituting the basis for apparent insolvency was for less than £3,000; the decision in *Arthur v HMA* appears to point in the opposite direction, but this may go against the long established practice referred to by Sheriff Murray in his judgment in *Angus Council, Petitioners*.

[24] In my view, as the matter is not free from doubt, it would not be appropriate to refuse warrant to cite. I say this for two reasons. (1) Having regard to *Fitzpatrick v Advocate General for Scotland* 2004 SLT (Sh Ct) 93), such a decision would preclude the petition being brought into court and prevent the petitioner exercising its article 6 right of access to the court, and (2) having regard to *Davidson v Davidson* (1891) 18 R 884, the petitioner would arguably have no right of appeal against that decision under section 27(4) of the 2016 Act as refusal of a warrant to cite does not amount to refusal of a petition to the court. The point in issue appears to me to be one that goes to the merits of granting the petition and therefore appears to be for consideration at the stage the petition calls before the court (section 22(5), 2016 Act; *cf Secretary of State for Social Security v Ainslie* 2000 SLT (Sh Ct) 35).