SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES AND GALLOWAY AT AIRDRIE

[2019] SC AIR 64

AIR SQ104-18

NOTE BY SHERIFF DEREK O'CARROLL

in the cause

DAVID MOND

Petitioner

against

CRAIG ALEXANDER BOOTH

Respondent

Petitioner: Mr Clair, solicitor; Balfour + Manson LLP
Respondent: Mr Hutchison, solicitor; Malcolm & Hutchison

Airdrie, 25 April 2019

[1] In this Petition, which I heard at the same time as the associated petition by the same petitioner against the wife of the present respondent Lorna Jeanette Booth, AIR SQ 103-18, the petitioner is a trustee for the creditors of the respondent acting under a trust deed originally granted by the respondent in July 2006. The identity of the trustee has changed over the years. The trust deed was originally granted due to the apparent insolvency of the respondent in terms of the Bankruptcy (Scotland) Act 1985. The trust deed grants all the usual powers to the trustee and places the usual duties on the grantor. The current petitioner was appointed trustee in July 2010.

[2] In this petition, the petitioner seeks an award of sequestration of the estate of the respondent, declarator that the estate belongs to the respondent's creditors and the

appointment of the petitioner as trustee. The principal asset in the trust is heritable property belonging to the respondent and his wife (the respondent in the associated action which seeks precisely the same remedies). The basis for the current petition is two-fold. It is said that the debtor has failed to comply with an instruction reasonably given to the debtor by the petitioner for the purposes of the trust deed in terms of section 2(7) of the Bankruptcy (Scotland) Act 2016. It is said that the debtor has failed to respond to any of the petitioner's requests to co-operate with him in the voluntary realisation of equity in the heritable property which is the main asset of the trust. Secondly, and crucially given the basis of the current challenge, it is also averred that it would be in the best interests of the creditors that an award of sequestration should be made. The plea in law is simply that the respondent being apparently insolvent within the meaning of the Bankruptcy (Scotland) Act 2016 and the petitioner, as trustee of the respondent under a trust deed, being entitled to have the respondent's estate sequestrated, the orders craved should be pronounced.

[3] The respondent has lodged answers. He denies having unreasonably failed to comply with instructions or requirements made of him and so on. He seeks a proof on that matter. The position of the petitioner is that standing the terms of the legislation and the averment made by the petitioner that it would be in the best interests of the creditors that an award of sequestration be made, this court is obliged to grant the prayers of the petition without further enquiry into fact into the disputed issue of failure to co-operate, etc. The representatives of the parties were agreed, standing their respective positions, that the court should hear from the parties by way of debate on their respective contentions. The parties were agreed that if I preferred the arguments for the petitioner, I would be obliged to grant the prayers of the petition. Contrariwise, if I found for the respondent, I should fix a proof.

[4] On 21 March 2019, having heard further more detailed submissions from the parties dealing with various questions from the bench and having considered the foregoing petition together with the productions and being satisfied that the petition was presented in accordance with the 2016 Act, that proper citation had been made to the debtor and that the requirements of the 2016 Act had been fulfilled, I granted an award of sequestration against the respondent, appointed the petitioner as trustee and granted the ancillary prayers of the petition. On that day, I issued an *ex tempore* judgement giving my reasons for that decision. Mr Clair, for the petitioner, advised the court that the point at issue was one of some interest not only to his client but also to others in the insolvency profession and that there was a dearth of authority on the point. I was asked if I would write a Note on the matter. This is that Note. I should like to thank the parties' representatives, particularly Mr Clair, for the clarity and helpfulness of their oral and written submissions.

[5] I summarise what I understood to be the respective submissions of the parties as follows.

Submissions by the petitioner

[6] The petitioner's agent Mr Clair commenced his submissions with a detailed analysis of the statutory history to the statutory provisions in question so as to better understand them. By way of background, the Bankruptcy (Scotland) Act 2016 ("the 2016 Act") is, according to its preamble, a consolidation statute. The Legislative Intention Note to the Act states as follows:

> "This Bill consolidates the Bankruptcy (Scotland) Act 1985 (c.66) and subsequent legislation on, or linked to, the topic of bankruptcy….Almost all the law proposed for consolidation is in fact already contained in the 1985 Act because any changes have, more or less consistently (though in stylistically diverse ways), been made by textual amendment. The principal amending statutes were — the Bankruptcy (Scotland) Act

> 1993 (c.6), the Bankruptcy and Diligence etc. (Scotland) Act 2007 and the Bankruptcy and Debt Advice (Scotland) Act 2014 … The existing Scottish law of Bankruptcy is therefore essentially the Bankruptcy (Scotland) Act 1985 as textually amended by other legislation….The inclusion of the words 'to consolidate' in the Long Title make it clear that, in the event of any uncertainty as to the meaning of a provision of any Act resulting from this Bill, a court construing the provision may have recourse to the provision of the 1985 Act (or other enactment) from which it was derived, the presumption being that there was no intention to change the law… One of the primary purposes of consolidating legislation is to make the law clearer and more accessible….The Committee recommends that the Bill, through the consolidation process, should not introduce ambiguity."

[7] Section 22(5) of the 2016 Act provides as follows [emphases in the following excerpts from the legislation are added by me]:

> **"22 When sequestration is awarded**
>
> […]
>
> (5) The sheriff must forthwith award sequestration on that petition on being satisfied—
>
> (a) if the debtor has not appeared, that proper citation has been made of the debtor,
>
> (b) that the petition has been presented in accordance with this Act,
>
> (c) that the provisions of section 13(1) have been complied with,
>
> *(d) that in the case of a petition by a trustee—*
>
> *(i) at least one of the conditions in section 2(7)(a) applies, or*
>
> *(ii) the petition includes an averment in accordance with section 2(7)(b)*, and
>
> (e) that, in the case of a petition by a creditor, the requirements of this Act relating to apparent insolvency have been fulfilled."

Section 2 of the 2016 Act, in turn, provides as follows:

> **"2 Sequestration of estate of living debtor**
>
> (1) The sequestration of the estate of a living debtor is—
> […]
>
> (b) on the petition of—

[…]

(iv) a trustee acting under a trust deed if a condition mentioned in subsection (7) is satisfied.

(7) The conditions mentioned in subsection (1)(b)(iv) are—

(a) that the debtor has failed to comply—

(i) with an obligation imposed on the debtor under the trust deed, being an obligation with which the debtor reasonably could have complied, or

(ii) with an instruction reasonably given to, or requirement reasonably made of, the debtor by the trustee for the purposes of the trust deed, or

(b) that the trustee avers in the trustee's petition that it would be in the best interests of the creditors that an award of sequestration be made."

Section 22(5) of the 2016 Act in nature and effect closely replicates the terms of section 12(3) of the Bankruptcy (Scotland) Act 1985 (as amended) ("the 1985 Act") at the time of its repeal. Section 12(3), as amended, latterly provided as follows:

"12.— When sequestration is awarded

[…]

(3) Where, on a petition for sequestration presented by a creditor or a trustee acting under a trust deed, the sheriff is satisfied—

(a) that, if the debtor has not appeared, proper citation has been made of the debtor;

(b) that the petition has been presented in accordance with the provisions of this Act;

(c) that the provisions of subsection (6) of section 5 of this Act have been complied with;

(d) that, in the case of a petition by a creditor, the requirements of this Act relating to apparent insolvency have been fulfilled; and

(e) that, in the case of a petition by a trustee—

(i) one or more of the conditions in section 5(2C)(a) applies, or

(ii) the petition includes an averment in accordance with section 5(2C)(b),

he shall, subject to subsections (3A) to (3C) below, award sequestration forthwith."

Section 5 of the 1985 Act, as amended, provided as follows:

"5.— Sequestration of the estate of living or deceased debtor.

(1) The estate of a debtor may be sequestrated in accordance with the provisions of this Act.

(2) The sequestration of the estate of a living debtor shall be—

(a) by debtor application made by the debtor, if subsection (2ZA) or (2B) below applies to the debtor; or

(b) on the petition of—

[…]

(iv) the trustee acting under a trust deed if, and only if, one or more of the conditions in subsection (2C) below is satisfied.

(2C) The conditions mentioned in subsection (2)(b)(iv) above are—

(a) that the debtor has failed to comply—

(i) with any obligation imposed on him under the trust deed with which he could reasonably have complied; or

(ii) with any instruction or requirement reasonably given to or made of him by the trustee for the purposes of the trust deed; or

(b) that the trustee avers in his petition that it would be in the best interests of the creditors that an award of sequestration be made."

[8] It was submitted therefore that the nature and effect of the statutory provisions section 22(5)(d) of the 2016 Act and section 12(3)(e) of the 1985 Act, at the time of its repeal, were identical. In particular, there were two distinct routes or bases available to a creditor trustee seeking sequestration: the first being that relating to instruction or requirement or obligation not performed, the second being the making of an averment in the petition that the best interests of the creditor would be satisfied by the making of such an award.

[9] However, that had not been always the statutory position. The equivalent provision in the 1985 Act prior to amendment was different. Prior to its final amendment, section 12(3)(e) of the 1985 Act, provided as follows:

> **"12.— When sequestration is awarded**
>
> […]
>
> (3) Where, on a petition for sequestration presented by a creditor or a trustee acting under a trust deed, the sheriff is satisfied—
>
> […]
>
> *(e) that, in the case of a petition by a trustee, the averments in his petition as to any of the conditions in subsection (2C) of the said section 5 are true,*
>
> he shall, subject to subsections (3A) to (3C) below, award sequestration forthwith."

[10] Whether the provision in section 5(2C)(b) of the 1985 Act actually required proof appears to have always been a moot point. In the unreported case of *Young, Petitioner* [2007] CSOH 194, Lady Paton reserved her position on the matter, noting:

> "[91] Counsel for the petitioner submitted that in terms of section 5(2)(c), 5(2C)(b), and 12(3)(e), all that was required of the court was an assessment whether or not it was true that the petitioner *had averred* in his petition that it would be in the best interests of the creditors that an award of sequestration be made. In the present case, the petitioner makes those averments in paragraph 8 of the petition. However, I reserve my position on the question whether the court is entitled to assess the truth of those averments. As it happens, in this particular case, against the background set out in this Opinion, I consider that the petitioner's averments about the best interests of the creditors are true."

[11] Mr Clair was unable to trace any subsequent reported case dealing with the question on which Lady Paton reserved her position.

[12] Section 12(3)(e) of the 1985 Act was amended by virtue of section 47 of the Bankruptcy and Debt Advice (Scotland) Act 2014 ("the 2014 Act"), which provides:

"47 Petition for sequestration by trustee under trust deed

In section 12(3) of the 1985 Act (conditions for sheriff to award sequestration), for paragraph (e) substitute—

'(e) that, in the case of a petition by a trustee—

(i) one or more of the conditions in section 5(2C)(a) applies, or

(ii) the petition includes an averment in accordance with section 5(2C)(b),'.

Unlike the primary thrust of the 2016 Act, which was a consolidation statute, the preamble to the 2014 Act makes clear that it was primarily legislation designed to amend the terms of the 1985 Act. The Policy Memorandum to the Bankruptcy and Debt Advice (Scotland) Bill provided that the key principles of the Bill were as follows:

"3. The Bill aims to ensure that appropriate, proportionate, debt management and debt relief mechanisms are available to the people of Scotland which are fit for the 21st Century. The Bill contains provisions to support AiB in improving its service underpinned by the following key principles:

- Ensuring that the people of Scotland have access to fair and just processes of debt advice, debt relief and debt management.

- Those individuals who can pay should pay their debts, whilst acknowledging the wide range of circumstances and events that contribute towards financial difficulty and insolvency for both individuals and businesses.

- Securing the best return for creditors by ensuring that the rights and needs of those in debt are balanced with the rights and needs of creditors and businesses.

4. The provision of appropriate debt advice, management and relief should be seen as a 'Financial Health Service', providing rehabilitation to individuals and organisations in relation to their financial pressures. Within the 'Financial Health Service' there will be a focus on individual responsibilities with renewed emphasis on individual debtors' responsibilities to cooperate. There is also mandatory debt advice for all those entering a statutory debt management or debt relief product which will assist in the rehabilitation of individuals going through the bankruptcy process thereby helping them contribute to the economy."

The key principles of the Bill were echoed in the Parliamentary debate on Stage 1 of the Bill on 18 December 2013, where the Minister for Energy, Enterprise and Tourism (Fergus Ewing) stated variously:

> "As paragraph 34 of the policy memorandum says, 'One of the key principles of the Bill is that those who can pay should pay.' (page 25928)….I turn to the Bill's principles. The Bill aims to ensure that appropriate and proportionate debt management and debt relief mechanisms that are fit for the 21st century are available to the people of Scotland. As many members said, including Mr Don, there is a balance to strike between the interests of the creditor and those of the debtor. That has not changed since Goudy's textbook, Meston and the 1985 Act, or in more recent legislation. That balance must be struck. A framework must provide for debt management to allow people to pay their debts and for debt relief for people who cannot pay their debts (page 25972). The main issue is the question of what contribution debtors should make, and the Scottish Government's view is that we are striking the right balance. The proposals that we have set out are designed to ensure that the creditor gets a reasonable turn; that the debtor is treated fairly; that there is provision for payment breaks and variations so that people's changing circumstances can be taken into account; and that, once the bill becomes law, people in Scotland will receive a system of managing debt that is second to none (page 25975)."

[13] The precise reason for the decision of the draftsman to include the amendment to the 1985 Act provided for by section 47 of the 2014 Act is unclear. In the draft Bills attached to the Scottish Law Commission's Consultation Paper on the Consolidation of Bankruptcy Legislation in Scotland in August 2011 and again in their Report on the Consolidation of Bankruptcy Legislation in Scotland in May 2013 (both of which informed the introduction of both the 2014 and 2016 Acts), the wording which formerly found favour in section 12(3)(e) of the 1985 Act had been retained and no recommendations are made in either document for an amendment.

[14] Nor can an explanation be found in the Policy Memorandum to the 2014 Act, which simply notes:

> "304. This section of the Bill relates to the following miscellaneous amendments to the 1985 Act:
>
> […]

> • petition for sequestration by trustee under a trust deed;
>
> […]
>
> 305. The Bill also includes certain minor amendments in schedule 3 to implement in the 1985 Act a number of recommendations from the Scottish Law Commission on the framing of the Act as part of its project in working towards its consolidation.
>
> 306. The intention is to modernise the legislative framework for bankruptcy, and to make these technical amendments which can be reviewed and incorporated as part of a consolidation Bill in due course."

[15] The amendment is similarly referred to simply as a "miscellaneous amendment" at paragraph 283 of the Economy, Energy and Tourism Committee's Stage 1 Report on the Bill. No particular discussion of the amendment provided by section 47 of the 2014 Act can be identified in any of the parliamentary material prior to the passage of the Bill.

[16] Notwithstanding the absence of clear legislative intention from these types of materials, it was submitted that the intention of Parliament was to amend the terms of section 12(3)(e) of the 1985 Act such that section 12(3)(e)(ii) provided the trustee under a trust deed with a particular mechanism to have the debtor's sequestration awarded if, in the sole judgment of the trustee, to do so would be in the best interests of the debtor's creditors. The prior position (that all bases required to be shown to be "true") was clear, which begs the question – why specifically amend the terms of section 12(3)(e) and draw a particular distinction between the first and second bases if nothing had changed and it was still the position that all bases required proof? Parliament must not be presumed to have acted in vain. A distinct change was introduced which must be given effect to.

[17] This construction is supported by the first principle of statutory interpretation that where the meaning of the statutory provision is plain and unambiguous, it ought to receive effect. The terms of section 22(5)(d)(ii) of the 2016 Act (mirroring the effect of section

12(3)(e)(ii) of the 1985 Act, as amended), should be given its plain and unambiguous meaning. That is, provided an averment is made in terms of section 2(7)(b) and assuming the petition otherwise conforms with the terms of section 22(5) of the 2016 Act, then the sheriff "must forthwith award sequestration". It matters not whether the petitioner has also pleaded the alternative base (failure to co-operate or fulfil instructions, etc). The petitioner was entitled to found on either base.

[18] That construction of the legislation happens to be supported at para 7-56 of McKenzie Skene on Bankruptcy (1st ed, 2018), the most recent Scottish textbook in this area. If perceived injustice or anomaly result therefrom, then it is the province of the Scottish Parliament and not the court to amend it (Gloag & Henderson, para 1.39).

[19] Moreover, a purposive interpretation of 2014 Act supports this construction. The statute requires to be read as a whole. The preamble to the 2014 Act makes clear that its primary purpose was to amend the terms of the 1985 Act. A key principle of the Bill was that "those who can pay should pay". There were distinct policy objectives underlying the Act which were explored and explained by the Sheriff Appeal Court in *McGleish* v *Tough*, 2018 SLT (Sh Ct) 291 where the Court stated:

> "[17] In bankruptcy legislation Parliament is seeking to strike a balance between the competing aims of the creditors having rights to make recovery from the bankrupt's estate and the bankrupt being free to move on following his discharge from bankruptcy. This has seen an ebb and flow of policy over the balance to be struck between these competing objectives …
>
> [26] We accept the submission on behalf of the appellant that the direction of travel of the bankruptcy legislation has been to bring more elements into the control of the trustee …That in our view accords with the direction of travel of the bankruptcy legislation; to attach more of the debtor's estate and to see a return of the bankrupt's rights…
>
> [27] …Current policy considerations seek to balance the rights of the creditors to have access to the bankrupt's estate to make recovery with the objective that after a suitable period that rights should return to the bankrupt. …

> [28] As Dr McKenzie Skene comments in *Bankruptcy* at para.11.14: 'in pursuance of the 'can pay, should pay' policy which underlay the Bankruptcy and Debt Advice (Scotland) Act 2014, that Act subsequently amended the provisions on *acquirenda* to provide that *acquirenda* become part of the sequestrated estate where acquired by the debtor on a date after the date of sequestration and before the date which is four years after the date of sequestration, which … is the current position.

[20] It was submitted that what was said by the Court in *McGleish* ("the direction of travel of the bankruptcy legislation") was consistent with the evident policy objective which was to bring property into the hands of the trustee for the benefit of creditors and reflects the current policy as to the point at which the debtor's rights return. The intention of the legislature was to provide a mechanism for the trustee for the creditors under a trust deed to take the more drastic step of seeking sequestration where it would be in the best interests of creditors.

[21] Therefore, it was submitted, the legislation provided a route for creditor trustees, on the basis of a simple averment that an award of sequestration would be in the best interest of the creditors, to seek and obtain as of right, such an award without the requirement to prove the truth of that averment.

[22] The petitioner therefore invited the court to grant sequestration with expenses as taxed in favour of the petitioner.

Submissions by the respondent

[23] In response, it was submitted as follows. There is no clear statement from any source, whether Parliamentary, extra-Parliamentary or caselaw to support the interpretation advocated by the petitioner. The respondent's position is that if the petitioner is correct then the effect would be that the Scottish Parliament has acted so as to deny the respondent an effective substantive defence where the creditor trustee seeks to rely simply on the assertion

that it would be in the best interests of the creditors. The only defence left for the debtor respondent would be relating to the other procedural requirements which also require to be satisfied before the court can grant sequestration. That failing, if the petitioner is correct, there could be no substantive enquiry into the facts leading to the presentation of the petition and its contents. That does not appear to be correct in principle.

[24] Agents referred to the recent decision of the Outer House in *AIB Pauline Farrell and the Lord Advocate* [2017] CSOH 78. That was a decision in which the debtor unsuccessfully argued that section 34 of the 1985 Act was not ECHR compliant. Although that case was not directly in point, it was submitted that the arguments made in that case on behalf of the debtor, with regard to the way in which the Convention and Convention principles bore on the interpretation of the 1985 Act, could be applied *mutatis mutandis* to this court's interpretation of the relevant parts of the 2016 Act. That was so, it was submitted, even though the Court in that case rejected all arguments based on Convention grounds mounted by the debtor. This court was not bound by the interpretation of that Court on the application of Convention principles to the 1985 Act. If one was to apply the same arguments set out and elaborated in the *AIB* decision by the Lord Ordinary to the legislation that this case is concerned with, one could reach the view that in order to give effect to the debtor respondent's Convention rights, this court could and should read down the terms of the 2016 legislation, applying the principles set out in section 3 of the Human Rights Act 1998.

[25] Several Convention Articles were engaged, namely 6, 8 and A1P1. Specifically, reading down in legislation in that way would require the court to interpret the 2016 legislation as requiring, where a challenge was made by the debtor, that the petitioner both aver and prove, in the usual way, that it would be in the best interests of the creditors to

seek an award of sequestration. That would provide the opportunity for the debtor to show that the best interests of the creditors would not in fact be met by an award of sequestration. In making such an assessment, the court would of course require to use the usual Convention tools including that of proportionality. It was accepted that the legislation had a legitimate aim but it was argued that the interference with the respondent's rights would be a major interference, being an interference apt to lead to loss of the family home and such an interference would require justification, which again would require proof.

[26] Not only would such a reading be more consistent with the application of Convention principles, it would also be consistent with the ordinary meaning of averment in the Scottish law of pleading. An averment in formal pleadings is a statement which the maker of the averment offers to prove is true. A written averment thus is intimately linked to the possibility of proof in the usual way where an averment is either denied or not admitted. The interpretation of the term "averment" urged on the court by the petitioner is one that strips that term of an essential characteristic, namely its relationship to proof of truth.

[27] Finally, in relation to the history of the legislation, he submitted that it was not until 1993 that the legislation was amended requiring a creditor trustee to aver and show the truth of the averment. Prior to 1993, the 1985 Act only required an averment to be made without there being any reference to proof. So here, unusually, the legislative history appears to show that the most recent change to the legislation represents a reversion to the *status quo ante* in part. However, in relation to that, it was submitted that the removal of the requirement that the averment be "true" was simply because that requirement was unnecessary, being tautologous, since the averment would require to be proved if challenged.

[28] Mr Clair responded commenting on the *AIB* case. It was clear from paragraphs [46] and [47] of that report that the Scottish Parliament had a wide margin of appreciation and it was clear from all he had previously submitted that that wide margin of appreciation had been employed by the Scottish Parliament which had taken into account all competing rights and interests to achieve a fair and workable scheme to protect the rights and interests of both creditors and debtors, each of whom of course are entitled to protection of Convention rights. What has changed over recent years is the introduction of a large range of protections for debtors in various legislation concerning insolvency and bankruptcy as can be seen from the references made by him earlier. The remedy presently sought is a remedy of last resort which was not something to be done lightly. It was worth noting that the trust deed had been in place for 10 years which was on any view an ample period within which steps could have been taken to satisfy the creditor's reasonable demands. It was further noted that even if an award of sequestration was made, separate proceedings would be required in order to enforce any order depriving the debtors of their home and the court would always have some control over proceedings. It was, it was submitted, a proportionate interference with Convention rights, although in his submission only A8 and A1P1 were engaged, not A6.

Discussion and decision

[29] I much preferred the arguments on behalf of the petitioner for the following reasons. First, I accept that the usual starting point for statutory interpretation is to decide what Parliament intended by what it said and that in doing so, the starting point is to give words their ordinary meaning. It seems to me that the plain meaning of section 2(7) read together with section 22(5)(d) of the 2016 Act is that in the case of a petition by a trustee, there are two

bases upon which the trustee can ground his petition for an award of sequestration (in addition of course to the other conditions set out in section 22(5)). In both cases, if the Sheriff is satisfied, the Sheriff must forthwith award sequestration. So, either the petitioner may satisfy the Sheriff that at least one of the conditions in section 2(7)(a) applies or he may satisfy the Sheriff that there is an averment that it would be in the best interests of the creditors to make such an award. If the first base is relied on, the statute is silent as to the basis on which the Sheriff may decide that s/he is satisfied that one or more of the conditions applies. If there is dispute, proof in the normal way might well be the only way for the Sheriff to be able to decide whether s/he is so satisfied. However, if the second base is relied on, whether there is an averment satisfying section 2(7)(b) can of course readily be demonstrated without any need for proof or a protracted hearing. In this case, the petitioner has made averments apt to ground the petition on both bases but seeks to rely only on the second base in his motion for sequestration. I do not see any reason why a creditor trustee may not proceed in this way and no objection was founded on that ground.

[30] Therefore, on a straightforward statutory construction, it appears to me that the intention of the statutory provisions is to provide a route to an award of sequestration which may be achieved on a summary basis providing that other requirements are satisfied (proper citation, proper presentation of petition, compliance with the provisions of section 13(1), and compliance with the requirements to show apparent insolvency). In so concluding, I do not accept that the use of the phrase in section 2(7)(b) "that the trustee avers…" implies a requirement also to prove in all cases. An averment may or may not need to be proved depending on its content. For example, an averment "*Quoad ultra* denied" or "Admitted that…" are by definition averments which do not call for proof by the maker of that averment. Moreover, such an interpretation would not explain why the Scottish Parliament has chosen to

amend the statute so as to distinguish between the two bases. If it had intended the second base also to require proof to the satisfaction of the Sheriff, there would have been no need to make such a separation by way of amendment. If the argument were correct, section 2(7)(b) would more naturally be recast as section 2(7)(a)(iii) and section 22(5)(d)(ii) would be otiose. Such an interpretation is not a natural reading of the legislation in my view.

[31] Second, it seems to me that insofar as this court is entitled to consider the policy intentions lying behind the legislation, it seems to me that the interpretation urged on this court by the petitioner is coherent and explicable for the reasons submitted by the agent for the petitioner considering the statutory history, the Parliamentary history and the observations by the Sheriff Appeal Court in *McGleish*. Applying a purposive interpretation, it seems to me that a fair reading of the legislation is that the Scottish Parliament, when reconsidering the balancing of interests as between creditors and debtors, has chosen to revert to the *status quo ante* in the case of petitions for sequestration by creditor trustees. In providing for a summary route by such a petitioner to an award of sequestration, the Scottish Parliament must be taken as having considered the panoply of legislation concerning creditors and debtors, sequestration and so on in deciding that in certain cases, mere averment (made in good faith of course) that a state of affairs exists rather than a requirement to satisfy the Sheriff that the state of affairs exists in fact was the intended result. The Scottish Parliament also must have taken into account that even where sequestration is awarded, the courts still have an important role where the property thus sequestrated includes residential property: see section 113 of the 2016 Act.

[32] Third, despite the valiant attempts by Mr Hutchison to persuade me that I should apply in this case the same sort of Convention arguments as were argued in and rejected by

the Court in *AIB*, I find for similar reasons that those Convention arguments have no application here.

[33] In particular, I do not accept that the legislation is not Convention compliant. I accept with respect the observations and reasoning of the Lord Ordinary at paragraphs [46] to [56]. Applying those to the circumstances of this case, I also do not accept that A6 is engaged. In my view, the respondent's argument is not properly directed at a failure by the State to provide a means for determination of his civil rights and obligations. Indeed, this process is part of that means. Rather, the real argument by the respondent is that he wants to have available to him a defence which is not provided by the Act which is therefore a challenge to the substantive content of the 2016 Act. However, A6 is not in itself a guarantor of the content of civil rights.

[34] As regards A8, I do find that because the family home will fall into the sequestration, and because it is possible that the petitioner might in due course seek to sell the property so as to satisfy the demands of the creditors, A8 is engaged. However, he will have the benefit of the protection afforded by section 113 of the 2016 Act and it would be at that stage, and not this stage, that consideration of the debtor's article 8 rights fall to be considered. Accordingly, in my view, nothing turns on that argument.

[35] So far as A1P1 is concerned, the property rights in issue are of course not only those of the respondent debtor but also those of the creditors this petitioner represents. It is the role of the Scottish Parliament to legislate so as to provide for resolution of competing interests as between the creditors on the one hand and the debtors on the other taking into account also the broader community interest in the implementation of social and economic policy. That involves matters of discretionary judgement in which a legislature is awarded a wide margin of appreciation. It is for the Parliament to assess the advantages and

disadvantages of legislative alternatives having regard to the aim sought to be achieved. As in *AIB*, I agree with respect with the Lord Ordinary that in such circumstances the Court must be slow to intervene unless it can be shown that the relationship of proportionality between any particular aim sought to be realised by a legislative measure, and the means employed to achieve it, is unreasonable in a Convention sense. That is not demonstrated here. I am not persuaded that any interference with the respondent's possessions is either unjustified or disproportionate. Considering that question, I have no basis on which to conclude that the legislation is other than that which falls within the margin of appreciation of this legislature. Accordingly, on the whole Convention argument presented by the respondent, I conclude that the legislation is Convention compliant and that therefore there is no basis on which the legislation can be or should be read down in terms of section 3 of the Human Rights Act 1988 in the manner proposed by the respondent.

[36] In summary, for the reasons I give above, I grant the prayers of the petition, I make an award of sequestration of the estate of the respondent, I declare that the estate belongs to the respondent's creditors, I appoint the petitioner as trustee and I find the petitioner entitled to the expenses of this application out of the respondent's estate.

[37] Finally, as I noted at the outset, this petition is in all material respects identical to that in the associated case involving this respondent's wife. The Note I give in this case has equal application to that case in respect of which however a separate interlocutor has been pronounced.

Sheriff Derek O'Carroll, Advocate

Sheriff of the Sheriffdom of South Strathclyde, Dumfries and Galloway at Airdrie