**SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT FALKIRK**

**[2018] SC FAL 32**

FAL-A116-17

JUDGMENT OF SHERIFF JOHN MUNDY

in the cause

CHEMCEM SCOTLAND LIMITED

Pursuer

against

LINDA BEATON

Defender

**Pursuer: McNairney**
**Defender: Logan**

Falkirk, 17 May 2018

The Sheriff, having resumed consideration of the cause, appoints the cause to a hearing, on a date to be afterwards fixed, to determine further procedure in light of the conclusions in the Note appended hereto; and reserves all questions of expenses meantime.

**NOTE**

[1] This is an action in which the pursuer, a limited company, seeks a declarator that the transfer to the defender of certain properties in High Street, Linlithgow was a conveyance and transfer in trust for behoof of the pursuer and that the heritable properties are held by the defender in trust. There are additional craves asking the court to find that the pursuer is entitled to revoke the trust and for the defender to denude herself of the said trust and execute and deliver all necessary dispositions and other deeds as shall be necessary for the pursuer to obtain full right to the said properties.

[2] The case called before me for debate on the defender's first plea in law which is in the following terms: "The pursuer's averments being irrelevant et separatim lacking in specification the action should be dismissed." The defender had lodged a note of the basis of this preliminary plea in terms of OCR 22. There are two paragraphs to that note. The first paragraph states:

> "The pursuer's averments quoad the creation of the alleged trust and its terms are insufficiently specific and irrelevant. The defender made a specific call in relation to the creation and terms of the trust. The defender seeks a diet of debate in relation to her first preliminary plea."

The second paragraph of the rule 22 note is in support of the defender's second plea in law of no title to sue. In relation to that it was conceded on behalf of the defender that was a matter for proof.

[3] The averments of the parties contained within the options record are brief. The relevant averments are contained within article 2 of condescendence and answer to. In article 2 the pursuer avers as follows:

> "The pursuer wished to acquire the following heritable properties as trust property in the trust hereinafter condescended upon: (i) the first floor house of the tenement 32 High Street Linlithgow, registered in the land register of Scotland under title number WLN47473 and (ii) the east most top flat house and the west most top flat house of the tenement 32 High Street Linlithgow registered in the land register of Scotland under title number WLN47476. The defender utilised the pursuer's funds to purchase the said heritable properties and duly registered dispositions in her favour in the land register of Scotland on 25 June 2014. It was clearly understood that the said dispositions and transfers were in trust only. The pursuer is the truster and sole beneficiary of the trust. The defender is the trustee of the trust. The pursuer set the trust up merely for the administration of their own property. The pursuer, as truster and sole beneficiary of the trust, is entitled to revoke the trust. The pursuer has revoked the trust…Explained and averred that the pursuer provided the funds in

connection with the purchase price of the said heritable properties. The pursuer provided the funds to refurbish the said heritable properties. The total amount of the funds provided by the pursuer in connection with the purchase price and the refurbishment of the said heritable properties was accounted for…in the pursuer's director's current account to the year end 30 April 2015 as a debit in the defender's director's current account. In the next set of the pursuer's accounts to the year end 30 April 2016 the total amount of the funds provided by the pursuer in connection with the said heritable properties was credited in the defender's director's current account. Copies of the pursuer's director's current accounts for the period 1 May 2013 to 30 April 2016 are produced herewith and referred to for their terms which are held as incorporated and repeated herein brevitatis causa. Further, and in any event, the defender has accepted that she holds the said heritable properties in trust. The acceptance that the defender holds the said heritable properties in trust is contained in the letter from the defender's former agents Gilson Gray to the pursuer's agents dated 24 August 2016 a copy of which is produced and referred to for its terms."

The averments go on to narrate the terms of the letter relied upon. In answer the defender avers as follows:

"Admitted the pursuer wishes to acquire the property forming the first floor flat at 32 High Street Linlithgow and the east most and west most top flat at 32 High Street Linlithgow…admitted the dispositions are registered in her name. Quad ultra denied. Explained and averred the properties were purchased in the defender's name. Any sums paid to the defender by the pursuer were paid and accounted through her director's loan account and will be repaid. The pursuer is called upon to specify the full basis of the said trust. Their failure to answer this call will be founded upon…"

[4] At the diet of debate on 24 April 2018 Mr McNairney, counsel, appeared for the pursuer and Mr Logan, counsel, appeared for the defender.

[5] At the debate Mr Logan on behalf of the defender argued his preliminary plea to the relevancy and specification of the pursuer's averments. It is fair to say that his arguments were rather more developed than appears from paragraph 1 of the rule 22 note. He submitted that there were insufficient averments to support the crave of the writ. He explained that he was challenging the sufficiency of the averments in relation to 1) constitution of a trust and 2) revocation of a trust. He accepted that a trust could be constituted verbally. He made reference to section 1 of the Requirements of Writing (Scotland) Act 1995. It's worth repeating its terms. Section 1 provides inter alia:

> (1) Subject to subsection (2) below and any other enactment, writing shall not be required for the constitution of a contract, unilateral obligation or trust.
> (2) Subject to subsection (3) below, a written document which is a traditional document complying with section 2 or an electronic document complying with section 9B of this Act shall be required for –
>  (a) The constitution of –
>  (i) A contract or unilateral obligation for the creation, transfer, variation or extinction of a real right in land…
>  (b) The creation, transfer, variation or extinction of the real right in land otherwise than by operation of a court decree, enactment or rule of law…
>  (c) The making of any will, testamentary trust disposition and settlement or codicil…

[6] Mr Logan submitted that in light of the terms of section 1(2)(a)(i) and section 1(2)(b) a writing of the sort required by the statute was required where a real right in land was concerned. As we were here dealing with heritable properties, it was necessary that the constitution of the trust be established under reference to a writing. I pause to note that this argument is not foreshadowed in the rule 22 note. Mr Logan developed his submission under reference to the decision of the Sheriff Appeal Court in *Miller* v *Smith* [2017] SAC (Civ) 26. That was an action in which the pursuer had relied on an "improper life rent" in relation to a certain property which he sought to assert against third parties. It appears that the sheriff had dismissed the case on the basis of the defender's argument that there

required to be an agreement in writing as related to real rights in land. However little detail of the sheriff's decision and reasoning is apparent from the judgment of the appeal court and the appellate court refused the appeal on another ground entirely, not expressing any view on the requirement of writing. Nonetheless, Mr Logan submitted that in the absence of writing the action was irrelevant and ought to be dismissed.

[7] He then went on to challenge the specification of the pursuer's averments in article 2 of condescendence as to the constitution of the alleged trust. He explained as background that the two shareholders in the pursuer company are husband and wife and that there is now a dispute between them. He referred to the averment that it was "clearly understood" that the dispositions and transfers were in trust only. He submitted this was wholly unspecific. It did not state by whom it was understood. It was not said when it was agreed or indeed what was agreed. In his submission the averments in support of the setting of a trust were wholly lacking in specification.

[8] He also submitted that the averments in support of the purported revocation of the trust were lacking in specification. The averment merely was "the pursuer has revoked the trust". Again, I would pause to observe that this is not an argument which is foreshadowed in the rule 22 note. Mr Logan went on to observe that the averments that during the accounting year 30 April 2015 a debit had been recorded in the defender's director's current account in relation to the transaction were incompatible with the creation of a trust. This was notwithstanding the subsequent averment by the pursuer that during the next accounting year to 30 April 2016 the total amount of funds provided by the pursuer was credited in the defender's director's current account. Mr Logan went on to submit that the letter referred to from the defender's former agents dated 24 August 2016 did not explain the basis of any trust.

[9] In response Mr McNairney for the pursuer invited me to repel the defender's preliminary plea or at least fix a proof before answer. He submitted that it could not be said that the pursuer's pleadings were such that the action was bound to fail. He submitted that a trust of the type averred here was not something which required writing for its constitution. It was not in itself a contract relating to heritage. It created a personal right on the part of the truster (and beneficiary) to assert the trust against the trustee. It was the trustee who held the real right in terms of the disposition. Accordingly the requirement of writing in terms of section 1(2) of the 1995 Act could not apply to the constitution of such a trust. He submitted that the case of *Miller* v *Smith* did not really advance the issue as the Sheriff Appeal Court did not decide the case on whether a writing was required or not. In support of his argument he referred to the decision of Lord Bracadale in the Outer House case of *Accountant in Bankruptcy* v *Mackay* 2004 SLT 777. In that action the pursuer sought reduction of a disposition granted by the defender's husband in her favour in 1998. In 1978 the defender and her husband had agreed that for the sake of administrative convenience title to the property would be taken in his name, the beneficial interest remaining with her and that he would hold the property in trust for her benefit. The 1998 disposition restored the property to the defender. In allowing a proof before answer Lord Bracadale said:

> "[18] I turn now to the argument advanced by counsel that writing was required to constitute the trust because it was over heritable property and that in the absence of writing the trust cannot be said to exist. The starting point is again to note that a trustee who is infeft has the real right in the property and that the beneficiary has only a personal right which can be vindicated against the trustee. It is important to separate the issues of whether, on the one hand, writing is required to constitute a particular contract or right, and, on the other, writing, or reference to the oath, is required to prove the existence of the contract or right.
>
> [19] In my opinion a trust of the type averred here is not a matter that required writing for its constitution. It is not in itself a contract relating to heritage. It creates a personal right. Again, on the approach which I have adopted, it is not necessary to consider where there was a lack of writing in the transfer of the interest from Mr

> McCloud to the defender. That is simply nothing to the point. Counsel did not refer to any authority to support the proposition at the creation of the trust as averred by the defender was a trust that required writing for its constitution, at least prior to the 1995 Act."

The Act referred to was the Requirements of Writing (Scotland) Act 1995. That passage in paragraph 19 of the judgment neatly sums up Mr McNairney's point. It is however to be noted that the court in that case was dealing with an alleged trust created in 1978, prior to the passing of the 1995 Act. As far as that is concerned Mr McNairney submitted that the last words in paragraph 19 – "at least prior to the 1995 Act" – were of no significance.

[10] In answering the specification points, Mr McNairney accepted that the pleadings were brief and recognised that they would benefit from amendment.

[11] In reply for the defender in relation to the case of *Accountant in Bankruptcy* v *Mackay*, which had not been included in the list of intimated authorities, it was submitted that the case was dealing with a transaction prior to the 1995 Act and did not address the requirements of that statute. He made reference to the last words of paragraph 19.

[12] It was clear from discussion with counsel that there were really two matters to address. The first matter was the relevancy point argued on the basis that writing was required for the constitution of the alleged trust. If the defender was right about that then the action required to be dismissed with a hearing then set on the question of expenses. If I was not minded to dismiss the action on that account then there remained the question of specification. It was agreed that if we were to get to this stage then a further hearing should be fixed in order that the question of amendment could be dealt with. Mr McNairney appeared to accept that there would require to be amendment on his part to meet the arguments advanced by Mr Logan.

[13] Accordingly the question I have to deal with at this stage is that of relevancy which turns solely on the issue of whether writing was required in the circumstances of this case in order that the trust could be constituted given that it related to an interest in heritable property.

[14] As indicated only two decisions were referred to in the course of argument. *Miller* v *Smith* does not take us any further as the Sheriff Appeal Court decided the case on a ground which was not related to requirements of writing. The more pertinent decision is that of Lord Bracadale in *Accountant in Bankruptcy* v *Mackay* with the caveat that this case dealt with the situation prior to the 1995 Act.

[15] In the course of submissions I did mention to counsel a passage I had found in Wilson and Duncan on *Trusts, Trustees and Executers* second edition at paragraph 2 – 55. That passage deals with requirements of writing in relation to trusts. The authors state under reference to section 1(2)(b) of the 1995 Act that:

> "While other *inter vivos* trusts remain exempt from the requirement of writing under this particular provision they require writing to comply with the act if they relate in any way to an interest in land."

In reading through the decision in *Accountant in Bankruptcy* v *Mackay* I note in paragraph [12] under the heading of the defender's submissions the following:

> "Counsel recognised that in the case of a trust constituted after 1995, it may be that writing is required. This view is expressed by the author in Gordon, Land Law at paragraph 16.08."

In the second edition of that work the author states, at 16.08, when dealing with formal requirement of constitution in relation to trusts:

> "Where an interest in land is involved or the trust is testamentary the trust must be constituted in writing."

This again is under reference to section 1(2)(b) of the 1995 Act and also Wilson and Duncan at paragraph 2 – 55 onwards, in other words the passage to which I referred counsel at debate. If I were to follow that view then I would require to dismiss this action on the basis that writing was required for the constitution of this trust involving as it does heritable property. However, with all due respect to the authors, it is not clear to me that their general statements that where a trust either "relates in any way to an interest in land" or "where an interest in land is involved" that writing is required, are justified on a plain construction of the statute. I have come to a different view as to the requirements in this particular case. Central to that view is the idea that the pursuer in this case, the truster and beneficiary, holds a personal right which can be vindicated against the trustee who holds the real right, the latter, not the former, being subject to the requirements of section 1(2)(b) of the 1995 Act. From the wording of the statute I cannot see that such a personal right forms one of the exceptions that requires a writing. Whilst Lord Bracadale did not form any view on the situation post the 1995 Act, it seems to be that the principle and the reasoning remain unaltered and in the absence of a clear statutory direction that the constitution of a trust *relating to* heritage requires writing, I am of the view that it does not.

[16] Accordingly I have come to the view that the defender's submissions in so far as they are based on the relevancy of the pursuer's case are unfounded and must fail.

[17] That leaves the question of the specification of the pursuer's pleadings which counsel for the pursuer conceded would require to be addressed by way of amendment. I have appointed the procedural hearing to deal with this aspect and also the question of expenses in relation to the debate.