SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2019] SC GLA 69

SQ45/19

JUDGMENT OF SHERIFF JOHN NEIL McCORMICK

in the cause

A & G R

Petitioners

against

J B

Respondent

Act: Ms Devine, Solicitor, Addleshaw Goddard, for the Petitioners
Alt: Ms Maguire, Solicitor, Flexlaw, for the Respondent

Glasgow, 26 July 2019

[1] In this the second petition to call before a commercial sheriff at Glasgow, the petitioners seek warrant to cite the respondent. The respondent had lodged a caveat. The hearing took place on 7 June 2019.

The issue

[2] The issue concerns the interpretation of the Bankruptcy (Scotland) Act 2016, Section 22(3) which reads:

> "(3) Where a petition for sequestration of the estate of a debtor is presented by –
> (a) a creditor, or
> (b) a trustee acting under a trust deed,
>
> the sheriff must grant warrant to cite the debtor to appear before the sheriff on such date as is specified in the warrant to show cause why sequestration should not be awarded."

[3] The issue is whether the court has discretion to grant warrant.

[4] In my opinion the answer is no unless the procedure has been incompetent or there is a lawful impediment preventing a petitioner seeking the warrant.

Submissions on behalf of the petitioners

[5] In 2014 the respondent signed a personal guarantee for a commercial lease between the petitioners and a company of which the respondent was a director. In January 2019 the petitioners had served a charge on the respondent which expired without payment.

[6] The current respondent raised an action at Hamilton Sheriff Court seeking reduction of the personal guarantee. That writ contained an allegation that the respondent's signature had been procured by misrepresentation. Interim interdict was sought so as to prevent further diligence on the part of the current petitioners. A hearing took place on 8 March 2019. Interim interdict was refused.

[7] The petitioners presented a petition for sequestration of the respondent which called at Glasgow Sheriff Court on 21 March 2019. A caveat was triggered. There was, at that point, no registered certificate certifying the sums due by the respondent. The warrant to cite was refused.

[8] Separately (but also on 21 March 2019) the respondent sought to amend the writ raised in Hamilton by adding new averments and craves and seeking further interim orders which were again refused. Then, on 22 May 2019, the respondent moved to abandon his action of reduction, interdict, etc, at Hamilton Sheriff Court.

[10] On 23 May 2019 the respondent presented a summons to the Court of Session seeking reduction and interim orders. A caveat was triggered in the Court of Session. After hearing parties on 23 and 24 May interim orders were refused. Accordingly, there was no

interim interdict, interim suspension or other order preventing the petitioners from presenting the current petition. In short, it was argued that the court had no discretion under section 22(3) of the 2016 Act.

[11] The petitioners had served a fresh charge for £370,450.51 on 9 May which had expired without payment. There was no challenge to the competency of the current proceedings. Three requests for interim orders had been refused at Sheriff Court and Court of Session level.

[12] I was referred to McBryde on *Bankruptcy* (2nd Edn) 1995 at paragraph 3-25 and 3-26 and to *Sales Lease Limited* v *Minty* 1993 SLT (Sh Ct) 52.

[13] If granted, the respondent will be entitled to appear before the court on a subsequent date to show cause why sequestration should not be awarded, if he is able to do so.

Submissions on behalf of the respondent

[14] The petitioners already have an inhibition in their favour. They are protected by that inhibition.

[15] I was invited to refuse warrant to cite on the basis of an alleged fraud. Warrant to cite should not be granted where there is a dispute elsewhere, namely, an action to reduce the original guarantee.

[16] It was submitted that "exceptional circumstances" exist in this case. I was referred to *Mackin* v *Mackin* 2016 SLT (Sh Ct) 95 where, at paragraph [2], Sheriff Deutsch opined:

> "The petition called before me because a caveat had been lodged on behalf of the respondent. In terms of Rule 2(1)(e) of the Act of Sederunt (Sheriff Court Caveat Rules) 2006 a caveat may be lodged against an order for intimation, service and advertisement of a petition for a person's sequestration. There must therefore be exceptional circumstances in which it would be appropriate for the court to refuse a first order; for example the debtor may be able to show conclusively that all debts

> due by him to the creditor have been satisfied or perhaps there might be an issue going to the competency of the petition."

[17] I was also referred to paragraph [9] of Sheriff Deutsch's decision in *Mackin* in relation to the effect on a respondent of the date of sequestration which becomes the date of the warrant to cite.

[18] I was invited to conclude that the exceptional circumstances which would entitle a court to refuse to grant warrant to cite in this case were twofold. Firstly, the circumstances whereby the respondent signed the personal guarantee have been reported to the police. I shall not detail the alleged circumstances. It is sufficient for me to indicate that it was suggested on behalf of the respondent that he had signed the personal guarantee on the basis that a third party had presented it to him as being the lease. I was advised that the police are investigating the allegation of fraud.

[19] Secondly, an action had been raised in the Court of Session to reduce the personal guarantee. It was accepted that interim orders had been refused. However, that action had been served and had commenced. I was also advised that when interim orders were refused (23 and 24 May 2019) in the Court of Session, counsel did not have to hand an (unnamed) authority which would then have persuaded the court to grant the interim orders. Counsel was on holiday currently and the interim orders will again be sought.

[20] I was referred to *Richard Gibbs* v *The British Linen Co* (1875) 4 R 630 at page 634 where Lord Shand said, after reviewing various authorities that:

> "It is a recognised principle both in the law of this country and in that of England that a gratuitous benefit conferred or obtained by one party, and gained through the fraud of another cannot be retained by the person benefited, even though innocent of the fraud. The most familiar application of this principle is the case of legatees or beneficiaries taking under a settlement which has been procured by fraud, to which they were no parties, and of which they were entirely ignorant. They cannot retain a benefit so gained. But the principle is throughout the authorities limited to the case

> of benefits conferred or received gratuitously, and does not apply where a valuable consideration has been given."

I was also referred to *McBryde* at paragraph 14-46. I was invited to refuse to grant warrant to cite the respondent on the basis that exceptional circumstances had been made out. A police investigation had commenced along with an action for reduction of the personal guarantee. The effect on the respondent will be substantial because the date of the warrant to cite will become the date of sequestration if sequestration is subsequently granted. In the meantime the petitioners have the protection of an inhibition.

Decision

[21] In *Mackin* v *Mackin*, Sheriff Deutsch was considering the interplay between the terms of section 12(2) of the then Bankruptcy (Scotland) Act 1985 and Regulation 30 of the Debt Arrangement Scheme (Scotland) Regulations 2011.

[22] Two points arise. Section 12(2) of the 1985 Act provided that the sheriff "shall" grant warrant to cite. Section 22(3) of the 2016 Act provides that the sheriff "must" grant warrant to cite. If there is a difference between these provisions, it is merely one of emphasis, with the latter being more emphatic. Secondly, in context, I do not consider that Sheriff Deutsch was implying discretion as to whether or not to grant warrant to cite under the 1985 Act. I note that at paragraph [13] Sheriff Deutsch in *Mackin* considered that he "was bound" to grant a warrant to cite.

[23] Standing the wording of section 22(3) of the 2016 Act, if an action is not incompetent and there is no legal impediment (arguably, in this context, synonymous with competency) preventing a petitioner moving for the warrant, the court must grant warrant to cite. If there is a flaw in the procedure or the debt has been paid it would not be competent for a

petitioner to proceed. It follows that issues of equity, fairness, motive or consequence are not relevant considerations.

[24] Here the respondent had argued that there were exceptional circumstances to justify the court departing from the statutory imperative that it must grant warrant to cite. However, as at 7 June 2019, there was no challenge to the competency of the procedure and no interim orders in place preventing the petitioners proceeding as they had. Moreover, competency is pars judicis and I could see no issue. That being so the court had no discretion. I granted the warrant to cite, as I must.