



OUTER HOUSE, COURT OF SESSION

[2018] CSOH 9

P1442/15

OPINION OF LADY WISE

In the Petition of

HER MAJESTY'S ADVOCATE

Petitioner

against

MOHAMMED YOUNAS

Respondent

and

FARZANA ASHRAF

Interested Party

**Petitioner: Byrne; Crown Agent**

**Respondent: No Appearance**

**Interested Party: Party**

8 February 2018

**Introduction**

[1] I heard an application in this case which initially involved a motion enrolled by the interested party, pursuant to section 135(1) of the Proceeds of Crime Act 2002 ("the 2002 Act") to recall or vary the interlocutor of 8 March 2016 appointing an enforcement administrator to realise the property subject to a Confiscation Order made by Lord Pentland on 11 November 2014 ("the Confiscation Order") and that so as to exclude the property at Flat 1f1, 82 Polwarth Gardens, Edinburgh, EH11 1LJ ("the property") so that it cannot be

disposed of by the administrator. Due to the lengthy and complex background to the case it was agreed that a Minute and Answers procedure with an evidential hearing would be appropriate before determination of the issue.

## **Background**

[2] The relevant Confiscation Order was made by Lord Pentland following contested proceedings in 2014. Those proceedings followed the conviction of the respondent, Mohammed Younas, at Glasgow High Court on 5 September 2012 of the offence of being concerned in the supply of diamorphine. The interested party, Farzana Ashraf, a sister of Mr Younas was represented in the confiscation proceedings and opposed the Order being made. At that hearing she, the respondent, and their sister Ruksana Ashraf all contended that when deciding on the available amount for a Confiscation Order the court should exclude from the benefit calculation the value of subjects at 82 Polwarth Gardens, Edinburgh. The Lord Ordinary rejected that argument, the reasons for which are set out in his Opinion- *HM Advocate v Younas* [2014] HCJ 123.

[3] In this application for variation of the order conferring power on the enforcement administrator, counsel for the Lord Advocate accepted that, notwithstanding that the interested party was heard in the High Court confiscation proceedings as a Minuter, she was entitled also to be heard on her present application to vary the Order. As indicated, the issue at the core of this contested application is whether or not the administrator should be allowed to sell the property at Polwarth Gardens and apply the free proceeds to payment of the respondent's Confiscation Order. It was agreed that Ms Ashraf should lead at the evidential hearing. In addition to giving evidence on her own behalf, she led evidence also from Gordon Hamilton, a retired solicitor and Russell Haddow, a policy development

manager in the office of the Accountant in Bankruptcy. The Crown led no evidence but both sides made detailed submissions.

### **Evidence Led in Support of the Application**

[4] Ms Ashraf gave evidence in support of her application. She explained that her brother had purchased the property at Polwarth Gardens in 1990 but had been sequestered in September 1993. The Accountant in Bankruptcy had been appointed as his permanent trustee. After the respondent's conviction for drugs offences Ms Ashraf and her sister Ruksana put forward a proposal in terms of which they would buy the property from the Accountant in Bankruptcy. They instructed Mr Gordon Hamilton of Messrs Garden Haig, solicitors, to act for them. Agreement was reached that the sisters would purchase the equity in the property from the Accountant in Bankruptcy for the sum of £25,000, payable in two instalments. Those instalments were duly paid in July 2002 and June 2003. Ms Ashraf's position in evidence was that she had accordingly become the beneficial owner of the property. She said that since 2003 she has serviced the two secured loans over the property. Both of the loans initially taken out by Mr Younas were from the Nationwide Building Society, which continues to hold a standard security in respect of both loans of which Mr Younas continues to be the named debtor.

[5] Ms Ashraf spoke to a number of productions she had lodged. In particular, No 6/12 of process comprised letters from the Nationwide to Mr Younas dated 23 and 30 July 2014 confirming that certain payments had been made in cash towards one of the secured loans. She referred also to receipts from the Nationwide lodged at No 6/13 of process. At the foot of each receipt was a reference number which appeared to correlate to a branch of the Nationwide. For example, she explained that reading one of the receipts with the letter of 30 July 2014 one could see that the reference 0915 related to the George Street Edinburgh

branch of Nationwide. She explained under reference to the same correspondence that it could be seen that the code 0723 related to a branch in Accrington, 0772 related to a branch in Bolton and 0921 related to a branch in Corstorphine, Edinburgh. Ms Ashraf's evidence was that the payments made in cash in the George Street branch of Nationwide were made by her sister Ruksana. After Farzana Ashraf married in 2007 she moved to Blackburn in Lancashire which is near Accrington and Bolton and her evidence was that where the documentation showed receipts for payments at those branches she had paid in the money herself. Her position was that while Ruksana had made some payments the majority of payments had been made by her alone. She produced a letter from Nationwide No 6/12/6 of process confirming that cashier transaction slips are held by them only for a 12 month period and she stated that this explained why no documents confirming that it was she who had paid in the cash were available. Ms Ashraf referred also to No 6/19 of process and a letter from Lloyds Bank Plc to her dated 10 December 2016. That letter appeared to confirm that certain debit card payments had been made from her bank account over a period and also that a direct debit to Nationwide had been set up between November 2006 and 2009. The direct debit appeared to relate to the second of the two loans with Nationwide. Ms Ashraf referred also to a letter from the Bank of Scotland (No 6/19/3 of process) addressed to another of her sisters, a Mrs N Ahmad and her husband which appeared to confirm that Mrs Ahmad had been taking responsibility for the payments for the second loan between January 2001 and June 2010. A statement attached to that letter was a bank statement relating to Mrs Ahmad showing a number of direct debits in the sum of £172.30 albeit that the payee is not identified on them.

[6] Ms Ashraf referred to the conveyancing file of Mr Hamilton which had been lodged as No 6/17 of process. In particular she referred to the missives at pages 72 – 83 thereof which set out the terms on which she and her sister Ruksana had agreed to purchase the

property. She drew attention to the qualified acceptance of the Accountant in Bankruptcy dated 14 August 2002 in terms of which a condition of the offer that the missives would cease to be enforceable after a period of two years from the date of settlement had been deleted. Ms Ashraf confirmed that her understanding remains that the missives remain enforceable for 20 years in light of the deletion of that restricted period.

[7] Under cross-examination Ms Ashraf was asked about possible inconsistencies between the position she had taken before Lord Pentland in 2014 and her evidence in this application. In particular it was put to her that she had given evidence at the previous determination hearing that her father had paid the mortgage on the Polwarth Gardens property until his death in March 2004. Ms Ashraf responded by stating that although her father had contributed occasionally it was mostly her and her sister Ruksana who had paid the secured loans between 2002 and 2004. When challenged again that her evidence was inconsistent with that which she had given to Lord Pentland, she said that she did not go into detail about the payment of the secured loans at the previous hearing and that she had not been asked in much detail about it. She claimed not to have been asked in the earlier proceedings about the specific time after which she claimed to have made the payments. Ms Ashraf was challenged also about evidence Lord Pentland recorded her as having given to the effect that Mr Hamilton had effectively acted contrary to her instructions and those of her sister in not transferring title into their names. She responded that the suggestion that Mr Hamilton had not followed instructions was raised by the Crown and that her position now was that Mr Hamilton had acted in accordance with instructions. She said that her understanding and that of her sister Ruksana was that the title to the property would remain with their brother until the inhibition had been discharged and the debts cleared. She seemed to deny having given the evidence recorded by Lord Pentland that her position was that Mr Hamilton had not acted in accordance with her instructions. When asked whether

her brother was living in the flat at Polwarth Gardens in 2007 she said that he was in custody at that time and that in any event he had other properties. When it was put to her that he had given his address as the Polwarth Gardens flat at that time she responded that he might have given his address as that property but that did not mean that he was holding himself out as the owner of it. It was suggested to Ms Ashraf that in relation to payment of the secured loans she had produced no significant new evidence beyond anything that was before Lord Pentland in 2014. Ms Ashraf disputed that, pointing to the receipts for cash payments in Accrington and Bolton and her efforts to link those to pay in slips signed by her albeit that she had been unable to obtain them. In relation to the letter from her sister (No 6/19/2 of process) Ms Ashraf agreed that she did not dispute that it was her sister Nazreen who had made payments between 2001 and 2006. She confirmed that those payments related to the second loan and that she, Farzana, had started paying from 2006. She said that in relation to the second loan Nazreen had become involved because she and Ruksana were in discussions with their solicitor because Ruksana did not want to be involved with the property any longer and so Nazreen was going to come in as second purchaser. It was put to her that again this was inconsistent with the position taken in the previous hearing before Lord Pentland when all that was stated was that she and her sister Ruksana had been making mortgage payments. Ms Ashraf responded by saying that there had been no detail of the second loan at the earlier hearing. The witness was taken through No 6/14 of process, statements from Nationwide, showing that the second loan amount was £15,000 as at 9 April 2001 and that interest payments had been made in 2004 by direct debit. The bank statement of her sister Nazreen (No 6/19/4) illustrated cash payments being taken from her bank account but not a direct debit. Ms Ashraf responded by saying that her sister Nazreen appeared to have paid cash into her bank account but that there may have been direct debits out of it. She said that her sister had tried to produce as many statements as

she could from her bank but they were incomplete. When it was pointed out to her in relation to the bank statements of her sister Nazreen that the money taken out was matched by the same amount of money going in every month with a question about who provided those funds, Ms Ashraf said that it was her sister Nazreen's money and that Nazreen had paid on the basis that she might take an interest in the property. It was put to her in terms that she could not rule out that the undisclosed cash payments being put in to Nazreen's bank account and then used to pay the mortgage were from her brother, Mr Younas. Ms Ashraf denied that and reiterated that Nazreen had taken responsibility for the second loan with a view to obtaining an interest in the property.

[8] Ms Ashraf accepted that she had been unable to produce anything from Nationwide to confirm the link between her and the cash deposits shown to have been made at the various branches. She said that the cashiers she dealt with had changed from time to time and that this could be seen from the reference numbers on the cash receipts. When asked why she had not produced pay in slips with her signature on them for a 12 month period if that was all that the Nationwide retained, she responded that she did not think that a period of only 12 months would be relevant for the purpose of these proceedings. She said that she and her sister had continued to make payments over the last 12 months and so such slips would have been available but she had not thought it would be relevant. In relation to the letter No 6/19/1 of process indicating that payments had been made by direct debit between 2006 and 2009 by her, she was asked where the bank statements relative to that direct debit were and she said that she could not obtain them and so had produced the letter instead. She accepted the letter does not say in terms that the direct debit was a monthly one.

[9] Ms Ashraf was pressed on what efforts she had made to obtain title to the property at Polwarth Gardens. She agreed that she had lodged email correspondence (No 6/6 of

process) to illustrate the efforts she had made to obtain title. When it was put to her that an email to her from the Accountant in Bankruptcy of 14 December 2015 had confirmed that as the respondent was now discharged he could transfer title of the property to her at any time, she maintained that her understanding was that the Accountant in Bankruptcy would sign any disposition. She claimed that she had received legal advice to the effect that only the Accountant in Bankruptcy could do so. She pointed out that the Accountant in Bankruptcy had also said that she could reappoint the Accountant in Bankruptcy who could then sign a disposition. She had raised proceedings in the sheriff court in relation to that which are sisted pending the outcome of these proceedings. She accepted that the email correspondence from the Accountant in Bankruptcy in December 2015 had been a response to a letter from solicitors confirming that Ms Ashraf wanted to enforce the missives against the Accountant in Bankruptcy. The response was that because Mr Younas had consented to the transfer of title in 2002 and had a duty to the trustee, he could sign a backdated disposition. Ms Ashraf maintained that, notwithstanding the terms of the Accountant in Bankruptcy's position, she had taken legal advice and was told it should be the Accountant in Bankruptcy who should sign the disposition and that it would be more beneficial for her if that occurred. She accepted that she had never simply asked her brother to sign a disposition. She accepted that the Accountant in Bankruptcy had been discharged in 2004 and that she had not taken any steps to have the property transferred to her between then and 2011 when the property was restrained by court order. Her explanation for that was that because there was a standard security to the Nationwide in terms of which her brother is the debtor she and her family realised that they had to gather funds to repay that loan. Her father was going to Pakistan to sell assets in order to achieve that but sadly he died before he could carry through that intention. Ms Ashraf herself married in 2007 and was involved in a serious car accident in 2010 after which she lost her job and became

self-employed. It then became difficult for her to “sort out the mortgage” she said and the only way in which the loan could be repaid would be to sell assets in Pakistan. She had been proceeding on the basis that she had a considerable amount of time left to resolve the matter given the deletion of the two year limitation in the missives. She disputed that she and her sister took a conscious decision in 2002 not to take title to the property. She said they simply delayed taking title at that time until the inhibition was paid and the secured loan was sorted out. She disputed also that she and her sister had decided not to take title until after the property was restrained in 2011. When asked whether she accepted that she had no more than a contractual right to the property under the missives, she said that she understood she could rely on those missives for a long period of time and take title at any time up to 20 years after they were entered into. She knew that a disposition would require to be recorded in order to give her title but reiterated that the process could not be completed until the position of the secured loans was resolved. Although she was aware of her brother’s criminal convictions that gave rise to a previous Confiscation Order, she disputed that she ever regarded Polwarth Gardens as something that would be treated as his property if he committed further crimes.

[10] Ms Ashraf gave further brief evidence in re-examination. She said that the correct position in relation to her father was that he had assisted her with the mortgage payments until 2004. She said she appreciated that the onus was on her to show what payments had been made by whom and that she was doing her best. She accepted that there was no written documentation confirming that Nazreen would make payments towards the secured loans.

[11] Evidence was led also from Mr Gordon David Hamilton, a 63 year old retired solicitor. He confirmed that he had acted for Ms Ashraf and her sister Ruksana in relation to the proposed purchase of the flat at Polwarth Gardens. His whole conveyancing file,

No 6/17 of process had been produced. His attention was drawn to a letter he had sent to the Accountant in Bankruptcy dated 21 October 2003, the substance of which is in the following terms:

*"We would confirm that the sums due in respect of the two inhibitions, which were registered against Mr Younas, have been or are in the course of being paid.*

*In these circumstances, our clients, Farzana and Ruksana Ashraf have decided that they do not wish the title of the property to be transferred to their names.*

*The title of the property is therefore to remain in the name of their brother Mohammed Younas and once you have paid the dividend to his creditors and obtained your own discharge, we shall be obliged by your issuing your usual letter of comfort to ourselves."*

[12] Mr Hamilton's evidence was that he recollected that with the missives having been concluded and standard Clause 9 in the original offer having been deleted, the missives were to remain open for the long negative prescriptive period of 20 years. There had been discussions in relation to the secured loans and as at October 2003 he understood that Farzana and Ruksana Ashraf were trying to obtain funds to repay those. In those circumstances he recollected that they had instructed him to let the Accountant in Bankruptcy know that they were happy to leave things as they were because there was a considerable period of time to run before the missives would become unenforceable.

[13] Under cross-examination Mr Hamilton was referred to a letter he had written to Farzana and Ruksana Ashraf on 29 January 2004 the substance of which is in the following terms:

*"I enclose for your information a copy of the most recent letter received from the Accountant in Bankruptcy office. As you will note it is confirmed that the permanent trustee in your brothers sequestration has no further interest in the property and that a letter of comfort from the trustee will be issued once a dividend payment has been made to creditors. This means that for the time being title will remain in the name of your brother and you will continue paying the mortgage as before."*

[14] Mr Hamilton explained that he had written that letter at a point in time when he understood that the title was to remain in Mr Yousaf's name but the expectation was that in

the fullness of time the Accountant in Bankruptcy would still effect the transfer. He said that the mechanics of how that might be done had not been considered given that the sisters were not in a position to redeem the secured loans. Mr Hamilton was referred also to an affidavit he had sworn on 23 March 2016 (No 6/4 of process). He confirmed that the affidavit stated accurately that his understanding as at 2002 was that Farzana and Ruksana's father was in Pakistan attempting to raise funds to repay the secured loans. At the time he anticipated that it might take up to 18 months for that to be done and the title to be transferred, although he acknowledged that he had no information on which he could reach any firm view on timescale.

[15] Mr Hamilton was referred also to a note he had made on the file on 26 May 2003 in relation to a telephone call with the Accountant in Bankruptcy's office on that date. The note recorded that the Accountant in Bankruptcy's representative said to Mr Hamilton that with regard to the inhibitions against the respondent *"he did not believe that they would be of any impact provided that you purchased the property from the Accountant in Bankruptcy rather than allow it to revert to your brother."*

[16] Mr Hamilton confirmed that he understood the Accountant in Bankruptcy's position in that telephone call as being that as an inhibition was in place against Mr Younas, the fact that missives had been concluded meant that the Accountant in Bankruptcy was the correct party to grant a disposition to the sisters, as otherwise the inhibitions would be of no effect. The discharge of the bankrupt Mr Younas was not, so far as he could recollect, in the forefront of minds at the time and had not yet occurred. In relation to the letter he had sent on 21 October 2003 to the Ashraf sisters, Mr Hamilton confirmed that he had instructions at that time from Farzana and Ruksana Ashraf that they did not wish to take title and that he had no cause to interrogate their explanation for that. He agreed also that between 2004 and 2011 the sisters could have had the missives implemented at any time by having a

disposition signed by their brother although he pointed out that on the face of it the missives still had a long period of time to run.

[17] In re-examination Mr Hamilton reiterated that the expectation he had at the time was that in due course the position with the existing secured loans would be clarified and resolved and that title would remain with Mr Younas until that was done.

[18] The final witness led on behalf of Ms Ashraf was Russell Alexander Haddow a 43 year old policy development manager at the Accountant in Bankruptcy's office.

Mr Haddow agreed that he had signed a letter from his office (No 6/2 of process) confirming that standing that the purchase price had been paid for the property and the Accountant in Bankruptcy had no further interest in it that office would not object to a transfer of title to the Ashraf sisters and would not seek to reduce any such transfer of title. He was referred also to the email sent by his office on 14 December 2015 (No 6/6 of process) in which it was confirmed that the missives were still valid and enforceable and so the Accountant in Bankruptcy would sign a disposition if asked but that there would have to be a reappointment process first and that an alternative was that Mr Younas could simply sign a disposition. Mr Haddow confirmed that he had not been a party to developments at that time and could not confirm that the letter set out the Accountant in Bankruptcy's position. He confirmed that any trustee in bankruptcy keeps only the petition and statement of affairs and other formal documents but tended not to keep correspondence because it was capable of being viewed by interested parties. Accordingly, he could not comment on the correspondence between Gibson Kerr solicitors and the Accountant in Bankruptcy's office in December 2015.

[19] Under cross-examination it was put to Mr Haddow that the Accountant in Bankruptcy's suggestion in this case had been that Mr Younas could simply sign a disposition, the trustee having been discharged in December 2004. Mr Haddow agreed with

that and said that he personally had advised Ms Ashraf to that effect when he was dealing with the matter directly between mid-2013 and mid-2014. There was some correspondence at that time with the solicitors representing Farzana Ashraf and then directly with her personally. On at least two occasions during that correspondence the Accountant in Bankruptcy's office had confirmed that Mr Younas could simply sign a disposition in order to transfer the title, stating that his office had no objection to that. That was confirmed in a letter of 14 May 2014, No 6/2 of process. He had no information about Mr Younas' attitude to a transfer of title and could not explain why the more direct route of asking him to sign a disposition had not been taken by the sisters.

### **The Parties' Submissions**

[20] The interested party and Minuter made submissions on her own behalf. She referred to the undisputed background of her brother's sequestration, the appointment of the Accountant in Bankruptcy as the permanent trustee and referred to the earlier confiscation proceedings at the instance of the Crown which had been alluded to in evidence.

Apparently the property at 82 Polwarth Gardens had been removed from the prosecutor's statement in 2002 and a Restraint Order in force at that time was varied to allow the permanent trustee to deal with that property. Ms Ashraf pointed out that the conveyancing transaction in terms of which she and her sister Ruksana offered to purchase the Accountant in Bankruptcy's interest in the property had predated the court order she now sought to vary by almost 14 years. In essence, Ms Ashraf's position was that the interlocutor of 8 March 2016 should be varied to exclude the property at 82 Polwarth Gardens for the following reasons:

1. That the two loans to Nationwide secured by the standard security had both been serviced by her and her family jointly over the years.

2. That she and her sister were beneficial owners of the property and so it should not be regarded as “free property” in terms of sections 121(7) and 149 of the Proceeds of Crime Act 2002.
3. That the inclusion of 82 Polwarth Gardens, Edinburgh in the Restraint Order and the subsequent Confiscation Order engaged Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) and that the Minuter had a reasonable expectation that she would acquire heritable proprietorship of the property by means of a disposition following upon the missives.
4. That she has applied in terms of section 63 of the Bankruptcy (Scotland) Act 1985 as amended to the Sheriff Court in Edinburgh to have the Accountant in Bankruptcy reinstated so that a disposition transferring title can be signed and delivered to her.

[21] Ms Ashraf sought to rely on *HMA v Voudouri* [2008] HCJAC 34 and *In re Norris* [2001] 1 WLR 1388 as authority for the legitimacy of third party intervention in cases of this sort. She referred also to the Prescription and Limitation (Scotland) Act 1973 in relation to the long negative prescription and to the Scottish Law Commission Report 1994 (Scot Law Com No 147) in relation to the protection of third parties’ rights in confiscation proceedings.

[22] For the petitioner and respondent in the Minute Mr Byrne submitted that Ms Ashraf’s application to recall or vary the Order should be refused. He analysed the evidence given by Ms Ashraf and submitted that it should be given no weight. The fact that she had once before exercised a reasonable opportunity to explain the true position pertaining to 82 Polwarth Gardens, Edinburgh and had failed to do so should be taken into account. Reference was made to paragraph 15 of the Opinion of Lord Pentland in the confiscation proceedings.

[23] Three relevant issues had been covered by the evidence at the present hearing. Firstly, payments to service the secured borrowings, secondly, the decision not to take title, and, thirdly, the ongoing intention not to take title. In relation to the servicing of the secured loans over the property, Mr Byrne submitted that Ms Ashraf had produced no reliable evidence that would entitle the court to conclude that she has serviced by payment of interest either of the two loans referred to in evidence. Her evidence was inconsistent with that she had given at the hearing before Lord Pentland and she had given contradictory evidence in relation to whether she or her sister Nazreen Ahmad had serviced the second loan. The documentary evidence provided failed to link the interested party and Minuter with any payments made to Nationwide. She had no proper explanation for the absence of documentary evidence. A negative inference should be drawn from her failure to produce any receipts bearing her signature. Further, no breakdown of payments relative to a direct debit in respect of the second loan had been produced. Again there was no link between payments made and Ms Ashraf herself.

[24] Turning to the initial decision not to take title to the property at Polwarth Gardens, counsel submitted that the Opinion of Lord Pentland clearly recorded that Ms Ashraf had claimed at the earlier hearing that Mr Hamilton had acted contrary to his instructions in not completing title for her and her sister. Her explanation for that was not credible and was unreliable. The position taken now was diametrically opposed to that taken at the previous Proof.

[25] It was submitted in relation to the third matter of an ongoing intention not to take title, that the evidence clearly illustrated that a representative of the Accountant in Bankruptcy, Mr Haddow, had explained on more than one occasion to Ms Ashraf during 2013 and 2014 that the Accountant in Bankruptcy would not object to Mr Younas simply signing a disposition conveying the property to Ms Ashraf and her sister. Ms Ashraf

had attempted to create an appearance of problems she faced in obtaining title suggesting that there were obstacles in doing so but the evidence illustrated that she could have obtained title simply by asking her brother to sign a disposition in her favour at any time between 2004 and 2011 and had confirmation that she could do so from the Accountant in Bankruptcy in 2013/2014. Mr Hamilton had accepted that it would have been open to the sisters to obtain a disposition from their brother, notwithstanding that he had been supportive of the Minuter's position in other respects. Other matters that cast doubt on the reliability of Ms Ashraf's evidence included that she had given evidence to Lord Pentland that she had resided in the property until 2009, whereas in these proceedings she stated that she had moved to Blackburn in 2007. Mr Byrne submitted that it could be easily inferred that Ms Ashraf had avoided taking title to the property and that if her application was granted the respondent Mr Younas would remain title holder to it.

[26] The petitioner's position on the application of the law to the facts involved the interpretation of section 132 of the Proceeds of Crime Act 2002. The court's powers of variation or recall in terms of that section requires to be exercised without taking account of any obligation of the accused if that obligation conflicts with the object of satisfying the Confiscation Order. Section 132(3) states that section 132(2) has effect subject to certain rules including that:

"the powers must be exercised with a view to allowing a person other than the accused or a recipient of a tainted gift to retain or recover the value of any interest held by him."

[27] It was submitted that as Ms Ashraf only has an interest in the missives, a variation of the Order would not cause "retaining" or "recovering" any "thing" within the meaning of section 132(3). It was submitted that the reference to "interest" in section 132(3) must be read to exclude an obligation (such as the obligation under the missives involved in these

proceedings) and that the use of the mandatory word “must” in section 132(2) meant that no account could be taken by the court of the obligation under the missives.

[28] There being no authority directly in point in this jurisdiction, Mr Byrne referred to the decision of the Court of Appeal in *Director of Serious Fraud Office v Lexi Holdings Plc (In Administration) and another* [2009] 2 WLR 905 (“*Lexi Holdings*”). In that case the Court of Appeal required to interpret section 69 of the 2002 Act, the equivalent English provision to section 132. Section 69(2) is a mirror provision of section 132(2) and section 69(3) mirrors the terms of section 132(3). The application made to the court, insofar as relevant to these proceedings, was whether Lexi Holdings, as an unsecured creditor, fell to be excluded from relief under section 69(2) of the 2002 Act where the assets were not greater than the proposed benefit from crime. The court held that on a correct construction of section 69(2)(c) a Restraint Order could not be varied so as to allow for the payment of a debt to an unsecured creditor except where there was no conflict with the object of satisfying the Order. The court discussed the meaning of “interest” in property and determined that it should be given a wide meaning. However an interest in property had to be read in light of the prohibition that the court have regard to obligations. Mr Byrne submitted that on the facts of the current application, the missives were a contract, Ms Ashraf has an interest in those missives and her interest is in the enforcement of an obligation alone. In any event, no reliance could be placed on her claim to have entered into a genuine transaction with a view to obtaining title to the property. The missives in question were unaffected by the order made by this court. Accordingly they do not logically fall to be property that can be retained or recovered in terms of the applicable provisions, as Ms Ashraf has never held the property and so cannot retain or recover it.

[29] Accordingly, the issue was whether the enforcement of the obligation due to Ms Ashraf as an unsecured creditor would conflict with the purpose of the Confiscation

Order. Much depends on whether the property is required to satisfy the Order and in this case it clearly was so required. While it may be argued that beyond the interest in the missives Ms Ashraf has an interest in retaining or recovering her interest in the value of the sums paid over in either price or mortgage interest payments, such an argument could not be supported by the evidence led. The court could not be satisfied that Ms Ashraf had either paid capital for the property or made payments of mortgage interest in light of the deficiencies with that evidence.

### **Discussion**

[30] The starting point in relation to Ms Ashraf's current application is that a Confiscation Order was made by Lord Pentland on 11 November 2014 in the sum of £126,000, having found the available amount for confiscation to be £126,000 of which £121,000 was in respect of the property at 82 Polwarth Gardens, Edinburgh. In terms of the interlocutor of 8 March 2016, the administrator has the power to realise that property unless it is excluded from the ambit of his powers. There can be no dispute that a variation such that the Polwarth Gardens property would be excluded would conflict with the object of satisfying the Confiscation Order already made standing the figures mentioned above. However, as someone with an interest under missives concluded in 2002, Ms Ashraf is, indisputably, a person affected by the Confiscation Order and so has standing to seek to vary or recall its enforcement by the administrator in terms of section 135 of the Proceeds of Crime Act 2002. I will address the inter relationship of the relevant provisions of the Proceeds of Crime Act 2002 in due course but will first deal with my assessment of the evidence led in this matter.

[31] The circumstances in which Ms Ashraf and her sister Ruksana entered into missives to purchase their brother's interests in the property at 82 Polwarth Gardens was not in

dispute. The whole conveyancing file of Mr Hamilton, the solicitor involved, was lodged in the proceedings before me and his evidence took matters a little further than the evidence presented to Lord Pentland at the time of the making of the Confiscation Order. The one matter that was clarified was that Mr Hamilton had advised Farzana Ashraf and her sister that the missives were enforceable for a period of 20 years from 2002 and that accordingly there was sufficient time for them to seek to take title to the property through a formal disposition once they had resolved any issues in relation to the secured loans. From Mr Hamilton's perspective, the matter of whether the sisters would ultimately take title was simply left open. He issued a note of his firm's fee and closed the file. The clear instructions given to him by the sisters in 2003 was that they did not wish to take title to the property at that time. Mr Hamilton's position was that he had no reason to question them or seek any further explanation about that.

[32] Chronologically, the next chapter of evidence to be examined is that relating to the period 2003/2004 until 2014 when the Confiscation Order was made. Ms Ashraf's position initially in evidence was that since 2003 she personally had serviced the two secured loans over the property. However that was later contradicted by her when she produced correspondence relating to the second loan (No 6/19 of process) which she claimed illustrated that her sister Mrs Nazreen Ahmad had been servicing that second loan at least between 2001 and 2006. Under cross-examination she changed her position again to the extent that she said that her father had made some payments of mortgage at least until 2004. Her ultimate submission on this point was that she and her family together had made the payments to service the loans throughout the relevant period. The difficulty with the position taken by Ms Ashraf is that the documentary evidence now produced is insufficient to support any of the particular stances she has taken on payments of the secured loans. There is some evidence available in the form of cash receipts showing that cash has been

paid to Nationwide at various branches in relation to these loans. Nothing has been produced to confirm Ms Ashraf's position that she was the payer. Quite apart from the fact that there are apparently "pay in slips" available, at least for a period of 12 months up to any request being made for them, that would show the signature of the person paying in the cash at the relevant branches, no evidence of any kind of the sources of income or other financial resources of Farzana Ashraf or her sister Mrs Ahmad was produced to the court. While Ms Ashraf is without legal representation, she has litigated in this court before and she is aware of the difficulties caused in the confiscation proceedings as a result of only limited documentary evidence being produced in relation to this matter. There was no evidence whatsoever in relation to the source of money used for servicing the interest on the principal loan. The only bank statements available are related to what Ms Ashraf said was her sister Nazreen's servicing of the interest on the second loan. However, as those bank statements show only that monies were received into the account and then monies of the same or a similar amount were paid out on a regular basis, it is not possible to draw any inference that Mrs Ahmad was serving the second loan from her own resources. Insofar as there was any mention of Ms Ashraf's resources in evidence it was that she had lost her job following an accident in 2010 and had subsequently become self-employed and that she was unable to repay any of the capital dues under the secured loans. All of that is a sufficient basis on which to conclude that the necessary link between any payments made to Nationwide and Ms Ashraf has not been established.

[33] In any event, Ms Ashraf was unconvincing in her answers to questions about the documentation when pressed under cross-examination. She could not explain why, for example, cash deposits from an undisclosed source would be paid into her sister Nazreen's bank account and then removed to service the second secured loan. She denied that the payments were from her brother and said that her sister took responsibility for the second

loan because Nazreen was considering taking joint title to the property, Ruksana having indicated that she no longer wished to be involved. This ignored completely the point that she was being pressed on, which was why somebody in her sister Nazreen's situation would pay cash into her own bank account in the precise amount required to service the loan. The source of the monies going in was simply unexplained. Further, no evidence was led to support the stated reason for Nazreen Ahmad making the payments or being the conduit through which the payments were made. Ms Ashraf's evidence about why she had not obtained pay in slips at least showing her signature on them for a 12 month period was also unsatisfactory. She said that she wanted to obtain all of the necessary slips and did not think that a 12 month period only would be relevant. Again, against a background of a previous hearing in which the documentary evidence was held to be unsatisfactory, I did not find her position that she did not consider that a whole years' worth of signatures on pay in slips would be relevant to be a credible one, particularly as she referred repeatedly to her evidence before Lord Pentland not having been "full evidence" and claimed that no real detail about the breakdown of the loans had been asked of her on that occasion, indicating that she could have provided more information if asked. I conclude that the evidence produced in relation to servicing the interest payments on the secured loans over Polwarth Gardens goes no higher than to illustrate that during the period 2004/2014, some payments have been made to meet the interest due on those secured loans. I can reach no conclusion on the identity of the payer.

[34] I have already indicated that the evidence on the sequence of events leading to Ms Ashraf and her sister Ruksana's decision not to take title to the property in 2003 was effectively undisputed in the proceedings before me. Mr Byrne sought to rely on the fact that the position stated before Lord Pentland had been entirely contrary to the one now put forward. In the Confiscation Order proceedings Farzana Ashraf had claimed that

Mr Hamilton acted contrary to the instructions given to him. In evidence before me Ms Ashraf and Mr Hamilton both confirmed that the decision had been taken not to take title as recorded by him on the file and for the reasons given. Accordingly, a finding that there was a decision not to take title in 2003 is not now controversial on the evidence led. The evidence leading to that finding, however, has a bearing on my assessment of the credibility and reliability of Ms Ashraf. Her answers in cross-examination on the point were evasive and unsatisfactory. She claimed that it was the Crown that had suggested to her in evidence at the previous hearing that Mr Hamilton had not acted as she had told him to act. That may be so, but it is clear from the Opinion of Lord Pentland that she did maintain such a position in evidence. When pressed again by Counsel in evidence in these proceedings on the matter Ms Ashraf prevaricated and tried to take the discussion into questions she had been asked about timescale in the earlier proceedings. She said she had been hesitant in the previous proceedings when asked about the matter because she had not looked at the missives until the court hearing. Effectively, she sought to avoid addressing a very clear point put to her that she had changed her position on why title was not taken to the property.

[35] The final important matter covered by the evidence was the question of Ms Ashraf's current intentions in terms of obtaining title to the property. In her own evidence in chief Ms Ashraf gave the clear impression that she had made efforts to have the title to the property disposed to her. When an email was put to her from the Accountant in Bankruptcy's office dated 14 December 2015 indicating there were alternative routes and that as her brother had been discharged from his sequestration he could transfer title to her at any time, she maintained that her understanding was that the Accountant in Bankruptcy would have to transfer title. She claimed that she had legal advice to that effect. To illustrate the efforts she was making to secure title she relied on proceedings she has raised

in the sheriff court, sisted pending the outcome of these proceedings, to reappoint the Accountant in Bankruptcy so that title could be transferred. However, matters were then clarified by Mr Haddow in his evidence when he went much further than the terms of correspondence from the Accountant in Bankruptcy in December 2015. He explained that he is no longer involved in the developments in this particular matter but that he had been in 2013 and 2014 and that on more than one occasion during that time he personally had made clear to Ms Ashraf and also to her then representative, that she could simply have her brother sign a disposition in fulfilment of the obligation under the missives. This information emanated from Mr Haddow only in cross-examination and although it turned out that the relevant correspondence (No 6/2 of process) was lodged, that too came to light only in Mr Byrne's cross examination. However, Mr Haddow was not re-examined and in submissions Ms Ashraf did not suggest that his evidence was in any way inaccurate.

[36] For the reasons given above I have considerable reservations about the credibility and reliability of any of the evidence given by Ms Ashraf. I accept the evidence of Mr Gordon Hamilton in so far as he was able assist the court with the matters currently to be determined. It was apparent that he had never been given any indication of when the sisters might seek to take title to the property at Polwarth Gardens and he was able to do no more than hazard a guess of what he thought might happen in future. Mr Haddow was a clear and straightforward witness. He was very careful to answer questions only insofar as he could do so from his own recollection or involvement in the matter. I accept without hesitation the evidence he gave in relation to the events of 2013 and 2014 and the information he had given to Ms Ashraf and also to her advisors.

[37] I conclude in relation to this matter that the interested party and Minuter knew that there was a mechanism through which she could take title without involving further the Accountant in Bankruptcy; that she deliberately sought to create an impression that there

were legal obstacles to her taking title and that her stated intention not to take title in 2003 has not altered.

[38] I turn to address the application of the relevant legislative provisions to the facts of this case.

[39] As already indicated, Ms Ashraf is entitled to seek to vary the order made under section 128 of the 2002 Act conferring power on the administrator or recall it to the extent of excluding the property at Polwarth Gardens because she is a party affected by it.

Section 135 itself does not impose any test or restriction on the court in determining an application to vary or recall such an order. The powers of the court are contained within section 132 which is in the following terms:

**“Powers of court and administrator**

- (1) This section applies to—
  - (a) the powers conferred on a court by sections 119 to 131, 134 to 136 and Schedule 3;
  - (b) the powers of an administrator appointed under section 125 or 128(3).
- (2) The powers—
  - (a) must be exercised with a view to the value for the time being of realisable property being made available (by the property’s realisation) for satisfying any confiscation order that has been or may be made against the accused;
  - (b) must be exercised, in a case where a confiscation order has not been made, with a view to securing that there is no diminution in the value of realisable property or of the proceeds of realisation;
  - (c) must be exercised without taking account of any obligation of the accused or a recipient of a tainted gift if the obligation conflicts with the object of satisfying any confiscation order that has been or may be made against the accused;
  - (d) may be exercised in respect of a debt owed by the Crown.
- (3) Subsection (2) has effect subject to the following rules—

- (a) the powers must be exercised with a view to allowing a person other than the accused or a recipient of a tainted gift to retain or recover the value of any interest held by him;
  - (b) in the case of realisable property held by a recipient of a tainted gift, the powers must be exercised with a view to realising no more than the value for the time being of the gift;
  - (c) in a case where a confiscation order has not been made against the accused, property must not be realised if the court so orders under subsection (4).
- (4) If on an application by the accused or by the recipient of a tainted gift the court decides that property cannot be replaced it may order that it must not be sold.
- (5) An order under subsection (4) may be revoked or varied.”

[40] This application raises issues about the relationship between section 132(2)(c) and (3)(a). The first of these two subsections requires the court to ignore any obligation of the accused if that obligation conflicts with the object of satisfying any Confiscation Order that has been or may be made against him. It is clear that Mr Younas is the person with an obligation to transfer property in terms of the missives and the starting point is that such an obligation has to be ignored as clearly in conflict with satisfying the Confiscation Order. Section 132(3) then provides important qualifications to that starting point. If a third party (ie a person other than the accused or a recipient of a tainted gift) can show that she holds an interest that she wishes to retain or recover, then all things being equal the court will exercise its power with a view to allowing that person to retain or recover such an interest. It is clear that the expression “with a view to” falls far short of mandatory direction; the court must evaluate all the circumstances and proceed on the basis that such a person with an interest should normally be allowed to retain or recover it, unless the circumstances otherwise dictate.

[41] It may be necessary to characterise the nature of Ms Ashraf’s right for the purpose of the exercise. Section 50 of the 2002 Act provides that property is all property wherever

situated and includes both money and all forms of property whether heritable or moveable and whether corporeal or incorporeal. Section 150(2) provides for certain rules in relation to property. Those relevant to the current situation are in the following terms:

- “(g) references to an interest, in relation to land in Scotland, are to any estate, interest, servitude or other heritable right in or over land, including a heritable security;
- (h) references to an interest, in relation to property other than land, include references to a right (including a right to possession).”

[42] Mr Byrne argued that Ms Ashraf’s interest was the enforcement of a contractual obligation only. She could not be regarded as having entered into a genuine transaction with a view to obtaining title in the property and so could not be regarded as having interest in that heritable property. He contended that the property is retained by Mr Younas who cannot recover it and that Ms Ashraf has never held the property such that she cannot be regarded as a party entitled to retain or recover it.

[43] In approaching this matter I have found the views expressed in the Court of Appeal’s decision in *Director of the Serious Fraud Office v Lexi Holdings Plc (in administration) and another* [2009] 2 WLR 905 to be of some assistance. In addressing section 69 of the 2002 Act, which is in effectively identical terms to section 132 but applies to England and Wales, the court described (at paragraph 64) the provision that allows for a third party to retain or recover the value of any interest held by him as a “legislative steer”. The court pointed out that the recovery of the “value of any interest” went beyond the “value of any property” which had been the previous legislative provision.

[44] I indicated that the starting point for discussion was the Confiscation Order made by Lord Pentland as the making of that Confiscation Order was not challenged and cannot be challenged in the context of this application. Further, as already indicated, in terms of section 132(2)(c) the obligations of the respondent Mohammed Younas in terms of the

missives must be ignored by the court unless any of the factors in section 132(3) apply. I have reached the view that Counsel for the petitioner was correct in submitting that Ms Ashraf has no more than an interest in the missives which remain in force. The obligations due to her (and her sister) in terms of the missives are unaffected by the realisation of the property by the administrator pursuant to the courts interlocutor of 8 March 2016. In light of the view I have reached on the evidence presented to me about the circumstances in which Ms Ashraf has not sought to obtain title to the property at Polwarth Gardens, I do not consider that her interest is such as to fall within the category of property that she should be permitted to “retain” or “recover”. Her rights are no greater than those of a third party unsecured creditor. In *Lexi Holdings* the Court of Appeal described the mandatory direction to the court in section 69(2)(c) (or in this case section 132(2)(c)) as a “...deliberate tightening up of the legislation by Parliament”. There are a number of factors that all support a conclusion that the Polwarth Gardens property does not on the face of it fall to be regarded as property of the interested party that can be retained or recovered or recovered by Ms Ashraf such that a departure from the mandatory direction would be justified or appropriate. These include the absence of any direct evidence as to who has been servicing the secured loans over the property since 2003, the decision taken by Ms Ashraf and her sister not to insist on taking title to the property during the whole period since then and Ms Ashraf’s evasiveness in evidence in relation to the circumstances in which she has not previously pursued the matter of obtaining title to the property.

[45] The title has remained throughout in the name of her brother Mr Younas who is not in a position to recover it. I accept the submission of Counsel for the petitioner that it can be inferred that the likely outcome of granting the orders sought by Ms Ashraf in this Minute would be that the title to the property would continue to be held by her brother. The sisted sheriff court application to reappoint the Accountant in Bankruptcy, raised recently, is far

too little too late to persuade me that the Minuter's intention has ever been to take title to this property.

[46] The argument presented by Ms Ashraf in terms of Article 1 of Protocol 1 ECHR also fails, as it did before Lord Pentland. She was advised by the Accountant in Bankruptcy in 2014 but prior to the Confiscation Order being made that Mr Younas could transfer title to her and her sister, yet she did not pursue that while also claiming to the court that Mr Hamilton had failed to take steps to have the title transferred to her. She has been well aware throughout that she needed a disposition to obtain title and she has not pursued that in the face of advice that she could do so. Having chosen not to convert her personal right under the missives into a proprietary right that could be given protection, she has no stateable human rights claim.

[47] It was acknowledged by Mr Byrne that a view could be taken that Ms Ashraf has an interest in recovering the value of the funds paid over in mortgage interest and even of the original price. However, there is before me no evidence that either of those items have been paid by her personally. In any event, Ms Ashraf does not seek a variation of the powers of the administrator simply to the extent that she should be reimbursed any monies she has paid; she seeks a variation to the extent of excluding the whole property from being realised by the administrator. For the reasons given, I have concluded that there is no basis on which such an order should be granted and I refuse the application made by the interested party and Minuter. I will reserve meantime any question of expenses.