FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 3
CA116/17

Lord President
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD DRUMMOND YOUNG

in the cause

YVONNE QUINN as Trustee in the sequestrated estate of John O'Boyle

Pursuer and Respondent

against

KAREN BRENNAN

Defender and Reclaimer

Pursuer and Respondent: McDougall; Halliday Campbell WS (for Kepstorn Solicitors)
Defender and Reclaimer: Gardiner; TC Young LLP

23 October 2019

[1] The pursuer is the trustee currently acting on the sequestrated estate of John O'Boyle ("the debtor"). The debtor was sequestrated on 11 February 2015, on his own application, and was subsequently discharged from sequestration on 1 May 2016.

[2] In December 2017, the pursuer raised an action on the commercial roll seeking declarator that certain payments made by the debtor to the defender were gratuitous alienations in terms of section 34 of the Bankruptcy (Scotland) Act 1985. Payments of £190,960 ("the first alienation") and £67,837.97 ("the second alienation") were said to have

been made by the debtor to the defender in August and September 2014, and it is to those payments that the declarator relates. The pursuer also concluded for payment of those sums by the defender. The first of those payments, of £190,960, was used to acquire a house at 16 Attlee Road, East Kilbride, title to which was taken in the defender's name. The defender admits the payment of £190,960 made in August 2014 and the acquisition of the house, but she avers by way of defence that the house was sold in January 2017, and that on 17 January 2017 she paid the sum of £197,462.20 to the debtor. She contends that the payment made by her on 17 January 2017 constituted adequate consideration for the alienation, and that she thus restored the relevant property to the debtor's estate. The critical question is accordingly whether the defender is correct in averring that she provided adequate consideration for the alienation of £190,960 made in August 2014.

[3] The action proceeded to a debate before the Lord Ordinary on 17 May 2018. At the hearing, the pursuer accepted that the defender's averments relating to the second alienation were suitable for inquiry, and accordingly the only challenge was to the defender's pleadings in respect of the first alienation. The Lord Ordinary, in an interlocutor dated 12 September 2018 and corrected by a further interlocutor of 12 October 2018, held *inter alia* that the defence in respect of the first alienation was irrelevant, and that declarator should accordingly be granted that that payment was a gratuitous alienation. He further decerned against the defender for payment to the pursuer of the sum of £190,960. The defender has now reclaimed against that interlocutor of 12 September 2018 as corrected by the interlocutor of 12 October.

The relevant statutory provisions

[5] The date of sequestration precedes the coming into force of the Bankruptcy

(Scotland) Act 2016. The issues in the present case are accordingly governed by the Bankruptcy (Scotland) Act 1985, as amended by *inter alia* the Bankruptcy and Diligence etc. (Scotland) Act 2007) ("the 1985 Act"). The relevant provisions of the 1985 Act are as follows:

> **"31.- Vesting of estate at date of sequestration.**
> (1) Subject to section 33 of this Act ... the whole estate of the debtor shall by virtue of the trustee's appointment, vest in the trustee as at the date of sequestration for the benefit of the creditors.…
> **34.- Gratuitous alienations.**
> (1) Where this subsection applies, an alienation by a debtor shall be challengeable by-
> (a) any creditor who is a creditor by virtue of a debt incurred on or before the date of sequestration, or before the granting of the trust deed or the debtor's death, as the case may be; or
> (b) the trustee, the trustee acting under the trust deed or the judicial factor, as the case may be
> (2) Subsection (1) above applies where-
> (a) by the alienation, whether before or after the coming into force of this section, any of the debtor's property has been transferred or any claim or right of the debtor has been discharged or renounced; and
> (b) any of the following has occurred –
> (i) his estate has been sequestrated ...; and
> (c) the alienation took place on a relevant day.
> (3) For the purposes of paragraph (c) of subsection (2) above, the day on which an alienation took place shall be the day on which the alienation became completely effectual; and in that paragraph 'relevant day' means, if the alienation has the effect of favouring-
> (a) a person who is an associate of the debtor, a day not earlier than 5 years before the date of sequestration, the granting of the trust deed or the debtor's death, as the case may be; or
> (b) any other person, a day not earlier than 2 years before the said date.
> (4) On a challenge being brought under subsection (1) above, the court shall grant decree of reduction or for such restoration of property to the debtor's estate or other redress as may be appropriate, but the court shall not grant such a decree if the person seeking to uphold the alienation establishes-
> …
> (b) that the alienation was made for adequate consideration;
> …
> (6) For the purposes of the foregoing provisions of this section, an alienation in implementation of a prior obligation shall be deemed to be one for which there was no consideration or no adequate consideration to the extent that the prior obligation was undertaken for no consideration for no adequate consideration.
> …

> (8) A trustee ... shall have the same right as a creditor has under any rule of law to challenge an alienation of a debtor made for no consideration or for no adequate consideration."

The pleadings so far as relevant to the first alienation

[6] As already noted, the pursuer avers that the debtor's estate was sequestrated on 11 February 2015 on his own application. Until 22 August 2014 the debtor had been the heritable proprietor of subjects in Cherrytree Wynd, East Kilbride. Those subjects were sold on that date, realising free proceeds of £283,500. It is further averred, and admitted by the defender, that on 28 August 2014 the debtor transferred £190,960 to a bank account created to finance the acquisition of a house at 16 Attlee Road, East Kilbride. The defender was at the material time the partner of the debtor. The sum transferred was to cover the purchase price, registration dues and associated fees. Title to 16 Attlee Road was taken in the defender's sole name on 4 September 2014.

[7] The pursuer avers that the defender and the debtor resided together at 16 Attlee Road until it was sold, that having occurred on 24 January 2017. The sale price is averred to have been £200,000. Since the sale, the pursuer avers, the debtor and the defender have resided together at a flat owned by the defender. This is denied by the defender.

[8] The pursuer contends that the transfer of £190,960 by the debtor to the defender and the defender's subsequently taking title to the property at Attlee Road in her own name amounted to, in combination, a gratuitous alienation in terms of s 34 of the Bankruptcy (Scotland) Act 1985, having been granted for no adequate consideration. The pursuer maintains that the defender acted in bad faith by facilitating the putting of funds out of reach of the debtor's creditors.

[9] For her part, the defender denies that she knew or ought to have known about the debtor's sequestration or his financial affairs at the relevant times, or that she acted in bad faith with a view to putting funds out of the reach of his creditors. Her position in the pleadings is that she had very limited understanding of the debtor's financial affairs and a very poor understanding of financial affairs generally. She avers that she trusted the debtor and, in so far as he discussed his financial affairs with her prior to his sequestration, he assured her that he had sufficient funds to pay his creditors. The defender avers that she accepted the transfer of 16 Attlee Road into her name and that there was "a loose understanding" between her and the debtor "that she would look after him if his health deteriorated". It is not, however, averred that this was adequate consideration for the first alienation.

[10] The defender further avers that, when the debtor's financial situation deteriorated, he asked her to sell 16 Attlee Road, and she complied. Net sale proceeds of £197,462.20 (£200,000 less £2,537.80 in respect of legal fees and other expenses) were paid to her on 16 January 2017. On 19 January she gave the debtor a cheque for that amount. She avers that the payment to the debtor of the net sale proceeds "constituted adequate consideration" and that she "restored the relevant property to the debtor's estate", through payment of a sum which represented the entire net proceeds of sale. That sum, it is said, constituted adequate consideration. The fundamental issue in the reclaiming motion is whether that last averment is correct as a matter of law

The Lord Ordinary's decision

[11] The Lord Ordinary accepted that the combined effect of (i) the transfer by the debtor of £190,960 to an account created to finance the acquisition of 16 Attlee Road, and (ii) the

taking of title in the defender's name, was that there was an alienation by the debtor to the defender which was challengeable under section 34(1). It involved part of the debtor's property (s. 34(2)(a)), the debtor's estate had been sequestrated (s. 34(2)(b)(i)) and the alienation took place on a "relevant day" in terms of sections 34(2)(c) and 34(3). The object of the 1985 Act, and of section 34 in particular, was important (*MacFadyen's Trustee* v *Macfadyen,* 1994 SC 416 at 421H; *Short's Trustee* v *Chung,* 1991 SLT 472 at 476K; and *Joint Administrators of Oceancrown Limited* v *Stonegate Limited* 2015 SCLR 619, [2015] CSIH 12). To suggest that, although the first alienation was gratuitous at the time it was made, it lost that character when, more than two years later (and almost two years after the sequestration), payment of an equivalent sum was made to the debtor for his own benefit, was a "startling proposition" and would mean that the object of section 34 could be circumvented with impunity.

[12] In terms of section 34(4) what the court had to do where there had been an alienation to which section 34(1) applied, and no defence had been established, was to grant redress which so far as possible put the creditors in the position they would have been in had the gratuitous alienation not occurred. The reference to "other redress as may be appropriate" was designed to enable the court to make an appropriate order in a case where reduction or restoration of the property is not a remedy which is available; it did not allow resort to equitable considerations and accordingly did not provide a relevant ground for resisting decree. On a proper construction of section 34(4) the words "debtor's estate" meant the estate vested in the trustee to be administered for the benefit of creditors. That is the natural reading of those words. It is a construction which sits comfortably with the other provisions of the Act. It is the only reading which gives effect to the clear purpose of the provision.

[13] The alienation here became challengeable (by the trustee or by a creditor) by virtue of section 34(1) as soon as the requirements of section 34(2) were satisfied. All relevant section 34(2) requirements were met at the time the debtor was sequestrated. Those requirements continued to be met when the trustee brought the section 34(1) challenge. But for the alienation, the funds concerned would have vested in the trustee at the date of sequestration. As a result of the alienation they did not so vest. The alienation was to the clear prejudice of the debtor's creditors. The character of an alienation generally fell to be determined at the time it was made. Where after the date of alienation but before the date of sequestration an alienation had been restored to the debtor's estate or adequate consideration for it had been granted, there might be scope for arguing that it is the position as at the date of sequestration which is important. On each of those scenarios it might be possible to show that in the result the purported alienation had not prejudiced creditors. It was unnecessary, however, and probably undesirable, to reach a concluded view on those questions because they did not arise in the present case.

[14] Here, the character of the alienation was not changed by subsequent events. It did not cease to be an alienation by reason of the defender's complying with the debtor's request to transfer funds to him. The transfer by the defender was not a "repayment" of the alienation. It did not in any way redress the gratuitous alienation or the resulting prejudice to those creditors. In relation to the submission that even if the payment to the debtor did not redress the alienation it was nevertheless adequate consideration for it, the defender had to establish "that the alienation *was* made *for* adequate consideration" (s. 34(4)(b)(emphasis added)). She had to show that at the time of the alienation something of more or less equivalent value was obtained in exchange for it. It was not suggested that adequate consideration was given between the date of the alienation and the date of sequestration,

and it was therefore unnecessary to explore whether the provision of consideration at that time could have provided a relevant defence although the decision in *Blackburn* v *Alexander* [2015] CSOH 179 was noted.

[15] The Lord Ordinary considered certain further authorities: *MacFadyen's Trustee* v *Macfadyen,* 1994 SC 416, at 421E – 422A; *Cay's Trustee* v *Kay* 1998 SC 780, at 785H - 786C; *Liquidator of Letham Grange Development Co Ltd* v *Foxworth Investments Ltd,* 2013 SLT 445, and on appeal, 2014 SC (UKSC) 203, at para 25; *Joint Administrators of Oceancrown Limited* v *Stonegale Limited,* 2015 SCLR 619, [2015] CSIH 12, and on appeal, 2016 SC (UKSC) 91 at para 17. On the authorities, it was "equally plain and obvious" from the defender's averments that the first alienation had not been made for adequate consideration. The alienation had been made for no consideration. Nothing had been granted by the defender in exchange for the alienation; she had undertaken no obligation to repay the debtor. There was no relevant nexus between the making of the alienation and the defender's subsequent compliance with the debtor's request that payment be made to him.

[16] There was no restriction of the section 34(1) rights of trustees and creditors to challenge gratuitous alienations requiring that the trustee ought to have challenged the alienation before the debtor's discharge. The discharge did not end the sequestration. The sequestrated estate remained vested in the trustee, who continued to be obliged to administer it for the benefit of creditors. His title to challenge alienations and preferences subsisted (*Henderson* v *Bulley* (1849) 11 D 1470 at 1473; McBryde, *Bankruptcy* (2nd ed.), paras 1-07 and 18-57; Mackenzie Skene, *Bankruptcy,* para 18-04). The Lord Ordinary accordingly concluded that the defender's pleadings disclosed no relevant defence to the pursuer's challenge to the first alienation.

The grounds of appeal

[17] The defender has reclaimed against the Lord Ordinary's decision. She contends that the Lord Ordinary was in error in holding that the defender "has to show that at the time of the alienation something of more or less equivalent value was obtained in exchange for it". If that was so, consideration could never come after the time of the alienation. The critical issue was accordingly whether a repayment made after an alienation could constitute adequate consideration for the purposes of section 34(4)(b) of the 1985 Act. On that issue, the defender contends that the words "the alienation was made for adequate consideration" meant that there must be a nexus between the alienation and the consideration. The subsection was nevertheless silent and non-prescriptive as to what the requirements for that nexus are. The defender submits that subsequent repayment could constitute such a nexus.

[18] In particular, the defender submits that the expression "was made for" does not require any temporal nexus between the alienation and the consideration. Nothing excluded the benefit of hindsight. Consequently a subsequent repayment of the amount of the alienation can be taken into account. The case law on the meaning of consideration in the context of section 34 and other provisions dealing with gratuitous alienations in insolvency proceedings is largely concerned with the adequacy of the consideration provided, rather than whether or not something could amount to consideration. In *Joint Liquidators of Grampian Maclennan's Distribution Services Ltd* v *Carnbroe Estates Ltd*, 2018 SC 314, a case dealing with the adequacy of consideration, it was said that consideration in the context of section 242 of the Insolvency Act 1986 (which corresponds to section 34 of the Bankruptcy (Scotland) Act 1985) "must mean something of material or patrimonial value which could be vindicated in a legal process". The meaning of "consideration in the context of section 34 was, however, addressed directly in *MacFadyen's Trustee* v *MacFadyen*, 1994 SC 416. In that

case the court held that "consideration" must be given its ordinary meaning as "something which is given, or surrendered, in return for something else". The consideration could be granted in respect of some "past, present or future return", and what is material is whether at the time of giving the consideration it is intended to be consideration for an alienation of property.

[19] Historically, repayment in full would constitute a defence. The focus of the Bankruptcy Act 1621 had been on the adequacy of the value received. This was reflected in section 34(4) namely that its purpose was to restore the debtor to the position that he or she would have been in but for the alienation. That function was fulfilled at the point when the defender repaid the debtor for the alienation. Assuming the defender's averment that she acted in good faith to be true, whatever then took place between the debtor and the trustee is a matter between them, and has no bearing on the adequacy of the consideration. Furthermore, if consideration paid subsequently to an alienation could not constitute adequate consideration, an unjust and anomalous result would follow, in that the defender would have to repay the alienation twice, once to the debtor and once to the trustee.

The meaning of consideration

[20] The defender's challenge to the Lord Ordinary's decision accordingly turns on the meaning of the word "consideration" as used in the insolvency legislation generally, and in particular as it is used in section 34(4) of the Bankruptcy (Scotland) Act 1985; the same issue might arise in relation to the successor of that section, section 98 of the Bankruptcy (Scotland) Act 2016, and section 242(4) of the Insolvency Act 1986, dealing with corporate insolvency. In the present context, the critical issue is not the adequacy of the amount paid, but whether the payment of £197,462.20 by the defender to the debtor on 19 January 2017

was consideration for the earlier transfer of funds by the debtor to the defender on 28 August 2014. Was the payment made in 2017 "consideration", in the statutory sense, for the alienation made in 2014?

[21] In our opinion the payment made by the defender was not consideration in this sense for the earlier payment made to her by the debtor. We reach this conclusion for two distinct reasons. First, we are of opinion that if a payment is to amount to "consideration" for an alienation for the purposes of section 34 and its successor, it must properly be regarded as the counterpart of the alienation. That element is absent in the present case, where the payment by the defender was made more than two years after the alienation that has now been challenged, without any prior obligation to make such a payment.

[22] Secondly, we are of opinion that the payment of funds to a discharged bankrupt is not capable, as a matter of law, of amounting to consideration for an alienation made by the bankrupt prior to his sequestration. The result of sequestration is to transfer the debtor's existing property to the trustee in sequestration, to be applied in the manner specified in the Bankruptcy (Scotland) Act 1985 or its successor, the Bankruptcy (Scotland) Act 2016. That property, which is subject to a form of statutory trust, forms a separate estate, or patrimony, from any property that the debtor may acquire after his discharge from the sequestration. Thus a payment made to the debtor after his discharge is not a payment into the estate or patrimony that was prejudiced by the gratuitous alienation that is under challenge.

[23] We will consider these reasons separately.

Whether the payments made by the defender to the debtor on 19 January 2017 amounted to consideration for the transfer of funds by the debtor to the defender on 28 August 2014

[24] If a payment is to amount to "consideration" for an alienation, it must in our opinion

be the counterpart of that alienation. This means that there must be a fundamental element of exchange or reciprocity between the payment and the alienation; the payment must be regarded on objective grounds as a *quid pro quo* for the alienation. That is the fundamental meaning of the word "consideration". Such an interpretation is supported by the decision of the court in *MacFadyen's Trustee* v *MacFadyen*, 1994 SC 416, where Lord McCluskey, delivering the opinion of the court, stated (at 421E-I):

> "The word 'consideration' is not defined in the Act and we consider that it must be given its ordinary meaning as something which is given, or surrendered, in return for something else. If something is given without any return being demanded or expected or obtained and at the time of giving is not intended to be regarded as a consideration of some past, present or future return… that which is given cannot later be converted into a consideration just because at the later date the giver and receiver chose so to describe it. A consideration appears to us to acquire its character as a consideration not later than the time when the giving or surrendering takes place. In the context of bankruptcy law, the bankrupt debtor must be regarded as a trustee for the creditors in respect of such of his assets as are under his control. In that context, it is our view that a consideration must mean something of material or patrimonial value which could be vindicated in a legal process, whether by being claimed or possibly by being pled in answer to another's claim. A principal purpose of the Bankruptcy (Scotland) Act 1985 is to regulate intromissions by a debtor with his material assets in order to safeguard the interests of his creditors: *cf* the headnote to secs. 34 and 35. These interests are patrimonial and able to be vindicated by legal process".

[25] For present purposes three important points emerge from this passage. First, for the purposes of the legislation governing gratuitous alienations, consideration must be given its ordinary meaning. As we have indicated, this inevitably involves an element of exchange or reciprocity between the alienation and the consideration; the consideration must be the counterpart of or a *quid pro quo* for the alienation. Secondly, whether the necessary element of reciprocity exists must be determined on strictly objective grounds; such an approach runs through the whole of the foregoing statement of the law. In any event, in legal provisions that govern the distribution of estate on insolvency, an objective approach will

almost invariably be called for unless good faith or a comparable subjective criterion is referred to expressly in the legislation.

[26] Thirdly, the existence or otherwise of the necessary element of reciprocity must be determined at the time when the exchange is agreed. That in our opinion is the clear implication of the quoted passage, read as a whole. It is implicit in the proposition that something given cannot later be converted into consideration merely because the giver and receiver choose so to describe it. Furthermore, the emphasis in the passage on the notion of "return" is a clear indication that the character of a payment or transfer as "consideration" must be apparent when the exchange, or *quid pro quo*, is agreed. Indeed, that proposition is necessarily implicit in the notion of return or exchange; if a return is to be given or an exchange is to take place there must be two parties to the transaction, each of whom gives something to the other. It is when those parties agree on the exchange, or the giving of a return, that it becomes possible to speak of "consideration" in any sense. If there is no agreement to exchange one thing for another, there cannot be consideration.

[27] Counsel for the defender argued that in the quoted passage the word "something" in the second sentence referred to the consideration, not the alienation, and that the words "at the time of giving" in the same sentence likewise referred to the time when consideration was given, rather than the time when the alienation was made. On that basis counsel submitted that the critical time was when the claimed consideration was provided to the debtor, and that it was sufficient that at that time the thing so provided was intended to be consideration of some "past, present or future return"; the quoted words are used in the passage and, it was submitted, indicated that it was immaterial that the thing for which the consideration was given had been transferred to the person providing consideration at some time in the past. In our opinion this interpretation of the passage cannot be correct. It is true

that the wording tends to focus on the time when consideration was given. Nevertheless, as indicated in the last paragraph, the existence of consideration requires that there should be an exchange – "something given… in return for something else". That requires the agreement of both parties to the transaction. If they do not agree on the necessary element of exchange or reciprocity at that time, there is no consideration. For that reason, a subsequent payment cannot be converted into consideration; the most elementary feature of that concept is absent.

[28] In the passage quoted from *MacFadyen's Trustee*, reference is made to a consideration for some "past, present or future return". That reference is entirely consistent with the fundamental requirement of exchange or reciprocity for the existence of consideration. It is important to bear in mind that contracts frequently provide for supplies or work or payments to take place in future, or by instalments. Consequently a distinction must be drawn between the time when consideration is agreed and the time when it is paid or supplied. If, for example, a contract is concluded for the supply of goods by instalments over a period of two years and for the payment of consideration for each instalment within 28 days after supply of that instalment, the consideration from both parties falls to be provided in future. Nevertheless, the consideration provided by each party is the product of the same agreement. It is the existence of that agreement that gives the performance by each party its character as consideration, by providing the necessary element of reciprocity. A past return, as referred to in the passage quoted from *MacFadyen's Trustee*, is more unusual, but this can occur where supplies take place, or payments are made towards the eventual price, during a period of contractual negotiation. In such a case the effect of the parties' agreement is to treat what has been done during the intervening period as consideration that forms part of the agreement. The critical point is that agreement is needed to create

consideration, and the existence or otherwise of consideration must be determined at the time of that agreement.

[29] In the present case it is averred that the debtor transferred the sum of £190,960 to an account created to finance the acquisition of the property at 16 Attlee Road, and that title to that property was taken in the defender's sole name on 4 September 2014. The Lord Ordinary held, and it is not now challenged, that the combined effect of the transfer of funds and the taking of title in the defender's name was that there was an alienation by the debtor to the defender which was challengeable in terms of section 34(1). The payment by the defender to the debtor is averred to have been made on 17 January 2017, more than two years after the alienation that is now challenged. It is not averred that there was any prior obligation on the defender to make such a payment. In particular, there is no averment that the transfer of funds by the debtor to finance the acquisition of the property was made on the basis that any future sum, whether a specific amount or the proceeds of sale of the property, would subsequently be transferred to the debtor.

[30] In these circumstances it is impossible to hold that the payment made by the defender to the debtor on 17 January 2017 was "consideration" for the earlier transfer of funds and acquisition of the property in the defender's name. The critical element of reciprocity or exchange – of the defender's payment being a *quid pro quo* for the transfer of the property – is entirely lacking. The transfer of the property to the defender in September 2014 was not made for any reciprocal obligation on the part of the defender. Without that, however, it cannot be said that the transfer was made for any consideration. As we have already emphasized, it is the time of the agreement to transfer that is critical for this purpose, because it is then that the necessary element of exchange must occur. Furthermore, as the Lord Ordinary indicates in his opinion, the argument for the defender involves the

"startling proposition" that, although the first alienation was gratuitous at the time when it was made, it lost that character when more than two years later and after the debtor's sequestration payment of an equivalent sum was made to the debtor. If that were so, as the Lord Ordinary indicates, the object of section 34 of the Bankruptcy (Scotland) Act 1985 could be circumvented with impunity. Funds would be diverted from the trustee in sequestration and returned to the debtor after his discharge, in such a way that they made no contribution to payment of his debts.

Whether the payment of funds to a discharged bankrupt is capable of amounting to consideration for a transfer of assets prior to formal insolvency proceedings

[31] Our second reason for rejecting the arguments for the defender is perhaps of an even more fundamental nature than the first reason. In our opinion the payment of funds to a discharged bankrupt is not capable, as a matter of law, of amounting to consideration for an alienation made by the bankrupt prior to his sequestration. This conclusion follows from the effect of sequestration on the insolvent's estate. On sequestration (or any other formal insolvency proceedings) the estate is vested in the trustee in sequestration, in the present case by virtue of section 31 of the Bankruptcy (Scotland) Act 1985, and thereafter that estate is held by the trustee for the purposes summarized in sections 38-43 and 51-53 of the Act. (This is obviously subject to the rights, obligations, powers and liabilities found in other sections of the statute and the general law). The proper legal analysis of these provisions is in our opinion that the trustee in sequestration holds the debtor's property on a form of statutory trust. In summary, the trustee is responsible for ingathering the whole of the debtor's estate and holds the free estate for payment of outlays, remuneration and certain expenses, and thereafter for payment to the preferred, ordinary and postponed creditors.

[32] Estate of that nature, held on trust for statutory purposes, forms a distinct patrimony from the debtor's own property. The concept of dual patrimonies was developed by Professors GL Gretton and, subsequently, KGC Reid in an important series of academic articles; for present purposes it is perhaps sufficient to note GL Gretton, "Trusts without equity", (2000) 49 ICLQ 599, and KGC Reid, "Patrimony not equity: the trust in Scotland", (2000) 8 European Review of Private Law 427; the effect of the articles is set out in the Scottish Law Commission's Report on Trust Law (Scot Law Com No 239) (2014) at paragraph 3.4. The dual patrimony theory was put forward to explain the fact that the trust estate is not liable for the trustee's own private debts, but is a distinct patrimony, with its own assets, rights and liabilities. This explains the fundamental principle, laid down in particular in *Heritable Reversionary Company Co Ltd* v *Millar*, 1892, 19 R (HL) 43, that if a trustee is sequestrated or made subject to corporate insolvency procedures, the trust property is not affected, but remains held for the purposes of the trust.

[33] The notion of a distinct trust patrimony has a further important application, however, in that the trust estate forms a separate patrimony from the estate of the truster. This has two important consequences. First, the trust estate must be applied for the trust purposes and cannot be used, in the absence of express authority in the trust purposes, to satisfy the debts of the truster as an individual, that is to say, debts incurred independently of the trust patrimony. Secondly, a payment made to the truster will not be a payment to the trust, as it involves a payment to a distinct patrimony. Those propositions are an inevitable consequence of the existence of a distinct trust patrimony, which is quite separate from the property of either the truster or the trustees as individuals.

[34] In the circumstances of the present case, the two patrimonies that are relevant are, first, the estate of the debtor as it exists at the date of sequestration and, secondly, the estate

acquired by the debtor following his discharge from the sequestration. The first of these patrimonies, the estate at sequestration, is transferred to the trustee for the statutory purposes summarized in paragraph of [31] above. Following sequestration, that estate must be applied by the trustee for those purposes, and in that way it forms a distinct patrimony. Following the discharge of the debtor from the sequestration, however, he is able to acquire further property, and in so far as he does so that property forms a distinct patrimony from the property that he held prior to sequestration which was transferred to the trustee. That result follows from section 55 of the Bankruptcy (Scotland) Act 1985, which provides that on discharge and subject to certain exceptions the debtor is to be discharged of all debts and obligations contracted by him or for which he was liable at the date of sequestration. That necessarily implies that the debtor's estate after discharge is a distinct patrimony from his estate prior to sequestration; it cannot be used to meet debts incurred prior to sequestration, and conversely the estate held by the trustee (the pre-sequestration estate) cannot be used to meet debts incurred by the debtor after his discharge.

[35] The estate held by the trustee in sequestration includes the right to challenge gratuitous alienations and other preferences, together with any property obtained by the trustee as a result of such challenge. That right, and any property that results from a successful challenge, accrues to the trust patrimony. By contrast, a payment to the debtor after the date of his discharge is made to the debtor's own patrimony, and does not accrue to the trust patrimony.

[36] Thus the alienation was made from the debtor's original patrimony, which passed to the trustee, and the trustee's right to reverse that alienation also forms part of that original patrimony. The payment made by the defender, by contrast, was made to the new patrimony that results from the debtor's discharge. It did not accrue in any way to the

original patrimony which passed to the trustee. Consequently the payment by the defender in January 2017 cannot be consideration for the original alienation made by the debtor in August and September 2014 because, although in a sense the same individuals are involved, the 2014 alienation was made from the debtor's original patrimony whereas the 2017 payment was made to his new patrimony following his discharge. A straightforward analogy can be drawn with an ordinary trust: if a third party purchases a trust asset from trustees, the consideration that he pays for it must be paid to the trust – to the trustees as such. If, instead of paying the trust, the purchaser pays an individual trustee as an individual, that will not amount to consideration for the acquisition of the asset from the trust. If a payment is to be consideration, it must respect the double patrimonies. If it does not, it cannot amount to a valid payment of consideration. That is an elementary principle of trust law, and in our opinion it is fatal to the defender's argument in the present case.

The statutory purpose of section 34 of the Bankruptcy (Scotland) Act 1985 and other legislation dealing with gratuitous alienations

[37] The defender submitted that regard should be had to the fundamental purpose of the legislation governing gratuitous alienations. This was reflected in subsection (4) of section 34, which requires the court to grant reduction or other restoration of property. This reflected an underlying policy that insolvent debtors should manage their estates in such a way as to protect the interests of creditors: *Joint Liquidators of Maclennan's Distribution Services Ltd* v *Carnbroe Estates Ltd*, *supra*, at paragraphs [12]-[15]. It was submitted that that underlying purpose was fulfilled when the defender repaid the debtor for the alienation in full, as the debtor was then put in the same position as he would have been in but for the alienation.

[38] In our opinion this argument is erroneous. The fundamental point, made in the preceding part of this opinion, is that the repayment was made to the estate of the debtor following his discharge, at a point where the repayment did not benefit the creditors of his estate as at the date of formal insolvency. This is the result of the existence of two patrimonies, the estate of the debtor prior to insolvency, which on insolvency must be held for the trust purposes referred to in paragraph [31] above, and the estate held by the debtor following his discharge. Because of the existence of the two patrimonies, it is inaccurate to state that the debtor was put in the same position as he would have been in but for the alienation; the insolvency intervened, separating the alienation and the prepayment.

The position of the defender in the event that decree is granted

[39] For the defender it was submitted that if a payment made subsequent to an alienation could not as a matter of law constitute adequate consideration for the purposes of section 34, an unjust and anomalous result would follow, in that she would require to repay the alienation twice, first on 17 January 2017 and secondly following decree. In our opinion this is not a valid defence to the trustee's claim to redress for the gratuitous alienation. While it is correct that the defender has made a payment to the debtor of £197,462.20 on 17 January 2017, and will require to make a further payment to the trustee, she will not be left without redress. It seems likely that the payment to the debtor was made as a result of an error as to the legal consequences of what she was doing. Furthermore, on the reasoning in paragraphs [24]-[30] above, the payment that she made was made without consideration. On either of these analyses, it is likely that she will be able to claim repayment of the sum paid to the debtor, relying on a restitutionary remedy: either the *condictio indebiti* to remedy a payment made under a material error, or the c*ondictio causa data causa non secuta* in the

event of a failure of consideration. In either event, the debtor has been enriched as a result either of an error made by the defender or the failure to provide any return for the defender's payment.

[40] For present purposes, however, it is inappropriate to express a definitive opinion on the availability of these remedies. We merely note that it cannot be said that the defender is left without a remedy in respect of the payment that she made in January 2017.

Conclusion

[41] For the foregoing reasons we are in agreement with the Lord Ordinary that there is no relevant defence to the pursuer's challenge to the first alienation made by the debtor. We will accordingly refuse the reclaiming motion and affirm the Lord Ordinary's interlocutor of 12 September 2018. It is still necessary for the court to consider the challenge made to the second alienation, made on September 2014. For that reason we will remit the action to the Commercial Court in order to deal with that aspect of the case.