

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

[2021] SC EDIN 17

EDI-A418-19

JUDGMENT OF SHERIFF JOHN MUNDY

in the cause

GILLIAN PEARCE

Pursuer

against

DAVID MYERS

Defender

**Pursuer: McShane, Advocate, Harvey, Solicitor**

**Defender: Murdoch, Solicitor**

EDINBURGH, March 2021

**Introduction**

The sheriff, having resumed consideration of the cause, finds as follows:

**Findings in fact**

1. The pursuer is Gillian Pearce residing at 4/5 Essendean Place, Edinburgh, EH4 7HF ("the subjects"). The defender is David Myers, residing at Colchicums, The Vale, Stock Ingatestone, Essex, CM4 9PW.
2. The pursuer is aged 58. She works as a property manager in Edinburgh. She is heritable proprietor of the subjects.

3. The pursuer was formerly in a relationship with a Mark Easton. They commenced a relationship in about 2007 and began living together in about 2008 until about 2017 when they separated.

4. When living together the pursuer and Mark Easton lived at the subjects. There was a break in the relationship for around 6 months to a year in about 2012.

5. Mr Easton worked for his father's window cleaning business along with another employee Brian McKinven.

6. The pursuer discovered of the existence of a secured loan over the subjects in a meeting with Mr Easton and his financial adviser in about 2012 at which time Mr Easton indicated that he was responsible for obtaining it and had forged her signature.

7. The signature on the Standard Security over the subjects purportedly granted by the pursuer in favour of the defender dated 8 September 2011 and registered in the Registers of Scotland for the County of Midlothian on 6 October 2011 is not that of the pursuer. Her signature has been forged. The Standard Security bears to be granted in consideration of borrowing of £32,000 and all sums due and to become due. The pursuer did not receive any funds from the defender. The witness on the Standard Security bears to be the said Brian McKinven. The pursuer did not sign any such document at the time where Mr McKinven was a witness.

8. On or about 22 September 2011 a cheque was written on the pursuer's account with the Nationwide Building Society, number [redacted] in the sum of £32,000, payable to "M.EASTON". The cheque was returned unpaid on 26 September 2011. The signature on the cheque is not that of the pursuer. It is a

forgery. The other handwriting on the cheque is not that of the pursuer. The pursuer had no knowledge of the cheque at the time.

9. The said Mr Easton was responsible for procuring the Standard Security.

10. From time to time Mr Easton assured the pursuer that there was no need to worry about the security and that she would not lose her home.

11. A letter dated 3 August 2016 was sent to the pursuer's address by solicitors acting on behalf of the defender, being the creditor in the purported Standard Security. In terms, it was indicated that the letter was being sent in advance of a Calling-up Notice in respect of the security and that the total sum due including arrears and charges was £146,326.

12. At the time the pursuer was still in a relationship with Mr Easton and they were living together at the subjects.

13. On or about 5 September 2017 agents for the defender issued a Calling-up Notice to the pursuer, following which the pursuer sought legal advice and on 6 November 2017 reported the matter to the police. Following enquiries running into 2019 and a report to the procurator fiscal, no criminal proceedings were instigated against Mr Easton.

### **Finding in Fact and Law**

14. The purported signature of the pursuer on the said Standard Security being a forgery, and there being no exceptional circumstances either by the pursuer expressly or impliedly authorising or adopting the forged signature as her own, the document is null and void and of no effect.

**Finding in Law**

15. In the foregoing circumstances, the said Standard Security falls to be reduced.

**Interlocutor**

Sustains the first plea-in-law for the pursuer; repels the defender's second and third pleas-in-law; grants decree for reduction of the Standard Security dated 8 September 2011 and registered in the Registers of Scotland on 6 October 2011 purportedly granted by the pursuer in favour of the defender; dismisses crave three; finds the defender liable to the pursuer in the expenses of the action except insofar as otherwise dealt with; allows an account thereof to be given in and remits same when lodged, to the Auditor of Court to tax and report; grants sanction for the employment of junior counsel in the cause.

**NOTE****Introduction**

[1] This is an action of reduction of a Standard Security over the pursuer's property purportedly signed by the pursuer in favour of the defender in 2011 on the ground of forgery.

[2] The action also seeks suspension ad interim of a Calling-up Notice dated 5 September 2017 and interdict and interim interdict against the defender from taking any further steps to enforce repossession of the property which is the subject of the purported security.

[3] The property in question comprises the subjects at 4/5 Essendean Place, Edinburgh, EH4 7HF of which the pursuer is heritable proprietor ("the subjects").

[4] The initial writ in this case was lodged on 17 June 2019 and at the outset of the action the pursuer obtained ad interim suspension of the Calling-up Notice and interdict against taking further steps to enforce repossession of the property.

[5] After sundry procedure the case came before me for proof on 20 January 2021 which proceeded remotely by way of a WebEx hearing. The evidence and submissions were completed within one day after which I made avizandum.

### **The pleadings**

[6] The averments are of fairly short compass. The case on record is that the pursuer was formerly in a relationship with a Mark Easton and in about 2011 a Standard Security in favour of the defender was granted, the pursuer's signature being written by the said Mr Easton. It is averred that the pursuer did not receive any loan funds and that the cheque written on her Nationwide account on 22 September 2011 in the sum of £32,000 was payable to her partner Mr Easton. It is averred that she was entirely unaware of the Standard Security until about 2013 (2012 on the evidence) when at a meeting with an independent financial adviser she was advised of a secured loan on the property. The pursuer contacted the police at that time and the matter remained under investigation. Mr Easton indicated that the matter would be resolved but it never was. It is averred that the signature used in the Standard Security is not the pursuer's normal form of signature and that it is a forgery.

[7] The averments in the defences simply state that the defender is a commercial lender and the loan in respect of which the Standard Security was granted was provided in the course of his business. It is explained and averred that the firm of solicitors Conveyancing Direct acted in respect of the provision of the loan and the preparation and signing of the security documentation. It is further averred that the loan funds of £32,000 were provided

by the defender to Conveyancing Direct who then confirmed that the funds had been provided to the pursuer in accordance with her instructions. Those averments apart, the defender essentially put the pursuer to a proof of her averments.

### **The proof**

[8] At the proof the pursuer was represented by Mr McShane, Advocate instructed by Mr Harvey, Solicitor. For the defender there appeared Mr Murdoch, Solicitor.

[9] At the outset of the proof, on the pursuer's motion, certain formal amendments were made to the record, including the crave, which are reflected in the interlocutor of that date.

[10] There was a joint minute of admissions agreeing the relevant documents, including the copy Standard Security, and that the copies were equivalent to originals. The pursuer's proof consisted of evidence from the pursuer herself (Gillian Pearce) and handwriting expert Dr Evelyn Gillies. The defender's proof consisted of one witness Mr Graeme McCormick, a retired solicitor formerly of Conveyancing Direct, Glasgow.

[11] The pursuer's position was that she did not sign the Standard Security nor did she receive any loan from the defender. She had not signed any such document at the time where Mr McKinven, Mr Easton's fellow employee, had been a witness. She didn't find out about the security until about 2012 (rather than 2013 as averred) when a secured loan over the subjects was mentioned in a meeting she attended with Mr Easton and his financial adviser. At that time Mr Easton admitted that he was responsible for it and indeed that he had forged her signature on the security. He assured her that he would resolve the question of borrowing over the property and that she should not worry about it. That seemed to be the position for the next five years or so. She herself was in financial difficulty and was in fact sequestrated between around 2016 and 2019. She was not as attentive to her financial

affairs as she is now. Her evidence was that Mr Easton was very manipulating. She did not recollect receiving the letter of 3 August 2016 from solicitors for the defender in advance of the Calling-up Notice indicating sums due of £146,326. She separated from Mr Easton in 2017. In September of that year a Calling-up Notice was served in relation to the security and that is when she decided to take steps. She sought legal advice and she also reported the matter to the police (not in 2013 as averred). Such matters are recorded in the findings in fact. A cheque for £32,000 drawn on the pursuer's Nationwide account also came to light. This was dated 22 September 2011 and was made out to Mr Easton. It was returned unpaid. The pursuer's evidence was that she knew nothing about it at the time. She was subject to rigorous cross examination as to her knowledge of transactions and the delay in taking any steps to deal with the situation but was not moved from the position that she did not sign the security nor the cheque. Separately, she was referred in her evidence to loan documentation bearing to be an unregulated credit agreement between the pursuer and the defender dated 9 September 2011 in respect of a total loan of £32,000 over a term of 3 months. She denied signing that document.

[12] Dr Evelyn Gillies is a forensic document examiner and has worked as such for 28 or 29 years. She produced a report for the purposes of this case on the instruction of the solicitor for the pursuer and that is dated 12 November 2019.

[13] She was taken through the report in her evidence. Her opinion was based on sight of the Standard Security and cheque and also known writings of the pursuer, and formal handwriting samples for comparison purposes. Her evidence was that comparison of the questioned signatures with the known signatures of the pursuer revealed numerous and significant differences in proportion, construction and style which indicated that they were not genuine signatures of Gillian Pearce. The questioned signatures were completed in a

completely different style to the genuine with only the first initial (rather than the name) and surname. In effect they were so different that they were not actually comparable.

[14] Dr Gillies considered that there was no evidence to suggest that the signature on the Standard Security was written with a view to deny. Her conclusions were (1) the signatures on the Standard Security and cheque are not genuine examples of the pursuer's handwriting (2) it is unlikely that she wrote either of the signatures in question and (3) it is unlikely that she wrote any of the customer entries on the cheque. She was not provided with or asked for an opinion on the purported loan documentation, but it is evident on the face of it that the same style of signature is used on that as the Standard Security and cheque.

[15] In cross examination, aside from accepting that a report such as this is only as good as the information provided, Dr Gillies was not moved from her conclusions as to the authenticity of the signatures.

[16] The defender's witness Graeme McCormick was a retired solicitor who formerly worked with the firm of Conveyancing Direct in Glasgow until 31 October 2018. He had worked for 40 years as a solicitor latterly undertaking domestic conveyancing. The vast majority of the work that he did with Conveyancing Direct was done remotely without any face to face contact with clients. In the firm were two other partners and a number of paralegals who did the majority of the conveyancing related work. His role was a supervisory one. His firm were instructed in the drawing up of the Standard Security in question in 2011. He had no personal recollection of this transaction and did not meet the pursuer personally. The information he was able to give was based on sight of an action list and certain documents generated on the firm's system. All the witness could really confirm was that this transaction took place and was dealt with remotely with no face to face meetings.

## Submissions

[17] In submissions counsel for the pursuer invited the court to grant decree of reduction on the basis of the evidence of the pursuer that the signature on the Standard Security was forged supported by the evidence of the handwriting expert that it was unlikely to be the pursuer's signature. Counsel indicated that it was unnecessary for there to be a perpetual interdict against the defender from taking any further steps to repossess the property in the circumstances if reduction is granted. In that respect Mr Murdoch for the defender indicated that his client would undertake not to proceed with any such enforcement proceedings in the event that reduction is granted. There is a separate action for recovery of possession in this court which is presently sisted. Mr Murdoch submitted however that I should not grant decree of reduction. He accepted that the defender's position was essentially to test the pursuer's case. He submitted that the pursuer's position was not plausible. Having found out about the existence of a security over her property in 2012 or 2013 she did very little if anything about it and her lack of knowledge of the transaction involving the cheque written for £32,000 in favour of Mr Easton was equally implausible. Dr Gillies report was only as good as the information provided. The conclusion must be that the signature was made with a view to deny although I pause to observe that the defender has no averments to that effect. Overall however it was submitted that the pursuer had failed to discharge the onus upon her to prove the forgery on the balance of probabilities.

[18] Counsel for the pursuer asked me to sustain the first plea in law for the pursuer. The defender's solicitor asked to sustain pleas two and three for the defender explaining that the fourth plea (relating to fraud) related to previous pleadings.

[19] Counsel for the pursuer submitted that sanction should be granted for the employment of counsel in terms of section 108 of the Court Reform (Scotland) Act 2014

given the circumstances of the case and in particular the importance of the proceedings to the client. It was agreed that expenses should follow success.

## Discussion

[20] There was no issue between the parties that, if it were established that the signature on the Standard Security was forged, then the result would be that the deed was null and void and of no effect and not simply voidable. Such is clear from the case of *Chalmers v Chalmers* 2016 SC 158, a case involving a forged disposition. In delivering the opinion of the court (Extra Division) at paragraph [23] Lady Paton said:

“In our opinion a forged disposition is a nullity. It is wholly void, not merely voidable (Gordon, *Scottish Land Law*, paragraph 12.41; Walker, *The Law of Civil Remedies in Scotland*, page 151; Walker, *The Law of Contracts and Related Obligations in Scotland*, paragraph 15.3; *Lockyer v Ferryman* (1877) 4R (HL) 32 at page 39; Thomson, JM, ‘*Fraud*’, *Stair Memorial Encyclopaedia Vol II*, para 758). Only in exceptional circumstances may a forged disposition have any effect, the exceptional circumstances being where the person whose signature has been forged expressly or impliedly authorises or adopts the forged signature as his or her own (*Muir’s Exrs v Craig’s Trs* 1913 SC 349 at pp 354, 355; *Mackenzie v British Linen Co Ltd* (1881) 8R (HL) 8; *Dodd v Southern Pacific Personal Loans Ltd* [2007] CSOH 93; Gloag, *The Law of Contract*, p 546; Rankine, *Treatise on the Law of Personal Bar in Scotland* p 209). Furthermore we consider that the system of Scottish land registration could be subverted if it were possible to forge a signature on a disposition which was duly registered, and then put forward equitable circumstances supporting a contention that the forged disposition should not be reduced, with the ultimate result (in the context of land tenure) depending upon the discretion of the court”.

[21] That statement would in my view be equally applicable to a deed such as a standard security. In this case there is no averment, nor evidence that the pursuer expressly or impliedly authorised or adopted as hers the forged signature on the 2011 Standard Security. Accordingly both counsel for the pursuer and the solicitor for the defender in this case are quite correct in acknowledging that the result of a forgery in this case would mean that the Standard Security was a nullity entitling the pursuer to reduction.

[22] I have found the pursuer to be a credible and reliable witness. While it was legitimate to question her knowledge of the transactions and why she did not take any steps in relation to the security before she did, this did not, in my assessment, undermine her credibility and in particular the essentials of her evidence that she did not sign the Standard Security. I believed her when she said she did not. I accept her explanation that she was not as attentive to her financial affairs as she is now and that Mr Easton was manipulative. I accept her evidence that she did not sign the cheque for £32,000 written shortly after the loan was obtained. Her evidence that she did not sign the security or the cheque is supported by Dr Gillies, the handwriting expert, who gave her evidence in a fair, measured and balanced manner. She was not moved from the conclusions in her report that the signature on those documents was unlikely to be that of the pursuer. I have accepted her evidence as credible and reliable. The witness for the defender Mr McCormick was not, and this was fairly conceded by Mr Murdoch, able to add much to the picture.

### **Conclusions**

[23] In all the circumstances I am satisfied that it is more probable than not that the signature on the Standard Security is not that of the pursuer and was therefore a forgery.

[24] As indicated, it is averred by the pursuer that it was Mr Easton who signed her name on the security and that the signature was a forgery, the necessary implication being that it was he who perpetrated the forgery. As also noted, there was evidence from the pursuer that, at the meeting with the financial adviser in 2012, Mr Easton admitted as much. I accept that he gave such an indication. An inference may also be drawn from the fact that "M. EASTON" appears as payee on the said cheque for £32,000 being the sum referred to in the Standard Security (and the loan documentation). He reassured the pursuer that there

was nothing to worry about. It is reasonable to infer that he was, in these circumstances, and as I have found, responsible for procuring the security. Whether he personally perpetrated the forgery is a distinct issue. However, it is unnecessary for me to find that he did. The material averments to the effect that the pursuer did not sign the Standard Security and that her signature has been forged are proved and are sufficient to warrant the remedy sought.

[25] The evidence about the loan documentation dated 9 September 2011 purportedly between the pursuer and the defender and perhaps likely to be the obligation in respect of which the security was purportedly granted is not addressed in the averments and no remedy in relation to that was sought. I would simply observe that, on the face of it, the signature thereon is similar to the signatures employed in the security and cheque. I believed the pursuer when she said she did not sign it. However, for the purposes of this action, it is unnecessary to make a formal finding in that regard.

[26] In the circumstances, I will grant decree of reduction as sought in the first crave (as amended). I have deemed production to be satisfied by the copy Standard Security lodged being agreed to be the equivalent of the principal. It is not necessary for me to make any order in terms of the second crave as this related to an interim order for suspension. I will dismiss the third crave as this was not insisted upon. I will, in accordance with the consensus how I should deal with expenses, find the defender liable in the expenses of the cause except insofar as otherwise dealt with prior to this. I am satisfied that in light of the importance of the claim to the client, with particular regard to the sums potentially involved in a security over her home, that it is reasonable to grant sanction for employment of junior counsel in the circumstances. The interlocutor I have pronounced reflects the foregoing.