



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 42

A125/21

OPINION OF LORD STUART

In the cause

(FIRST) MOHAMMAD AZIR SHARIF AND (SECOND) MANAWAR SHARIF

Pursuers

against

MOHAMMED SHOAIB MOUGHAL

Defender

**Pursuers: Roxburgh; BTO Solicitors LLP  
Defender: Tosh; Dentons UK and Middle East LLP**

30 June 2023

**Introduction**

[1] The first pursuer and defender were, respectively, tenant and landlord of the pursuers' family home ("the Property") under a private residential tenancy agreement dated 1 September 2018. By application to the First-tier Tribunal for Scotland (Housing and Property Chamber) ("the FtT"), the defender sought eviction of the first pursuer and his family from the Property. By decision dated 20 September 2019 the FtT granted the defender's application and made an order for eviction ("the FtT Decision"). In this action the pursuers seek reduction of the FtT Decision.

[2] The case called before me on 8 June 2023 for debate. The defender sought dismissal of the action on the basis that the pursuer's pleadings did not disclose a relevant basis for reduction. It was common ground between counsel that the correct test for this court to apply is that an action will not be dismissed at debate as irrelevant unless it must necessarily fail even if all of the pursuers' averments are proved. Accordingly, it is appropriate to begin with the pursuers' case on record.

### **The pursuers' case on record**

[3] The pursuers offer to prove, *inter alia*:

"In 2014 the pursuers were the heritable proprietors of [address] (the 'Property'). They lived in it with their three children. In 2012 Mohammad Sharif (the 'first pursuer') was sequestered. ... The first pursuer was anxious to find a way to retain the family home. He agreed with his trustee in sequestration and the defender that the defender would purchase the Property from the trustee. The first pursuer arranged with family and friends to put the defender in funds to purchase the Property. The defender purchased the Property from the trustee in sequestration. There was a shortfall in the funds provided by friends and family and the defender funded that shortfall by taking out a buy to let mortgage. The defender executed a trust deed dated 13 May 2014 (the 'Trust Deed'). The Trust Deed was drafted by the defender's solicitor ... By the Trust Deed the defender acknowledged that although he was the heritable proprietor of the Property he held it in trust for and on behalf of the pursuers. The Trust Deed *inter alia* provided that when directed to do so the defender would convey the Property to the pursuers or to such person or persons as they might direct. William Meehan provided the pursuers with a copy of the Trust Deed after it was executed. On 12 July 2014 the first pursuer assigned his interest in the Trust Deed to Manawar Sharif (the 'second pursuer') .... The first pursuer intimated the Assignment to the defender in or around July 2014. He did so by providing a copy of the Assignment to the defender. At this time, the first pursuer had recently suffered a heart attack. He was concerned for his health and wished to provide for his wife. He granted the assignment in order to ensure that his wife had control of the Property in the event that his health were to deteriorate. He advised the defender of this. The first pursuer further intimated the Assignment to the defender in or around February 2017. At this time, the defender wished to arrange for the transfer of the Property back to the pursuers. He wished to do so in order to be able to repay the mortgage secured against the Property. It was proposed that the Property would be transferred into the name of the second pursuer, as the sole beneficiary of the Trust Deed at this point. The defender asked the pursuers to provide him with copies of the documentation which put in place the trust

arrangement. The first pursuer obtained copies of the Trust Deed and Assignment. ... He provided copies of them to the defender at a meeting in or around February 2017 .... In 2014 the pursuers signed a Short Assured Tenancy agreement with the defender anent the Property (the 'Tenancy Agreement'). The rent payable under the Tenancy Agreement was to fund the sums due by the defender in terms of the buy to let mortgage. ....

On 23 July 2019 the defender applied to the First Tier Tribunal (Property and Housing Chamber) ('FTT') for an eviction order in relation to the first pursuer and the Property (the 'FTT Application'). The basis of the FTT Application was that he wanted to sell the Property. This was prohibited by the Trust Deed. Sheriff Officers served the papers on the first pursuer on 15 August 2019. The pursuers did not have the funds to instruct a solicitor. The first pursuer prepared written submissions and submitted them on 30 August 2019. The written submissions contained no reference to the Trust Deed. The pursuers had no physical record of the Trust Deed and could not remember its precise terms. A Case Management Discussion took place on 20 September 2019. The pursuers did not attend the hearing because they had arranged for a friend to appear on their behalf. The FTT did not allow the friend to appear as a lay representative because it had received no authority from the pursuers. The first pursuer emailed the FTT following a call from the friend but sent the email to the wrong email address in error. The FTT proceeded in the absence of the pursuers and granted the eviction order on 20 September 2019 ('The FTT Decision'). ... The FTT application was advanced on the basis that the defender intended to sell the Property. The defender lodged an affidavit in the FTT proceedings asserting that it was his intention to sell the Property. The FTT granted the FTT Decision in reliance on the statements to the FTT that he intended to sell the Property. At all material times, the defender was aware that by virtue of the Trust Deed he was expressly prohibited from selling the Property without the consent of the pursuers. The defender was aware that he did not have the consent of the pursuers to sell the Property. The defender, knowingly and materially, misled the FTT. ... The decree which this action seeks to reduce would not have been granted had it not been for the defender misleading the FTT. ...

The first pursuer sought to have the FTT Decision recalled. The Application for Recall was refused on 21 October 2019. The first pursuer sought permission to appeal to the Upper Tribunal. The Permission to Appeal to the Upper Tribunal application was refused on 23 January 2020 on the basis that it was late. The first pursuer sought permission to appeal that decision to the Court of Session. The Permission to Appeal to the Court of Session application was refused on 3 March 2020. In none of these appeals were the pursuers represented by solicitors. In none of these appeals did the first pursuer make reference to the Trust Deed. ...

On or about 15 February 2023 the Second Pursuer raised proceedings in Paisley Sheriff Court seeking to implement the Trust Deed. In that action the Second Pursuer craves the Court to ordain the Defender to convey the Property to her. The Defender has defended that action. ... That action remains ongoing. ..."

**Submissions for the defender**

[4] Mr Tosh for the defender had provided the court with a note of argument in advance of the hearing. Mr Tosh submitted that the FtT Decision was a decree *in foro* and as such could only be reduced in exceptional circumstances where it was necessary to produce substantial justice or avoid a miscarriage of justice. Mr Tosh submitted that the pursuers' averments failed to disclose exceptional circumstances that justified reduction, in particular (i) alternative methods of review of the FtT Decision had been available and no exceptional circumstances were averred that excused the first pursuer's failure to use these and (ii) the fact and terms of the Trust Deed were not *res noviter* and could not now be raised and, in any event, even if they did bear upon the question of the entitlement of the defender to sell the Property, that matter had been determined by the FtT and could not now be re-visited. Even if the defender had mis-led the FtT, it was not now open to the pursuers to seek to re-litigate the issue by reduction.

**Submissions for the pursuers**

[5] Ms Roxburgh accepted that the FtT Decision was a decree *in foro* and that, accordingly, reduction would be available only in exceptional circumstances. Ms Roxburgh submitted that the one cannot define the categories in which reduction would be competent. The proper approach was to examine the whole circumstances of the particular case to determine whether there existed exceptional circumstances such that reduction was required to achieve substantial justice. The court might be reluctant to allow a decree to stand where a *prima facie* or substantive defence existed but has not been heard.

[6] Turning to the pursuers' pleadings, Ms Roxburgh submitted that the pursuers' pleadings advanced four key issues or points such that, if established, it could not be said that no Lord Ordinary could hold that exceptional circumstances existed such as to warrant reduction and that the action must necessarily fail.

[7] The first related to the circumstances in which the defender came to hold the Property. These were unusual. They arose out of the first pursuer's sequestration. The first pursuer wanted to maintain his family in their family home. He had agreed to purchase the Property from his trustee in sequestration. Family and friends had contributed towards the purchase cost but there was a shortfall. The defender only became involved as he was able to obtain a mortgage for the shortfall. The rent payable under the tenancy agreement was set by reference to the mortgage premiums. Further, the use of the Trust Deed was particularly unusual. Given the Trust Deed, the defender was not entitled to remove the pursuers or sell the Property.

[8] Second, the FtT Decision was granted where there had been no substantive procedure in the proceedings. There was a substantive defence to the defender's application that had not been heard. The Trust Deed prohibited the orders sought by the defender from the FtT. Further, the FtT Decision was made at a case management hearing at which the first pursuer was unrepresented. The first pursuer had taken steps to be represented but the FtT refused to allow the first pursuer's nominated representative to appear due to the first pursuer's email nominating him being sent to the wrong address.

[9] Third, the defender raised proceedings before the FtT and sought the order for eviction in full knowledge of the Trust Deed and that, as a consequence of the Trust Deed, he was not entitled to evict or sell the Property. The defender represented to the FtT that he met the statutory basis for seeking eviction, namely that he was entitled and intended

to sell the Property. In doing so, the defender concealed the Trust Deed from the FtT and deliberately misled the FtT into granting the order for eviction.

[10] Fourth, the second pursuer has raised proceedings at Paisley Sheriff Court seeking implement of the Trust Deed. Questions of title would be determined as part of those proceedings. Reduction was an equitable remedy. It would be inequitable to require the second pursuer and her family to be evicted from the Property (in which they had lived since 1999) under the FtT Decision only for it to be determined that the defender was obliged under the Trust Deed to sell the Property to the second pursuer. In answer to a question from me, Ms Roxburgh informed me that the pursuers had sought an undertaking from the defender not to seek to evict pending resolution of the sheriff court action but the defender had declined to grant such an undertaking.

### **Decision**

[11] In the case of *Man Hen Liu v Andersons Solicitors LLP and Others* [2017] CSIH 45 the Lord President (Carloway), giving the opinion of the court, citing Lord Abernethy in *Malcolm v Park Lane Motors* 1998 SLT 1252, stated at para [19]:

"...reduction is competent if it is necessary to avoid a miscarriage of justice or, to put it another way, to produce substantial justice. It is not possible to define categorically the cases in which reduction is competent but it is clear that the circumstances must be exceptional."

[12] In *Bain v Hugh L S McConnell Ltd* 1991 SLT 691 at 965], the Lord Justice-Clerk (Ross), giving the opinion of the court, stated: "It is, in our opinion, well established that a decree may be reduced in exceptional circumstances if reduction is necessary to produce substantial justice."

[13] In applying that test of substantial justice, the authorities disclose a number of relevant propositions, including:

- i. Reduction will be competent where it is necessary to achieve substantial justice or avoid a miscarriage of justice.
- ii. It is not possible to define categorically the cases in which reduction is competent.
- iii. Cases turn on their own individual facts and circumstances and little is to be gained from extensive citation of other cases save as to highlight points of principle or broader propositions.
- iv. Reduction of a decree *in foro* is only available in exceptional circumstances.
- v. Reduction is a question of judicial discretion.
- vi. The existence of, or failure to use, an alternative remedy is not necessarily a bar to reduction.
- vii. The court should be reluctant to foreclose a substantive defence where this has not been heard.
- viii. It might be a good ground for reduction where a party intentionally kept back from the court a fact that materially undermined their entitlement to the orders sought.

[14] Turning then to the circumstances of this case in light of the propositions above.

I agree with Ms Roxburgh that the proper approach is to consider the whole facts and circumstances of the case in the round, rather than taking a more deconstructionist approach as argued for by Mr Tosh. In any event, the propositions narrated above answer the criticisms advanced by Mr Tosh; at least at this stage in proceedings. Considering the facts and circumstances averred by the pursuers and under particular reference to the four key

issues or points advanced by Ms Roxburgh, I am far from persuaded that, if the pursuers prove all they aver, they would necessarily fail to establish circumstances amounting to a miscarriage of justice or that reduction was required to produce substantial justice. Indeed, it seems to me that the circumstances of this case, if proved, might be just such a case that the equitable remedy of reduction is designed to meet; but that is for another day.

[15] In light of my decision, I will put the case out by order to be addressed on the precise terms of the interlocutor to be pronounced and on further procedure.