SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2019] SC EDIN 23

A61/15

JUDGMENT OF SHERIFF R B WEIR QC

in the cause

THE ACCOUNTANT IN BANKRUPTCY

Pursuer

against

LEIGH DOROTHY REID or URQUHART

Defender

Pursuer: Ower, Advocate: Harper Macleod LLP
Defender: Anderson, Advocate: RSC Solicitors

EDINBURGH, 13 March 2019

The Sheriff, having resumed consideration of the cause;

(i) sustains the third plea-in-law for the pursuer to the extent of excluding from probation (a) in answer 4, p 7, between lines 30 and 35, the sentence commencing with the words "Explained and averred that having regard…", and (b) the final sentence of answer 5;

(ii) *quoad ultra* allows parties, before answer, a proof of their respective averments, and appoints the cause to a procedural hearing, on a date to be afterwards fixed, in order that dates, and preparations, for a diet therefor can be fixed and considered;

(iii) reserves meantime the question of expenses of the debate, and appoints parties to be heard thereon at Edinburgh Sheriff Court on a date to coincide with the procedural hearing appointed in terms of sub-paragraph (ii) hereof.

Note

Introduction

[1] The pursuer is the Trustee on the sequestrated estate of James Urquhart ("the debtor"). The defender and the debtor formerly lived together as husband and wife, and resided latterly at 31 Craigentinny Avenue, Edinburgh ("the subjects"). They separated on or around 1 October 2007. It is a matter of admission by the defender that, following the separation, the subjects were sold at a price of £285,000, leaving a balance available to the debtor and the defender, after deduction of mortgage, debts, marketing and conveyancing costs, of £131,512. It is also admitted that, in circumstances which I will come on to consider, the defender benefitted in the full net free proceeds of the sale of the subjects.

[2] In the present action the pursuer challenges the manner in which the free proceeds of sale of the subjects were dealt with. He contends that the receipt by the defender of the whole of the sale proceeds amounted to a challengeable alienation in terms of section 34 of the Bankruptcy (Scotland) Act 1985 ("the 1985 Act"), being the relevant legislation where the affairs of the debtor's sequestration are concerned, and seeks redress under section 34(4) of the 1985 Act, amounting to the debtor's share of those sale proceeds. The defender avers, broadly, that the debtor received adequate consideration for his share of the proceeds of sale of the subjects. In any event, she maintains that immediately, or at any other time, after the alienation the debtor's assets were greater than his liabilities. Accordingly, the remedy sought by the pursuer should be refused.

[3] The case called before me for debate on the pursuer's general plea to the relevancy of the defences. I heard argument over a period of two days and made *avizandum.*

Section 34 of the 1985 Act

[4] Section 34 of the 1985 Act is central to the issues before the court, and provides *inter alia* as follows:

> **"34.- Gratuitous alienations**
> (1) Where this subsection applies, an alienation by a debtor shall be challengeable by -
>
> …(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 (other than, in the case of a natural person, after his death)…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 -
>
> (a) that immediately, or at any other time, after the alienation the debtor's assets were greater than his liabilities; or
>
> (b) that the alienation was made for adequate consideration; or
>
> (c)that the alienation -
>
> (i)was a birthday, Christmas or other conventional gift; or
>
> (ii)was a gift made, for a charitable purpose, to a person who is not an associate of the debtor,
>
> which having regard to all the circumstances, it was reasonable for the debtor to make:
>
> Provided that this subsection shall be without prejudice to any right…acquired in good faith and for value from or through the transferee in the alienation…"

The pleadings

[5] In condescendence 4 the pursuer narrates (and the defender subsequently admits) that (i) the subjects were sold upon the separation of the debtor and the defender; (ii) there remained a balance, after deduction of debts and other expenses, of £131,512; (iii) the debtor authorised the solicitors handling the sale to pay his share (amounting to £65,756) to the defender, and (iv) the debtor's share was paid to the defender at settlement.

[6] The pursuer's position is that the debtor's share of the proceeds of sale should have been paid to him and not to the defender. It being a matter of admission that the debtor's share was paid to her, it was common ground that it was for the defender to establish one of the statutory defences set out in section 34(4) of the 1985 Act. Unsurprisingly, therefore, the discussion before me substantially concerned the terms of answer 4. The averments are of some length. However, given that they were subjected to detailed criticism by Ms Ower, it is appropriate to narrate the defender's explanatory averments which are in the following terms:

> "4…Explained and averred that the defender and the debtor separated in September 2007 when the debtor left at short notice. The debtor left the family home, which was the subjects. The parties subsequently entered into a separation agreement dated 26 and 22 February 2008 whereunder they agreed that 1 October 2007 would be their formal date of separation (hereafter referred to as the "Separation Agreement"). The Separation Agreement is produced, adopted and held to be incorporated herein *brevitatis causa*. Under the Separation Agreement the debtor and the defender agreed that their children would have their principal residence with the defender. The debtor agreed that he would pay to the defender the sum of £62.50 per week per child by way of aliment for the debtor and the defender's two children until they reached the age of 18. The children are now over 18. Up until that point the debtor only made around two payments. The debtor and the defender waived their claims for spousal ailment against each other and claims on each other's pension rights. The defender worked part time at the time of separation while the debtor worked two jobs as a printer and as a football coach. The defender earned in the region of £7,000 while the debtor earned in the region of £16,000. Given the debtor and the defender's respective incomes at that time and their whole financial circumstances, the defender believes and avers that her waiver of claims to aliment had a value, however, this was not explained to the defender at the time that the Separation Agreement was

entered into. The Separation Agreement also dealt with the Subjects. The defender and the debtor agreed that the Subjects would be sold and that the "net free proceeds of sale" as defined in the Separation Agreement would be paid for to the defender. The "net free proceeds of sale" are defined in the Separation Agreement as being the gross price received for the Subjects under deduction of i) all secured sums and associated charges; ii) legal costs; iii) outstanding utility bills; and iv) all sums due to the Bank of Scotland in respect of the debtor's Visa credit card. The defender and the debtor had purchased the Subjects on or around 30 May 2002. The purchase price of the Subjects was £135,000. Shortly before the purchase, the defender's father had provided the sum of £90,000 to the defender and the debtor to assist with the purchase of the Subjects. The feu disposition produced by the pursuer is adopted and held to be incorporated herein *brevitatis causa*. The defender's father transferred these funds to her via bank transfer. The defender and the debtor used £80,500 of this sum for a deposit on the Subjects and obtained a loan from the Abbey National secured by a standard security for the balance of the purchase price. The standard security produced by the pursuer is adopted and held to be incorporated herein *brevitatis causa*. The remainder of the £90,000 provided by the defender's father was used for legal expenses and other associated costs. The defender's father had obtained this sum from his sale of a flat at 12 Piershill Terrace, Edinburgh. When the defender and the debtor moved into the Subjects it required to be refurbished and redecorated. The defender's father forwarded sums in the region of £30,000 to £40,000 to the defender and the debtor over the course of their occupation of the Subjects. He had obtained these sums from the maturation of financial products. The defender and the debtor used these sums, for example, to add a conservatory to the Subjects. It was understood between the defender, the debtor, and her father that these sums would be repayable on demand. In any event, the defender's father not having intended to donate the funds, it is an implied term that the said sums would be repayable on demand. When the defender's father heard of the defender and the debtor's separation, in late 2007, he requested "a repayment" from the defender and the debtor. The defender and the debtor discussed this both over the phone and when the debtor attended the Subjects, in the period between October 2007 and February 2008 when the Separation Agreement was executed. The defender and the debtor agreed that the defender would receive the net free proceeds of the sale of the Subjects, after the debtor's debts were settled, so that the defender could then settle the debt to her father with the debtor having no liability to him. The defender's father accepted this. On sale of the Subjects the debtor's debts were settled. However, these were not precisely in accordance with the terms of the Separation Agreement. Rather than a Bank of Scotland Visa card in the debtor's name, the debtor's Sainsbury's bank Visa card was repaid in the sum of £3,005.01. Otherwise, the debts were settled in accordance with the Separation Agreement. The defender agreed with her father that she would repay him in the sum of £90,000 from the sale proceeds of the Subjects. However, by the time that the Subjects were sold and the sale proceeds realised, the defender had identified a new property at 15 Loganlea Avenue, Edinburgh which she intended to purchase. The defender's father agreed that she could retain the sale proceeds to put to the purchase of this new property. The letter from Colin Blaikie & Co dated 5 June 2008 together with the statement attached thereto is produced, adopted, and held to be incorporated herein *brevitatis*

causa. The defender's father passed away in November 2008. By way of the Separation Agreement and the verbal agreement hereinbefore condescended upon, the debtor wished, and the defender and the debtor agreed, that the debtor's liabilities would be settled from the sale proceeds of the Subjects before the net free proceeds would be paid to the defender. This took place. The debtor continued to work following the alienation. On that basis it is believed and averred that the defender was solvent immediately following the payment of the net free proceeds of the sale of the Subjects to the defender. The debtor was sequestrated on 8 December 2010. This is around 2.5 years after the alienation upon which this action proceeds, and over eight years from the payment of £90,000 by the defender's father. This action was raised in 2015. Due to the passage of time before the debtor's sequestration, and thereafter before these proceedings were raised, the defender has found it difficult to obtain documentation in relation to the transactions condescended upon. The defender approached her bank to request a statement vouching her receipt of the sum of £90,000 from her father, however these were not available due to the time which had passed since the transfer was made. The Separation Agreement represents an amicable separation of a marital breakdown, which thereby avoided contested divorce proceedings, saving the debtor expense and inconvenience thereof. In the whole circumstances of the case, the debtor received adequate consideration for the alienation of which the pursuer seeks repayment. Explained and averred that having regard to the principles of the Family Law (Scotland) Act 1985 (as amended) in the circumstances that the Defender continued to the sole burden for the care, wellbeing and upkeep of the children of the parties' marriage, the Debtor and the Defender agreed that it was just and equitable for the Defender to benefit in the full net equity of the matrimonial home. Explained and averred that the Debtor was given the opportunity of obtaining separate and independent legal advice but declined to do so. Further explained and averred that in terms of said Agreement, and specifically Clause Nine thereof, all other debts, save for those provided for in Clause Five, were to become the sole responsibility of each party. So far as the Defender is aware, based on the information provided, the debtor was solvent at the time of separation, at the time of entering into the Minute of Agreement and at the time of sale of the former matrimonial home. Further explained and averred that so far as the Defender is aware, said debt was re-paid. The Pursuers are called upon to specify the nature and identity of the petitioning creditor, and to specify the amount of the debt, the nature of the debt, and the date or dates upon which said debt became due and resting owing and their failure to do so will be founded upon. Insofar as the list of debts narrated by the Pursuer is concerned, the Defender reasonably believes and avers that the purported debts were all incurred post separation. Messrs Thorley Stephenson were the firm of solicitors who acted for the debtor during the separation. Accordingly, any debt incurred to them was post separation. The defender reasonably believes and avers that at the date of separation and date of the alienation there was no debt due to Argos, Bank of Scotland or Sainsburys."

Submissions for the pursuer – adequacy of consideration and solvency

[7] Ms Ower submitted that no specific and relevant defence to the action had been pled, in terms of section 34(4) of the 1985 Act, such as would enable the court to find, if her averments were proved, that the defender had paid adequate consideration for receiving the whole net proceeds of sale of the subjects, or that the debtor was solvent immediately, or at any time, after the alienation. She introduced her oral submissions with a reminder that the onus lay on the defender to establish one of the statutory defences in section 34(4). The averments just quoted failed relevantly to invoke any of those defences. No purpose would be served in remitting the action to proof, and decree should be pronounced *de plano.*

[8] Expanding on that broad position Ms Ower advanced criticisms of the defender's averments which addressed, in turn, (i) the defender's invocation of the principles of the Family Law (Scotland) Act 1985 as a justification for her benefitting from the full net equity in the subjects; (ii) the defender's apparent position that her waiver of any claims to aliment had a value which ought to be seen as forming part of any consideration for her benefitting from the full net equity in the subjects; (iii) the adequacy of the averments relative to the debtor's solvency immediately following the payment of the net proceeds of the sale of the subjects; (iv) the adequacy of the averments to the effect that the settlement agreement between the debtor and the defender represented "adequate consideration" for the purposes of s.34(4)(b) of the 1985 Act, and (v) the lack of specification provided in connection with the repayment arrangements in respect of sums averred to have been advanced by the defender's father towards the original purchase, and subsequent refurbishment, of the subjects.

[9] Dealing with the authorities, Ms Ower referred me first of all to *Joint Administrators of Oceancrown Ltd* v *Stonegate Ltd* [2015] CSIH 12; 2016 SC (UKSC) 91 as authority for what the

court should understand the word "consideration", where it appears in section 34(4)(b), to connote. Albeit a case concerned with a company liquidation she submitted that what Lord Brodie, giving the Opinion of the Inner House, set out at paragraph [23] was apposite to the circumstances of the present case. Adopting what was said by Lord McCluskey, delivering the Opinion of the Court in *McFadyen's Trustee* v *McFadyen* 1994 SC 416, at 421E-H:

> "[W]hat is meant by "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…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 being pled in answer to another's claim."

[10] In what Ms Ower described as a key passage, Lord Brodie continued, at paragraph [32], that:

> "[G]iven that the alienation of the four properties within the relevant period was admitted, it was for the defenders to show (a) that consideration had been given as a counterpart, and (b) that the patrimonial value of the consideration was such that it should be held adequate…Moreover…the adequacy of the consideration is to be determined at the date it is given."

What that meant, Ms Ower submitted, was that the alienation had to be undertaken knowingly, and at the time when the consideration was given. She derived the same principle from *Liquidators of Grampian Maclennan's Distribution Services Ltd* v *Carnbroe Estates Ltd* [2018] SLT 2015, emphasising that a relatively strict view required to be taken by the court as to the adequacy of the consideration, and that an objective assessment was required (paragraphs [14] to [18], and [26], per Lord Drummond Young; and see, also, *Jackson* v *Royal Bank of Scotland plc* 2002 SLT 1123 at 1128D).

[11] On the types of averments and evidence needed to rebut the presumption of insolvency (*McBryde:* Bankruptcy, second edition, paragraph 12-77), Ms Ower referred to

Lombardi's Trustee v *Lombardi* 1982 SLT 81; *Taylor* v *Russo* 1977 SLT 60, and *Hunt's Trustee* v *Hunt* 1983 SLT 169(n). Thus, general and unspecific evidence about the debtor's solvency would not be sufficient to rebut the statutory presumption of insolvency (*Lombardi's Trustee, supra.*, at p 83). It followed that the question for this court was, and is, whether the defender has averred facts and circumstances which would enable her to lead evidence capable of rebutting that presumption (*Taylor* v *Russo*, at p 61). Absent such averments regarding the financial position of the debtor as at the time of the alienation (or thereafter) no useful purpose would be served by allowing proof (*Hunt's Trustee* v *Hunt*, at p 170).

[12] From her consideration of the authorities, I can summarise relatively briefly Ms Ower's submissions on the issues of adequate consideration and insolvency. In relation to the former, she noted that, at p 8 of the record, between lines 30 and 35, the defender averred that, having regard to the principles of the Family Law (Scotland) Act 1985, it was (in the circumstances there averred) just and equitable for the defender to benefit in the full net equity of the matrimonial home. Her submission was simply that section 34(4) of the 1985 Act did not contain a just and equitable test. There was no room to innovate on the wording of the defences set out in section 34(4) and the relevancy of the defender's averments fell to be tested by the statutory wording in that section. Accordingly, the averments just mentioned should be excluded from probation.

[13] Looking at adequate consideration more broadly, Ms Ower adopted the arguments contained in paragraphs 3, 5, 6 and 7 of the pursuer's note on the basis of preliminary plea. In so far as the defender relied on a waiver by the debtor of claims to aliment, there were no averments that such claims had a value such that the adequacy of the consideration could be assessed. The averments at p 5 of the record, lines 17-31, should be excluded from probation as being wholly lacking in specification. Indeed, the same criticism of lack of specification

permeated the defender's averments about the provision, by the defender's father, of £90,000 to assist with the subjects, and "between £30,000 and £40,000" in respect of their refurbishment. Besides, there was nothing in the Separation Agreement to indicate that the free proceeds of sale were being applied in a particular way in discharge of obligations said to be owed to the debtor's father-in-law. In that sense the explanation tendered by the defender for the advances made cut across the Separation Agreement which was silent on the matter (yet purported, by clause 10, to discharge the parties' respective claims upon one another arising from the fact of the parties' marriage to each other).

[14] Further, the defender appeared to be asserting that, by agreeing to repay her father from the free proceeds of sale, she had in effect procured a discharge of any liability the debtor may have had for the debt. Yet the defender averred that no sums had been paid to her father at all. Ms Ower reminded me that a consideration meant something of material or patrimonial value which could be vindicated in a legal process, whether by being claimed or possibly being pled in answer to another's claim (*McFadyen's Trustee* v *McFadyen*). In relation to the advances of the defender's father, and their purported purpose, the defender's averments were not sufficiently specific to justify probation.

Submissions for the pursuer – prescription

[15] While addressing the averments in relation to adequate consideration (and, specifically, the purported arrangements involving the advances by the defender's father) Ms Ower advanced an argument, derived from section 6 of, and schedules 1(g) and 2(2)(b) to, the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). The argument, as far as I could follow it, underwent a number of refinements during the course of Ms Ower's submissions and her reply to those of Mr Anderson. At one point, she appeared to submit

that, in respect of the sums averred to have been advanced by the defender's father, those payments could not constitute "consideration" because any obligation to repay must have prescribed, and the defender had made no averments that there was now an enforceable obligation at all. Ultimately, I understood her position to be that it was for the defender to make sufficient averments as to the existence of a loan by the defender's father which connoted an obligation to repay, and capable of being vindicated in a legal process (*McFadyen's Trustee* v *McFadyen, supra.*, at p 421D-G; *McArthur's Executors* v *Commissioners of HM Revenue & Customs* SC 3148/007, 9 July 2008, at paragraphs 45-46). Absent any enforceable obligation (constituted by a written demand for payment) there was no basis in the pleadings for characterising the advances by the defender's father as "consideration" for the purposes of section 34(4)(b) of the 1985 Act.

Submissions for the defender – prescription

[16] Mr Anderson began his reply by addressing, briefly and succinctly, the prescription argument. He observed that the pursuer's position, as eventually presented, was completely at odds with how it had been presented in paragraph 8 of the pursuer's note on the basis of preliminary plea. From a position where it was contended that any obligation to repay sums advanced by the defender's father had prescribed, it appeared now to be argued that prescription had not even started to run (there being no averment about a written demand for payment). Either way, the pursuer's submissions were without substance. An obligation which had not yet become enforceable was still an obligation which had a value capable of being vindicated in a legal process. Put shortly, a demand could still have been made but the debtor would have had an answer to any claim by the defender's father (or, presumably,

his estate) because of the arrangements which were made at the time of the Separation Agreement (answer 4, p 6, lines 19-31).

Submissions for the defender – adequacy of consideration and solvency

[17] Mr Anderson observed that the majority of cases in the area under discussion concerned corporate insolvencies. The court should bear in mind the differences that may arise between such insolvencies and those involving individuals with few assets and who would be unlikely to have kept detailed accounts and financial records. When dealing with a transaction which brought to an end a personal relationship, especially if the objective was an amicable resolution, there may be circumstances, which the law would recognise, where assets were disposed of without a precise value being attributed to them. As Mr Anderson put it, the value may be "nebulous" but it still existed. In the instant case it was necessary to avoid viewing certain averments in isolation. Rather, the court should examine the totality of the pleadings, including averments which may be thought to provide background, before determining whether a relevant defence had been pled.

[18] Turning to the authorities, Mr Anderson submitted that it was appropriate to refuse probation only in the most obvious case where evidence could, on no view, assist the court in forming a view on its merits (*Heather Capital Ltd (In liquidation)* v *Levy & Macrae* 2017 SLT 376, at p 397, per Lord Glennie). The onus of proof, where adequate consideration (and solvency) was concerned, was on the defender. All that the defender required to do was to lead evidence sufficient to allow inferences to be drawn on the essential matters of fact. In the present case, given the passage of time and the absence of any suggestion of the alienation having been an attempt to defraud creditors, the defender might not require to

lead much in the way of evidence to allow inferences favourable to her position to be drawn. Either way, it was inappropriate to reach any concluded view without evidence being led.

[19] The pursuer's criticisms of the defences amounted to complaints about a lack of fair notice. The plea of lack of specification found its proper application in a case where the defender did not know the case to be made against him and objected to being taken by surprise at proof (*Soofi* v *Dykes* [2017] CSIH 40, at paragraph [11], per Lord President Carloway, citing *Macdonald* v *Glasgow Western Hospitals* 1954 SC 453, at p 465, per Lord President Cooper). In the present case there was no question but that the pursuer knew the case against him. Since (according to Mr Anderson) Ms Ower had, herself, contemplated the possibility of the pursuer seeking decree in a lesser amount if some measure of consideration were found to be established, then the adequacy of the consideration had to be a matter for proof, and all of the defender's averments should be admitted to probation for that purpose (*Bank of Scotland* v *Reid and another*, unreported, Lady Paton, 13 June 2000, paragraph [22]). Moreover, there may be circumstances in which the precise value of a consideration could not be identified. It did not follow that such a consideration would fall to be treated as inadequate (*John E Rae (Electrical Services) Linlithgow* v *Lord Advocate* 1994 SLT 788, at p 791E-H).

[20] Mr Anderson emphasised that, as far as adequate consideration was concerned, the defender relied on the Separation Agreement. It constituted a contract under which rights and obligations were exchanged. The fact that the Separation Agreement was silent on the repayment arrangements involving the defender's father was not something upon which a view could be taken without hearing evidence about those arrangements (cf. *Bank of Scotland* v *Reid, supra.*, at paragraphs [21]-[22]). Mr Anderson further submitted that the circumstances of the present case could be contrasted with cases such as *Grampian*

MacLennan, in which a relatively strict view of the adequacy of consideration was taken but in a commercial context. Here, there were no averments to the effect that the debtor was likely to become insolvent at about the time of the alienation. The question to ask, Mr Anderson argued, was whether parties were behaving in a manner one would expect of them in circumstances where they were drawing a personal relationship to a conclusion (cf. *Macbryde: Bankruptcy, supra.*, paragraph 12.77); whether or not the transaction was "commercial" should be considered in that context (cf. *Jackson* v *Royal Bank of Scotland plc, supra.* at 1128C/D). The pursuer made no averments that the debtor's financial affairs were complex, such as to require the production of detailed accounts and valuations (cf. *Lombardi's Trustees* v *Lombardi, supra.*, p 83). Moreover, in terms of the level of detail which could be presented to the court on the matter of adequate security, the defender should not be prejudiced by the significant passage of time which had elapsed between the alienation and the raising of the present proceedings.

[21] Under reference to paragraph 3 of the pursuer's note, it was unnecessary for the defender to aver the specific value of alimentary claims waived by the defender in terms of the minute of agreement since, even if a precise value could not be ascribed, they were a factor in the adequacy of the consideration as a whole. The criticisms of the defender's pleadings relative to the solvency of the debtor, in paragraph 4 of the pursuer's note, were substantially points of specification which ought not to succeed at debate. The fact that the pleadings did not detail the extent of the matrimonial assets or their values (paragraph 5 of the pursuer's note), was not a basis for excluding the defender's averments on adequate consideration from probation (cf. *Lombardi's Trustee, supra.*, p 83; *Soofi* v *Dykes, supra.*, paragraph [5]).

[22] Turning to paragraph 6 of the pursuer's note, there were adequate averments as to the nature of the loan arrangements among the debtor, the defender and her father. There was nothing controversial in the proposition that it was implied that sums would be repayable on demand (*Neilson* v *Stewart* 1991 SC (HL) 22, at p 34 per Lord Hope (giving the opinion of the First Division)). Similarly, the criticisms contained in paragraphs 7.2 and 7.3 of the pursuer's note were all matters which could, and should, be explored at proof. The criticism in paragraph 7.4 of the absence of explanation for the mechanism of repayment of the advances by the defender's father was irrelevant to the question whether those advances in themselves constituted a part of the consideration.

[23] Taking all of these matters into account Mr Anderson submitted that the criticisms advanced in the pursuer's note on the basis of preliminary plea were ill-founded and a proof before answer should be allowed with all pleas left standing.

Pursuer's reply

[24] Ms Ower submitted that the concept, invoked by Mr Anderson, of the "commerciality" of a transaction in personal bankruptcy cases was a novel one which had no foundation in law. It remained the position that very particular circumstances required to be averred and proved if a section 34(4) defence was to be established. That had simply not been done. To the suggestion that the pursuer might seek decree in a lesser sum (meaning that the averments relating to adequate consideration could only be dealt with at proof) Ms Ower submitted that section 34(4) conferred on the court no general equitable jurisdiction such as would enable decree in a lesser sum to be pronounced (*Short's Trustee* v *Chung* 1991 SLT 472; *Cay's Trustee* v *Cay* 1998 SC 780).

[25] If the waiver of spousal aliment was to be relied on as part of the consideration for the alienation considerably more detail would require to be averred. Yet the defender did not even seek to attribute any value to what was given up. It was difficult, in those circumstances, to see how it could amount to something capable of being vindicated in a legal process.

[26] Finally, Ms Ower pointed out that, even at their highest, the defender's averments relating to the advances by her father accounted for a consideration of in the region of £60,000. That was less than the amount received by the defender and which constituted the alienation under challenge.

Discussion

[27] The terms of section 34(4) of the 1985 Act, and the authorities to which I was referred, make it abundantly clear that it is for the person seeking to uphold the alienation to show that it was not gratuitous. So, the onus of proof of whether or not value was given, or adequate consideration received, is on the defender and not on the debtor's trustee. Where the solvency of the debtor is put in issue at (or any time after) the alienation under challenge, the onus of proof is again on the defender, solvency at or after the alienation being a complete defence under section 34(4)(a) of the 1985 Act.

[28] When a defence under section 34(4)(b) of the 1985 Act is invoked, the authorities cited to me disclose certain principles which fall to be applied. In the first place, it is clear that the adequacy of consideration is to be determined as at the date it is given (*Joint Administrators of Oceancrown Ltd* v *Stonegale Ltd, supra.*, at paragraph [32]; *MacFadyen's Trustee* v *MacFadyen, supra.*, at 421E-H). The reason for such a rule is clear. It elides the possibility of an action of reduction being met by a defence which introduces, into the

computation of the consideration and its adequacy, circumstances which never truly entered into the thinking of those most nearly concerned with the challenged transaction (cf. *Matheson's Trustee* v *Matheson* 1992 SLT 685). In the second place, a "consideration" must mean something of material or patrimonial value which could be vindicated in a legal process (*MacFadyen's Trustee* v *MacFadyen*). That does not necessarily import the requirement of a precise correlation in money terms between the value of the thing alienated and the consideration given. Value received in money or money's worth will be a good defence to a challenge (*Goudy: The Law of Bankruptcy* (4th Edition), p 47, cited in *Joint Liquidators of Grampian Maclennan's Distribution Services Ltd* v *Carnbroe Estates Ltd, supra*., at paragraph [17]; *John E Rae (Electrical Services) Linlithgow Ltd* v *Lord Advocate, supra.,* at p 791E/G). Moreover, vindication in a legal process should be understood to mean being claimed, or being pled in answer to another's claim. Thirdly, however, the adequacy of the consideration should be assessed strictly (*Joint Liquidators of Grampian Maclennan's Distribution Services Ltd* v *Carnbroe Estates Ltd, supra*., at paragraph [24]; *Jackson* v *Royal Bank of Scotland plc*, *supra.*, at p 1128D). Such a strict assessment will be appropriate, whether on a consideration of a defender's pleadings (see e.g. *Matheson's Trustee* v *Matheson*) or after evidence has been led (*Joint Administrators of Oceancrown Ltd* v *Stonegale Ltd*; *Joint Liquidators of Grampian Maclennan's Distribution Services Ltd* v *Carnbroe Estates Ltd*), because of the underlying principle that once a debtor appears to be insolvent, he is obliged to manage his assets in such a way as to protect the interests of his creditors.

[29] A similar approach is called for in relation to the types of averments and evidence needed to rebut the presumption of insolvency. If a defender prays in aid the defence in section 34(4)(a) insolvency will be assumed unless and until the contrary is proved (*McBryde: Banruptcy, supra.,* paragraph 12.77). Specific averments will be necessary to allow

proof of the necessary facts. So, particularly where a debtor's business affairs were complex, it will be necessary to detail the financial position and general statements will attract a plea to the relevancy (*Lombardi's Trustee* v *Lombardi*; *Taylor* v *Russo*; *Hunt's Trustee* v *Hunt*).

[30] Against that background, it is necessary to consider, in turn, the defender's averments relative to adequacy of consideration and solvency. I will then touch on the parties' competing positions on prescription (in so far as still relevant).

Adequacy of consideration

[31] Ms Ower's initial criticisms were directed towards the averments in answer 4, at p 7, lines 30-35, which appeared to invoke the principles of the Family Law (Scotland) Act 1985 as a justification for the defender receiving the whole of the free proceeds of sale of the subjects. I agree with her submission that the defences set out in section 34(4) do not include what might be termed a "just and equitable" test. Indeed, the averments I have just mentioned sit uncomfortably with the surrounding averments in answer 4 which, whatever else one might say about them, are plainly directed towards sections 34(4)(a) and (b) of the 1985 Act. What one is left with appears to be an uncomfortable conflation of separate statutory tests which, in my opinion, serves only to confuse the line of defence. That certain arrangements might, as between former spouses, have been just and equitable does not mean that a section 34(4)(b) defence will necessarily succeed. In my opinion, the averments highlighted by Ms Ower are irrelevant and I have excluded them from probation. I have reached the same conclusion with regard to the substantive averments in answer 5. Again, they seem to me to address the defender's position, and justification for her receipt of the whole free proceeds of sale, through the prism of the Family Law (Scotland) Act 1985. There is no attempt in the pleadings to relate what is averred to the section 34(4) defences.

[32] While recognising the cogency of many of Ms Ower's criticisms of the defender's remaining averments on adequate consideration I am not, however, satisfied that those averments fail the test of relevancy set out in *Jamieson* v *Jamieson* 1952 SC (HL) 44. There are, fundamentally, two limbs to the defender's argument where the adequacy of the consideration is concerned. Firstly, (answer 4, p 5, lines 17-31) the defender prays in aid the waiver of spousal aliment to which the defender would otherwise have been entitled but for the terms of clause 3 of the Separation Agreement. Second, (answer 4, p 5, line 31 – p 6, line 31; p 7, lines 2-14) the defender puts forward the existence of a verbal agreement relating to repayment of advances made by the defender's father, relative to the purchase and refurbishment of the subjects, as constituting a further element of the consideration received by the debtor in exchange for his share in the free proceeds of sale of the subjects.

[33] In deciding whether the averments relating to the first of these two methods of giving consideration should be remitted to proof I have been troubled by the averment, on p 5, lines 27-31, which reads:

> "Given the debtor and the defender's respective incomes at that time and their whole financial circumstances, the defender believes and avers that her waiver of claims to aliment had a value, however this was not explained to the defender at the time that the Separation Agreement was entered into."

[34] The caveat at the end of those averments might be thought to run contrary to the notion of an alienation having been undertaken knowingly, at a time when the consideration was given. That said, whatever is meant by the averment about the value of any waiver not having been explained to the *defender* (my emphasis), it does, or at least may, not follow that the debtor agreed to the defender receiving the free proceeds of sale of the subjects without the knowledge that he was (amongst other things) gaining, through her waiver of any alimentary provision, something of value in return. It is undoubtedly right that the

defender's averments do not attempt to place a precise value on her waiver. But I do not read the authorities cited to me as requiring, as a critical matter of pleading, that that be done, particularly where the defence relies on more than one way in which adequate consideration was given, and it is averred that the consideration given was adequate (cf. *Bank of Scotland* v *Reid, supra.,* at paragraphs [12] and [21]). Ms Ower relied on the decision of Sheriff Principal Reid QC in *Taylor* v *Russo* as illustrating the requirement for detailed pleadings on the matter of adequacy of security. However, I note that that case was concerned with whether the defender had averred facts and circumstances which would enable him to lead evidence capable of rebutting the statutory presumptions of non-onerosity and insolvency which applied to transactions challenged under the Bankruptcy Act 1621. The court's view that he had not done so appears to have been predicated on the basis that the defender was unable even to aver the date when the payment challenged was made. That is not the situation here. The defender avers that, cumulatively, adequate consideration was received to justify the receipt by the defender of the whole of the free proceeds of sale of the subjects.

[35] Ms Ower made the point that it was difficult to see how the defender's waiver of spousal aliment could amount to something capable of being vindicated in a legal process. But, to repeat Lord McCluskey's observation in *McFadyen's Trustee* v *McFadyen*, quoted earlier, vindication in a legal process could involve not only a claim but a defence to a claim which, *ex hypothesi*, would be that of the defender seeking to recover from the debtor sums by way of aliment to which, under the Settlement Agreement, she was no longer entitled.

[36] Moreover, I am not prepared to hold, at least at this stage, that the defender's averments concerning the advances by her late father are bound to fail at proof. What the defender offers to prove is the existence of an agreement among the debtor, the defender,

and the defender's father, arising from the fact of the separation, whereby the defender would receive the free proceeds of the sale of the subjects. On that basis, so it is averred, the debtor would have no liability for repayment of any part of the sums advanced, either before or after subjects were purchased and, as Mr Anderson submitted, would have been able to meet any claim by the defender's father (or his estate) for their recovery (the second branch of Lord McCluskey's description of "vindication in a legal process"). I recognise that questions may arise as to the precise amounts involved in the advances by the defender's father, and I also acknowledge the point made by Ms Ower that the Separation Agreement is silent on the matter of their repayment. Proof of the existence of these "loan" arrangements may, in these circumstances, be far from straightforward (not least because the creditor in the arrangement is averred to be deceased). However, in my opinion, it does not follow that the defender should be precluded from the opportunity of explaining, if she can, why matters were dealt with in the way that she claims. To Ms Ower's point that, even on the best case scenario, one half of the sums purportedly advanced does not equate to the sum sued for, I would reiterate that the defender relies on two separate aspects to the adequacy of the consideration, and evidence in relation to both would have to be taken into account.

[37] A further point was raised by Ms Ower, in paragraph 7.4 of the pursuer's note of argument, which also touches on the prescription issues which I will address shortly. The point was that, whatever might have been agreed between the parties, the "debt" in favour of the defender's father, on the defender's own averments, was never paid. I do not consider that that is a point which may properly be resolved at debate. The issue which the defender requires to address is the adequacy of the consideration given to justify the free sale proceeds being dealt with in the way that they were. It is not obvious that subsequent arrangements between the defender and her late father, after the sale of the subjects and

receipt of the free proceeds of sale, can have any bearing on that question; *res inter alios acta aliis non nocet.*

[38] In all of these circumstances I have concluded that, save to the extent that I have already done so, it would be wrong to exclude from probation the averments relating to both branches of the defence on the adequacy of the consideration given.

Solvency

[39] The arguments about solvency are rendered problematic by the late amendment, moved by Mr Anderson, which resulted in the deletion from p 6 of the record, line36, of averments in the following terms:

> "This included the principal mortgage over the property, and a loan from "Swift Advances" which was the debtor's responsibility. The said loan from "Swift Advances" was in the sum of £49,949.65".

Accordingly, the argument (in paragraph 4.2 of the pursuer's note on the basis of preliminary plea) to the effect that the defender's pleadings, if proved, disclosed what amounted to confirmation of the debtor's insolvency at the relevant time, was arithmetically superseded. Legitimate questions may remain as to whether the debtor's true financial position is accurately reflected in the relatively sparse averments which remain. I am unable to draw any particular conclusion from the excision from the pleadings of a very substantial loan which was once averred to be the responsibility of the debtor.

[40] However, in spite of Ms Ower's spirited submissions as to the lack of specification provided, what remains is a positive averment that on sale of the subjects the debtor's debts were settled. There follows (p 6, line 32) a confusing averment that those debts were not settled precisely in accordance with the terms of the Settlement Agreement, the implication being that a debt attributable to a Bank of Scotland Visa card (clause 5(iv)), whatever it may

have been, was not settled at the time (an averment which is later re-visited to the effect that it was believed that there was no debt due to the Bank of Scotland at the time of the alienation). There is a further bold averment (p 7, line 11) that the debtor wished, and the defender and he agreed, that the debtor's liabilities would be settled from the sale proceeds of the subjects before the free proceeds were paid to the defender, and that *this took place* (my emphasis). Thus, the defender offers to prove that the debtor's liabilities were to be paid off as part of the agreement whereby the alienation now under challenge took place. Whether, after evidence, the defender's position proves at all sustainable cannot now be predicted. I should have thought that, at the very least, there would require to be resolved a potential tension between what the defender avers and the terms of clause 9 of the Settlement Agreement. Professor McBryde's interpretation of the authorities, cited in paragraph 12-77 of his work on the law of bankruptcy, is that, where the debtor's business affairs were complex, it would be necessary to detail the financial position. General statements would attract a plea to the relevancy. However, those authorities seem to me to be less forthcoming on the point raised by Mr Anderson, namely the extent to which such a strict approach to pleading would be justified in a situation where the affairs of the debtor could not be said to be complex. In any event, given that the defender offers to prove that the debtor's liabilities were paid off at the time of the alienation, I am unable to conclude at this stage that the pursuer is unable to tell what the case against him is going to be (*Soofi* v *Dykes, supra.*). Accordingly, I am not prepared to exclude the averments bearing upon the question of solvency from probation.

Prescription

[41] Finally, it is necessary to say something about the issue of prescription which was raised. The argument ultimately advanced on behalf of the pursuer bore little resemblance to that contained in paragraph 8 of the pursuer's note on the basis of preliminary plea. Mr Anderson was, in my view, correct to observe that, far from being an argument that an existing obligation had prescribed, the pursuer's position now appeared to be that the prescriptive period had not even commenced in the absence of a written demand for payment. Having acceded to Mr Anderson's invitation, at least in part, to fix a proof before answer I do not propose to express a concluded view on the two arguments advanced, and the apparent tension between them. I confine myself to observing that, if it can be established that the defender's late father had entered into an arrangement around the time when the debtor and the defender separated, which involved repayment of the sums earlier advanced by him, then it is not obvious (to me at least) that the absence of a written demand for repayment subsequently has any bearing on the real question before the court (which goes to the adequacy of the consideration).

[42] I make that observation because, during the debate, Ms Ower departed from the argument in paragraph 7.1 of the pursuer's note on the basis of preliminary plea (although not paragraph 7.4). That argument had sought to make something of the fact that the pleadings were silent on why the debt said to be due to the defender's father had not been settled when the subjects were sold. During the debate, and echoing an earlier point about the absence of averment that the defender's father was ever repaid, the question was raised as to whether the fact that the "creditor" had not sought payment at that time should not be regarded as *res inter alios acta aliis non nocet.* The defender had made averments, at p 7 of the record, explaining how the proceeds of sale had then been dealt with (by agreement

between the defender and her father they were invested in another property). It seemed to me that that was a matter for the parties most nearly concerned, and could have no bearing on the question whether, by, in effect, procuring a discharge of any liability the debtor may have had to repay his share of the advances, adequate consideration had been given for the receipt, by the defender, of the whole of the free proceeds of sale.

[43] It might be thought that the absence of any written demand for payment by the defender's father ought to evoke a similar response. The substantial question was what was offered, and what was agreed, at the time of the alienation, not what may have been decided between the defender and her father thereafter.

Decision

[44] In the result, I have acceded to Ms Ower's motion to the extent of excluding from probation those averments which bear to invoke the provisions of the Family Law (Scotland) Act 1985 as a basis for resisting decree in this case. *Quoad ultra* I have allowed a proof before answer, leaving all pleas standing. Since the matter is not without complexity, and I did not hear counsel specifically on their disposal, I have reserved meantime the question of the expenses of the debate. I have caused a procedural hearing to be fixed to consider dates, and preparations, for proof. It would seem appropriate for the matter of expenses to be disposed of at the same time. I, therefore, invite the parties' respective agents to liaise with the sheriff clerk in order that a suitable hearing date can be identified to suit the court and also counsel's diaries.