[2016] SAC (Civ) 4
XO30/16

Sheriff Principal C A L Scott QC
Sheriff Principal I Abercrombie QC
Sheriff P Arthurson QC

OPINION OF THE COURT

delivered by the Vice President, SHERIFF PRINCIPAL C.A.L. SCOTT QC

in appeal by

Alison Donnelly

Appellant;

Against

The Royal Bank of Scotland plc

Respondents:

Appellant: Carlin, Solicitor.
Respondent: Thomson, Advocate.

16 June 2016

[1] The appellant challenges the decision of the sheriff in the commercial court in Glasgow to exclude certain of the appellant's averments from probation all in the context of a payment action concerning three sums totalling £10,815.76.

[2] As the sheriff indicates at the outset of his note, the action raised by the appellant against the respondents (hereinafter referred to as "the bank") "…raises a number of interesting and novel issues, including the extent of a creditors' right of set-off in insolvency, the effect on creditors' claims of the discharge of a debtor from a personal insolvency

process, and the proper legal classification of a complaint or claim by a customer concerning the alleged mis-selling of payment protection insurance ('a PPI claim')."

[3] There is no dispute that the bank agreed to pay the sums due in settlement of the appellant's PPI claims. However, the bank has declined to make any payment. It maintains that it is entitled to withhold payment of the three sums totalling £10,815.76 and to set them off against a greater alleged indebtedness said to amount to £21,617.42 and said to be due by the appellant to the bank under contracts of loan between the parties entered into between 1997 and 2003.

[4] As the sheriff records in his helpful summary, the interesting complication in the case is that between the dates of the contracts of loan and related PPI sales (in 1997 and 2003) and the dates of the PPI agreements (in 2014) the appellant became insolvent. She granted a trust deed in favour of her creditors in 2006.

[5] There was a further complication; the bank submitted claims in the trust deed for payment of, broadly speaking, the same aggregate indebtedness founded upon by way of set-off. Those claims were adjudicated upon by the appellant's trustee and the bank received payment of dividends on the claims. In 2012, the appellant was discharged from the trust deed.

[6] Before the sheriff, the bank's primary position was that it is entitled to plead set-off by application of the principle of the balancing of accounts in bankruptcy. In contrast, the appellant disputed the application of any such insolvency set-off. It was maintained on her behalf that the principle of the balancing of accounts in bankruptcy had no application because she was no longer *in bankruptcy*, having been discharged from the trust deed; that the effect of the discharge was to extinguish any obligation she may have had to make payment of any outstanding loan balance due to the bank as at the date of her insolvency;

that even if the appellant's discharge did not extinguish her indebtedness to the bank, any obligation to the bank under the loan contracts had been extinguished by operation of prescription, the bank's claim in the trust deed not having been renewed periodically; and that the debt sought to be enforced by the appellant, being a post-insolvency debt which first arose after the date of her insolvency under the PPI agreements in 2014, could not be set-off against the pre-insolvency obligations founded upon by the bank under the loan agreements dating back to the period from 1997 to 2003.

[7] After a diet of debate, the sheriff determined that the bank was entitled to plead set-off. In doing so, he arrived at certain specific conclusions:

(i) that absent a discharge on composition, the mere discharge of the appellant from the trust deed did not have effect to extinguish any obligation owed by the appellant to the bank to pay the unsatisfied balance due under the pre-insolvency contracts of loan;

(ii) that upon a proper analysis, the indebtedness sought to be enforced by the appellant against the bank had its source and origin in a contingent obligation that had been in existence prior to the date of the appellant's insolvency;

(iii) that as a result, the appellant's correlative right to enforce that contingent obligation properly fell within, and formed part of, the appellant's insolvent estate under her trust deed;

(iv) that the contingencies attaching to the bank's obligation were purified, post-insolvency, by the appellant submitting complaints to the bank regarding the PPI sales and by the bank determining those complaints in favour of the appellant;

(v) that the effect of the PPI agreements themselves had merely been to ascertain the present value of the pre-insolvency contingent obligation by the bank;

(vi) that while the appellant had title to sue for payment of that newly ascertained and newly non-contingent indebtedness, she did so as constructive trustee for the benefit of her creditors under the trust deed;

(vii) that to the extent that there was a greater extant contra-indebtedness owed by the appellant to the bank under the pre-insolvency contracts of loan, the bank was entitled to set it off against the bank's newly ascertained and newly non-contingent indebtedness to the insolvent estate, by virtue of the principle of the balancing of accounts in bankruptcy;

(viii) that the appellant's obligations to repay any sums due to the bank under the contracts of loan had not prescribed because the bank's acts in submitting claims to the trustee under the trust deed for implement of those obligations constituted "relevant claims" for the payment of those debts, in terms of the Prescription & Limitation (Scotland) Act 1973, section 9(1)(c); those claims had effect continuously to interrupt or suspend the operation of the applicable 5 year prescriptive period, for as long as the claims subsisted before the trustee, until such time as the claims were finally adjudicated upon and accepted by the trustee.

[8] In the note of appeal, the broad contention on behalf of the appellant is to the effect that the sheriff erred in law in holding that the appellant's averments anent the effect of her discharge from the trust deed, the non-application of the principle of balancing of accounts and bankruptcy and the operation of prescription to be irrelevant.

[9] At paragraph 4 in the note of appeal, the argument on behalf of the appellant is developed. *Inter alia*, it is maintained that the sheriff ought to have held that the debts arising from the three contracts on which the appellant sues only arose when those contracts were made. Moreover, it is argued that, those contracts having been constituted *after* the

appellant's discharge the debts did not vest in the trust. In that connection, the appellant maintains that the sheriff erred in omitting to proceed on the footing that (1) the contracts were agreed to be without admission of any pre-existing liability and (2) that the bank's contention that their liability in fact pre-existed the contracts could not be determined at debate.

[10] Even on the hypothesis that the bank's liabilities pre-dated the contracts, the appellant contends that the sheriff erred "…in failing to hold that on a proper construction of the trust deed, there did not vest in the trustee (nor hence in the trust, whether that concluded with the pursuer's discharge or has a continuing existence) such unknown and contingent claims as the Sheriff held to have ante-dated the contracts." Reference is made to the case of *Dooneen Ltd* v *Mond* [2016] CSOH 23.

[11] The appellant, for the purposes of her appeal, argues that she had relevantly averred that the rights under the aforementioned contracts were personal to her and that in her personal capacity (as opposed to any capacity of constructive trustee) her discharge from the trust deed had extinguished any pre-insolvency debt such as those averred by the bank for the purposes of set-off.

[12] The appellant, when it comes to her prescription argument, maintains that the sheriff ought to have held that the claims by the bank to the trustee were one-off events which did not have a continuing effect so as to suspend the operation of prescription, instead, it is argued that the prescriptive period ought to have been calculated from the dates of the claims which, as a matter of fact, were more than 5 years prior to the instigation of the present action. It is also maintained that the sheriff erred in holding that the effect of adjudication of the claims could be determined at debate "…where the facts and terms of any adjudication are not a matter of admission on record".

[13] In terms of their motion No 3/1, the bank moved the court to remit the cause to the Court of Session in terms of section 112(2) of the Courts Reform (Scotland) Act 2014 on the following grounds:

(a) The appeal deals with many complex and novel points of law, including vesting of assets in insolvency, classification of obligations, the common law principle of balancing of accounts in bankruptcy, the effect of discharge in insolvency and specific aspects of prescription. There is also a paucity of direct authority on the points to be addressed.

(b) The subject matter of the appeal is of great importance to the respondents and has wider implications for the respondents and other banks, for those standing behind the appellant and potentially also for consumers and those in the general field of insolvency. The financial implications of this cause for the respondents substantially exceed the sum sued for.

[14] Initially the foregoing motion was opposed by the appellant. However, by the time of the hearing on the motion, the court was advised that the appellant was now prepared to conjoin in the motion.

[15] In support of a remit to the Court of Session, counsel referred to section 112(2) of the 2014 Act. He highlighted the proposition that the Sheriff Appeal Court *may*, if satisfied that the appeal raises a complex or novel point of law, remit the appeal to the Court of Session. Counsel submitted that the very first line in the sheriff's note drew the reader's attention to the fact that the action was imbued with novelty, principally in relation to matters of law. Moreover, counsel adopted the sheriff's observation, at paragraph [43] in his note to the effect that the present case involved "a tangle of legal conundrums".

[16] When it came to the court's ability to resolve those conundrums counsel stressed that there was a dearth of authority which might be said to be directly in point and which might

serve to assist the court. Counsel referred to the case of *Dooneen Ltd supra*. It was suggested that whilst that case had not been available for consideration by the sheriff there were, nevertheless, a number of issues which tended to overlap with the present case. As we understood counsel's submission, the suggestion was that there would be value in having those issues in the present case aired before judges in the Inner House at the same time or in conjunction with the matters constituting the dispute in *Dooneen Ltd*.

[17] The relatively moderate sum sued for in the present action was, counsel maintained, of no consequence for present purposes. The court was advised that the present action formed a part of what was described as a cohort of litigation involving similar issues. As far as the bank was concerned, in general terms, we were advised that its ability to utilise the concept of set-off afforded it a saving to the extent of £41 million in the course of any given year. In cases involving the granting of trust deeds, something over £10 million would be saved by the ability to plead set-off.

[18] Counsel for the bank suggested that the issues which had been the subject of the sheriff's determination were of considerable importance to those claims companies operating in the PPI field. The appellant in bringing the present action had been and was being funded by such a claims company.

[19] In seeking to support the second part of the bank's motion, counsel was at pains to submit that, despite its appearance, the action ought not to be characterised as involving "a private dispute". The issues in dispute were, counsel argued, a matter of wider importance for banks generally and claims companies involved in the PPI recovery industry.

[20] The litigation in the *Dooneen Ltd* case together with the present action were both said to be viewed by those having an interest as being of major importance. Counsel also sought to highlight the issues commented upon by the sheriff at paragraphs [63] to [70] in his note.

Under the heading "The continuing nature of claims made in insolvencies" it was contended that the sheriff was dealing with issues of significant import particularly, for instance, when it came to the effect of a creditor submitting a claim to a trustee under a relevant trust deed and whether that continuously interrupted the running of the prescriptive period in respect of the debtor's obligation for as long as the claim subsisted before the trustee and up to the date of the final, formal adjudication of the claim. (See paragraph [65] in the sheriff's note).

[21] The solicitor for the appellant supported the granting of the motion albeit that the financial interest said to prevail as far as the claims company backing the appellant was concerned was far less than the significant sums said to be affecting the bank's operation.

Decision

[22] This court acquired its civil jurisdiction in terms of part 5 of the 2014 Act on 1 January of this year. The effect of the 2014 Act was to end the automatic right of appeal from the Sheriff Court to the Inner House of the Court of Session. All civil appeals now require to be made to this court. An application in terms of section 112 of the 2014 Act can be made once an appeal is lodged in this court. However, the court, in considering such a motion, requires to be satisfied that the appeal raises a complex or novel point of law before, in turn, it exercises its discretion as to whether a remit to the Court of Session is appropriate.

[23] In other words, whilst section 112(2) permits this court to remit an appeal to the Court of Session there is no necessity to do so even if the appeal raises a complex or novel point of law. The 2014 Act permits an appeal to be taken to the Court of Session against a decision of the Sheriff Appeal Court with the permission of this court or with the permission of the Court of Session if this court refuses permission (section 113 of the 2014 Act). It goes without saying that this court has to consider carefully the nature of the appeal in question.

In reflecting upon the issues giving rise to the appeal together with the submissions in support of the motion to remit, we wholly agree with the sheriff's assessment to the effect that the action raises a number of interesting and novel issues.

[24] However, whilst the factual/legal matrix involved here is also far from straightforward, on the strength of the submissions advanced before us we do not accept that the points of law involved are complex or, at least, sufficiently complex to merit the appeal being remitted directly to the Court of Session.

[25] We arrive at that view not least because the sheriff, whatever the merits of his decision, has commendably described with great clarity each discrete legal question involved. In exercising our qualitative judgement in the matter, we do not hold to the opinion that, when the various issues are broken down and analysed, they are particularly complex whether individually or in the round. Indeed, leaving out of account the question of prescription, it might readily be said that there really is only one main issue, viz. the bank's entitlement or otherwise to plead set-off in the whole circumstances of this case.

[26] We did not derive much assistance from the somewhat nebulous reference to the case of *Dooneen Ltd*. In the course of submissions, there was no attempt to explore the detail of that decision and we were, accordingly left to consider vague assertions regarding its own importance and its undefined relationship with the present case.

[27] The motion to remit also embraced the integral proposition that the determined outcome of the present litigation was a matter of wider importance to banks and to claims companies within the PPI industry. To our mind, and even taking the proposition at face value as we must, it does not meet the sort of criteria desiderated when it comes to this court's readiness to remit an appeal to the Court of Session. What has been or may come to be decided in the context of the present litigation may well be of interest to those having a

financial stake of one sort or another. Nevertheless, that feature does not equate to a scenario involving national or wide ranging issues of public concern. Allowing for the fact that the present dispute cannot merely be regarded as a singular litigation between this appellant and the bank, it is nevertheless limited to largely private interests within a particular parcel of the financial sector.

[28] The submissions advanced on behalf of both parties were silent as to the longer term prospects of the present case. For instance, on closer questioning by the court, there was no suggestion on the part of counsel for the bank that the points of law with which the litigation was concerned were of such complexity or novelty that they would, in any event, attract the attention of the Supreme Court at some later stage.

[29] Accordingly, in the whole circumstances, the court was not persuaded that the motion should be granted. Whilst noting that an earlier motion presented to the sheriff prior to the occasion of the debate giving rise to the appeal had been refused by him, we share his view, then expressed, to the effect that the complexity or novelty of the points of law arising together with the allegedly wider "importance" of the cause can be viewed as being overstated. The motion, therefore, is refused and the matter will now proceed to an appeal hearing before this court. As far as expenses are concerned, we shall order that no expenses be due to or by either party given that, in effect, this ended up being a joint motion before the court.