



SHERIFF APPEAL COURT

**[2017] SAC (Civ) 6
SAC/2017/EDI-A353-15**

Sheriff Principal I R Abercrombie QC
Sheriff Principal D L Murray
Appeal Sheriff N C Stewart

OPINION OF THE COURT

Delivered by Sheriff Principal D L Murray

In Appeal by

ARGYLL & BUTE COUNCIL

Pursuers/Appellants

Against

JOSEPHINE CLARE LINZEE GORDON

Defender/Respondent

**Appellant: Hay; Argyll & Bute Council
Respondent: Blane (sol adv); A& WM Urquharts**

9 February 2017

[1] This is an action brought under Section 21 of the Health Services and Social Security Adjudication Act 1983 in which the appellant, the local authority, seeks to recover from the respondent the sum of £42,750 in respect of provision of care accommodation for a third

party. The appellant's case, stated briefly, is that the respondent is indebted to it by virtue of Section 21 of the 1983 Act having received a gratuitous alienation of an asset by the third party, that alienation having been made knowingly and with the intention of avoiding charges for the accommodation. The respondent does not dispute that a gratuitous alienation was made, nor, if she is liable to the appellant at all, that the sum sued for is the sum which is payable. The respondent contends that Section 21 does not impose liability on her because the disposition in question was not made knowingly and with the intention of avoiding accommodation charges.

[2] Most of the factual background is not in dispute. In particular the following is agreed: the third party was in receipt of care accommodation provided by the appellants from 3 June 2005 until her death on 4 January 2013. This accommodation was provided at Ardfenaig Residential Home, Ardrishaig, Lochgilphead in terms of the National Assistance Act 1948. In terms of that Act, the third party was properly the subject of charges set by the appellant. Those charges were met from her resources from 3 June 2005 until 10 January 2010 in the sum of £167,000. The present action involves the recovery of a proportion of the charges incurred for the period from 11 January 2010 until the death of the third party. The third party owned heritable subjects known as Barrachourin Cottage, Kilmartin, Argyll, prior to her taking up residence at the care home, and until that time the cottage was her principal dwelling-house. As at 17 October 2005 the cottage, which was unencumbered, had a market value of £95,000. On 30 September 2005, the third party disposed the cottage to the respondent and her late husband equally for no consideration beyond love, favour and affection, conform to missives concluded on 7 June 2005.

[3] A copy of the letter concluding the missive dated 7 June 2005 is lodged as number 511 of process. It contains a qualification in the following terms:

“The seller declares that she is taking up a place in a retirement home. While she will be fully funded from her own resources for the foreseeable future, it is a possibility, which the purchasers will accept, that the local authority might need to take steps to try and reduce the conveyance in order to recover costs which they have paid for the seller to stay in residential/nursing home accommodation. The purchasers will be bound to accept the property in the full knowledge of this risk. For the avoidance of doubt, any two-year limitation of missives will not apply to the terms of this clause.”

As a result of the transfer of the cottage the third party's estate was divested of an asset worth £95,000 for no consideration, the proportion of benefit attributable to the respondent was £42,750, the sum sued for. The appellant having become aware of the transfer and having initiated enquiries a letter was sent to the appellant by DM Mackinnon, Solicitors on behalf on the third party. In that letter the solicitors answer various queries which the respondent had posed about the transfer. In terms of a letter dated 8 April 2010 the appellant advised the third party solicitor:

“... the Council intend to proceed in terms of Section 21 of the Health and Social Security and Adjudication (*sic*) Act 1983 and hold Mr James Gordon and Mrs Josie Gordon liable to pay the Council the difference between the amount assessed due to (*sic*) for the accommodation by Mrs Duncan Jones and the amount we received for it as the transfer took place while Mrs Duncan Jones was residing in residential accommodation

Further, the Head of Adult Care has advised that the Council will assess Mrs Duncan Jones contribution on the basis of notional capital of £90,000 plus capital held by her and an account will be issued to Mr and Mrs Gordon and to your client via yourselves on the basis of the portion of the costs assessed as due to be paid relative to the capital held by Mrs Duncan Jones and the capital she transferred to Mr and Mrs Gordon.

If you do not agree with the terms of this letter then you have the right to ask for a review by the Executive Director – Community Services.”

Following that letter there was consistent correspondence between the third party, the defender's solicitors and the appellant in which the liability of the respondent in particular had been disputed, but since the letter had been written no steps had been taken to challenge the appellant's position by means of judicial review.

[4] The sheriff found, applying normal principles of statutory construction, there is nothing about the terms of section 21 of the 1983 Act that suggests the local authority is entrusted with a jurisdiction to make a determination as to whether or not a person to whom an asset has been transferred is liable to make payment to the local authority. The sheriff opined:

"All that the section does is to set out three conditions which, if satisfied, render such a person liable to make payment and limit the amount for which he is liable to the value of the asset. The conditions are questions of fact, namely, (paraphrasing) (a) that the service-user has availed himself of part III accommodation; (b) that the service-user has knowingly and with the intention of avoiding charges for the accommodation transferred assets not more than six months before the date on which he began to reside in the accommodation, or so transferred it whilst living in the accommodation; and (c) that there was either no consideration or consideration for less than the value of the asset. If the local authority consider those conditions are all met, then it is simple to request payment from the transferee."

The sheriff concluded that if the transferee denies liability then it is open to the local authority to seek redress in the court in the usual way, leaving it to the court to decide whether or not the conditions are indeed satisfied. The sheriff noted in passing that this analysis is borne out by the appellant's plea-in-law which is that the respondent is indebted to the appellant in terms of Section 21 of the 1983 Act and not by virtue of any decision reached.

Submissions for the Appellant

[5] The appellant submits that the appellant made a determination that the purpose of

the third party in disposing Barrachourin Cottage to the respondent and her late husband had been to deprive her of an asset. This is submitted to be a finding in accordance with Section 22 of the National Assistance Act 1948, Section 21 of the Health and Social Adjudications Act 1983 and Regulation 20 of the National Assistance (Assessment of Resources) Regulations 1992. The appellant accepts that such an exercise of statutory function by the appellant is amenable to judicial review to the Court of Session, it being noted that it is of the essence of the judicial review proceedings that no other remedy is available for appeal of the decision at issue: Rules of the Court of Session Chapter 58.3(2).

[6] The appellant admits if there is any ambiguity in the construction of the words used in the Act the correct approach is to identify the mischief Parliament sought to address, under reference to Lord Hope in *Robertson v Fife Council* (2001) SC HL 145. Further such a purposive approach is consistent with the overarching exercise of statutory interpretation in seeking to ascertain the intention of Parliament. If there is ambiguity then following *Pepper v Hart* 1993 AC 93 resort can be had to parliamentary material, such as clear statements by ministers or other promoters of a Bill. It was submitted that the Hansard report of the debate on the Health Services and Social Security Adjudication Bill which became the 1983 Act makes clear the intention was to reduce the administrative burden placed on local authorities for the assessment and collection of charges. The appellant submits that adopting a purposive interpretation, that the exercise of determining liability for care charges incurred by the service user under the 1948 Act and the 1992 Regulations on the one hand, and the liability of a third party for capital which the service user has knowingly and with the intention of avoiding charges for the accommodation transferred assets to some other person or persons is a single scheme. Having not so found the sheriff has fallen into error. It is

submitted to be a matter of common sense that it is preferable for there to be a single scheme for the determination of liability. This is because where an authority makes a determination which affects the service user in respect of liability for care charges on the basis there was a deprivation of capital, such an exercise must involve much consideration of a transaction or other mechanism by which a deprivation of assets is identified, and such a situation will involve a recipient of those assets.

[7] It is submitted on behalf of the appellant that the difference between “knowingly and with the intention of avoiding charges for the accommodation” in Section 21 of the 1983 Act and “for the purpose of decreasing the amount that he may be liable to pay” in terms of Regulation 25 of the National Assistance (Assessment of Resources) Regulations 1992 is of no material difference. Similarly it was submitted there is no meaningful distinction between the terminology of inadequate consideration found in section 21 and deprivation of capital in Regulation 25.

[8] The appellant further submits that the decision of the sheriff gives rise to an anomaly whereby the individual primarily incurring the care costs, (the third party) are prevented from founding upon their own subjective intention to dispute such liability in terms of *Yule v South Lanarkshire Council (No2)* 2001 SC 203 and the respondent is able to rely on evidence of the same subjective intention in order to resist liability.

[9] In short, the appellant’s position is that having made an assessment that the third party had transferred the property “for the purpose of decreasing the amount that they may be liable to pay” that the appellant is entitled to recover payment of the calculated care costs from those to whom the property has been transferred and decree should have been granted in their favour.

[10] In the alternative, the appellant submits, there remains an unanswered question, if the sheriff is correct in his view, as to what legal tests should be applied to the facts and circumstances of this case in order to establish liability. In particular, how and on what basis will the appellant establish that the service user “knowingly and with the intention of avoiding charges for the accommodation” transferred the cottage?

Submissions for the Respondent

[11] The respondent submitted the sheriff was correct for the reasons set out in the judgment to hold that Section 21 of the Health and Social Services and Social Security Adjudications Act 1983 is sufficiently different to that of Section 23 of the 1948 Act and the regulations made under it, such as to allow a clear distinction to be drawn between them. In particular that the power given to the local authority in terms of the 1948 Act and the 1992 Regulations to determine the amount paid for provision of accommodation and the power to treat a resident as disposing of actual capital, which he has deprived himself for the purpose of decreasing the amount that he may be liable to pay, does not empower the local authority to determine whether a third party should be liable to pay.

[12] The respondent submitted the sheriff was correct to hold that the Inner House decision in *Yule v South Lanarkshire Council* was distinguishable from the instant case as the Inner House were only considering the application of Section 22 of the 1948 Act. The respondent further submitted the sheriff did not err in concluding it was not anomalous that a local authority should be able to make a decision which is binding on the service user but not binding on a third party and adopted paragraph 25 of the sheriff’s reasoning.

Decision

[13] On the substantive issue, we agree with the sheriff for the reason he gives, and shall refuse the appeal. We do not accept that the terms of section 21 of the 1983 Act empower the local authority to make a determination which affects the transferee of assets, disposed of by a service user. We do not find it particularly useful to opine on the operation of a “unitary scheme” or otherwise, and determine the matter simply on the terms of section 21:

“21.— Recovery of sums due to local authority where persons in residential accommodation have disposed of assets.

(1) Subject to the following provisions of this section, where—

(a) a person avails himself of Part III accommodation; and

(b) that person knowingly and with the intention of avoiding charges for the accommodation—

(i) has transferred any asset to which this section applies to some other person or persons not more than six months before the date on which he begins to reside in such accommodation; or

(ii) transfers any such asset to some other person or persons while residing in the accommodation; and

(c) either—

(i) the consideration for the transfer is less than the value of the asset; or

(ii) there is no consideration for the transfer,

the person or persons to whom the asset is transferred by the person availing himself of the accommodation shall be liable to pay to the local authority providing the accommodation or arranging for its provision the difference between the amount assessed as due to be paid for the accommodation by the person availing himself of it and the amount which the local authority receive from him for it.

(2) This section applies to cash and any other asset which falls to be taken into account for the purpose of assessing under section 22 of the National Assistance Act 1948 the ability to pay for the accommodation of the person availing himself of it.

(3) Subsection (1) above shall have effect in relation to a transfer by a person who leaves Part III accommodation and subsequently resumes residence in such accommodation as if the period of six months mentioned in paragraph (b)(i) were a period of six months before the date on which he resumed residence in such accommodation.

(3A) If the Secretary of State so directs, subsection (1) above shall not apply in such cases as may be specified in the direction.

(4) Where a person has transferred an asset to which this section applies to more than one person, the liability of each of the persons to whom it was transferred shall be in proportion to the benefit accruing to him from the transfer.

(5) A person's liability under this section shall not exceed the benefit accruing to him from the transfer.

(6) Subject to subsection (7) below, the value of any asset to which this section applies, other than cash, which has been transferred shall be taken to be the amount of the consideration which would have been realised for it if it had been sold on the open market by a willing seller at the time of the transfer.

(7) For the purpose of calculating the value of an asset under subsection (6) above there shall be deducted from the amount of the consideration –

(a) the amount of any incumbrance on the asset; and

(b) a reasonable amount in respect of the expenses of the sale.

(8) In this Part of this Act "*Part III accommodation*" means accommodation provided under sections 21 to 26 of the National Assistance Act 1948, and, in the application of this Part of this Act to Scotland, means accommodation provided under the Social Work (Scotland) Act 1968 or section 25 (care and support services etc.) of the Mental Health (Care and Treatment) (Scotland) Act 2003."

[14] The terms of the section do not provide the local authority with the power or jurisdiction to make the determination which the appellants argue for. We consider for this power to be given to a local authority there would require to be specific statutory authority. Such specification is seen in section 22 of the National Assistance Act 1948. Accordingly such a decision on section 22 is *habile* to challenge by judicial review. We also agree with the sheriff that the charging regime imposed by section 22 of the 1948 Act and the 1995 Regulations only apply in a question between the local authority and the service user. We find nothing untoward in Parliament having determined that the separate question of whether another party may be liable to pay for charges is left to the courts to resolve.

[15] In so finding we do not consider there to be an ambiguity which would allow, following *Pepper v Hart*, consideration to be given to Parliamentary material to assist us in the interpretation of section 21. We do however note that in his evidence to Standing Committee B on the Health and Social Security Adjudications Bill Official Report 19 April 1983 page 581 the Minister, Mr. Kenneth Clark, stated:

"The litigation would be taking place between the local authority and the beneficiary of the transfer of the asset and the proceedings would be for the recovery of a civil debt. The plaintiff local authority would have to prove its claim and would have to satisfy the civil burden of proof for each element of its claim.

When it came to the question of whether the resident had transferred assets "*Knowingly and with the intention of avoiding charges*" the local authority would have to lead evidence to satisfy the court of its claim. That would be the general proposition which the court would have to apply to the facts of the case and to the evidence brought before it."

That statement was made in the context of litigation in the county court, or the high court if the sum is above the county court limits. Given the clause and enacted section apply also to Scotland the Minister's statement supports our interpretation, were such support required, that the sheriff was correct and it is for the relevant Scottish court, in this case the sheriff court, to determine the issue.

[16] Having refused the appeal we shall remit the matter back to the sheriff to proceed as accords. We were invited by the appellant to give some direction as to the legal issues in order for liability to be determined; we do not consider it is appropriate for to do so. If necessary this court can do so when it is faced with established facts.

[17] The appellant sought to add an additional ground of appeal that the matter should be heard as a proof before answer. After consideration this was opposed by the respondent. We will refuse the motion as in our view it adds nothing to the presentation of the case. The appellant and indeed the respondent will be entitled to bring forward evidence for which there is record.

[18] The appeal having been refused, the normal rule shall apply and we will award the expenses of the appeal in favour of the respondent.