SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT DUNDEE

[2025] SC DUN 23

DUN-B331-24

JUDGMENT OF SHERIFF GREGOR MURRAY

in the cause

INGRID GRAY AND CATHERINE DEENEY OR SWEATON

Pursuers

against

THE ACCOUNTANT IN BANKRUPTCY AS THE DAS ADMINISTRATOR

Defender

Act: MacRae, GFM Law
Alt: MacEwan, Anderson Strathern

Dundee, 13 February 2025

The Sheriff, having resumed consideration of the cause:

i) sustains, in part, the pursuers' plea-in-law and repels the defender's pleas-in-law;

ii) allows the appeal;

iii) remits the application for approval of a Debt Payment Programme by John Cape dated 17 April 2024 to the defender to review and reconsider;

iv) finds the defender liable to the pursuers in expenses as the same may be taxed; allows an Account thereof to be given in and remits to the Auditor of Court to tax and report.

NOTE

Statutory background

[1] The defender is the DAS Administrator for the purposes of the Debt Arrangement and Attachment (Scotland) Act 2002 and The Debt Arrangement Scheme (Scotland) Regulations 2011.

[2] In that capacity the defender assesses applications by debtors to approve a Debt Payment Programme ("DPP"). Approval of a DPP entitles a debtor to reschedule payment of debts over an extended period, prevents creditors from taking enforcement action and freezes interest, fees and charges.

[3] The Regulations provide that DPP applications must be prepared by reference to a standard test, known as the Common Financial Tool, under the supervision of a Money Adviser.

[4] The Regulations oblige the defender to approve applications in defined circumstances and in others oblige it to decide whether to grant approval. In the exercise of those functions, it must have regard to the following Regulations:

> **"25.— Approval by the DAS Administrator**
> (1) Where approval cannot be given…the DAS Administrator must approve a debt payment programme that is fair and reasonable.
> (2) In determining whether a debt payment programme is fair and reasonable, the DAS Administrator is to have regard to—
>> (za) where the debtor is an individual, the Common Financial Tool;
>> (zb) where the debtor is an individual, any statement and evidence required under regulation 20(2B) to satisfy the DAS Administrator in applying the Common Financial Tool;
>> (a) the total amount of debt;
>> (b) the period over which a programme will operate;
>> (c) the amount (if any) by which it appears to the DAS Administrator, on the basis of such information as the creditors and the debtor have provided, that the value of any land owned by the debtor exceeds so much of the total amount of debt as is secured by way of a standard security over any interest in that land;
>> (d) the method, and frequency, of payments under a programme;

(e) an earlier proposed programme that was not approved;…
(h) the extent to which creditors have consented (deemed or otherwise) to a programme;
(i) any comment made by the money adviser; and
(j) an asset of a debtor that could be realised to pay debts to be included in a programme.
(3) In determining whether a debt payment programme is fair and reasonable, the DAS Administrator may have regard to any other factor that the DAS Administrator considers appropriate.
(4) Approval under paragraph (1) may be made subject to a condition under regulation 28.

28.— Discretionary conditions
(1) A debt payment programme on approval under regulation…25…may be made subject to one or more of the conditions specified in paragraph (2).
(2) A specified condition is that the debtor must—
(a) realise, and distribute amongst the creditors the value of, an asset of the debtor…
(c) be bound by any other reasonable condition intended to secure completion of the programme…"

[5] Finally, the Regulations provide that a creditor may ask the defender to review a decision to approve a DPP and may appeal any review decision to a sheriff on a point of law.

Relevant facts

[6] The pursuers hold decrees for payment of around £293,000 against John Cape. The amounts due include a principal sum, interest, expenses and a sum awarded under Chapter 27A of the Ordinary Cause Rules. The pursuers are Mr Cape's only creditors.

[7] Mr Cape then consulted BDO LLP in its capacity as a Money Adviser. On 9 and 17 April 2024, it submitted two DPP applications on his behalf to the defender. Copies form numbers 1-6 of the pursuers' first inventory.

[8] The first application disclosed Mr Cape had a £300 monthly surplus of income over expenditure. It proposed Mr Cape pay £200 monthly to his DPP for an unspecified period

and that the balance of the debt be paid by 1 June 2027, when Mr Cape anticipated he would have sold land he owned in Kirriemuir and "other property" which would enable the whole debt to be paid.

[9] The pursuers objected to the first application by submitting, *inter alia*, that Mr Cape owned a number of apparently valuable cars and other heritable properties which could be sold to satisfy the debt.

[10] The second application proposed Mr Cape contribute £200 per month to the DPP for an unspecified period and that it be made subject to the undernoted Regulation 28 discretionary condition, which would enable the whole debt to be repaid by 1 June 2027. It also responded to the pursuers' original objections. Mr Cape had never owned the cars. While he owned and rented out 12 properties, they afforded him a limited income as they were subject to mortgages. BDO had verified those points and Mr Cape's assets, income and expenditure.

[11] The pursuers lodged numerous objections to the second application, only some of which are relevant to these proceedings: the DPP would last for an excessive period; Mr Cape had not identified or valued the properties he owned; the equity in them exceeded the debt to the pursuers and the application made no provision for payment of sums secured over them; sequestration of his estates would allow the debt to be repaid more quickly; weight should be attached to Mr Cape's previous failure to account to the pursuers for rent he collected for them, his conviction for embezzling a sum from them and his conduct, which caused the court to order him to pay substantial additional sums.

[12] Notwithstanding, on 1 May 2024 BDO sent a letter to the pursuers advising them that the defender had approved the second application. A copy forms number 8 of the

pursuers' first inventory. The approved DPP bound Mr Cape to both pay £200 per month into the DPP and to the following discretionary condition:

> "Mr Cape has received an offer to purchase a piece of land he has for sale in Kirriemuir. The land is being purchased with the intention of providing a local town hub for the people of Kirriemuir. An application is in process for funding through a grant from the Scottish land fund. This kind of sale does generally take longer than normal, but emails confirming the proposed purchase and price are on file. I n addition to this, Mr Cape plans to sell a property at Thorter Row, Dundee in April 2027 (when current tenancy finishes) which has equity of £142K (value of property £320,000 with a current mortgage of £178,000). Property sale, after selling expenses, along with the sale of land will provide enough funds to repay the debt in full by over 1/6/2027. Should the sale of land in Kirriemuir fall through for any reason, further property will be sold to endure (*sic*) the debts are paid in full by all 1/06/2024 (*sic*)."

[13] On 8 May 2024, the pursuers asked the defender to review its decision to approve the DPP. In their request, which forms number 9 of their first inventory, they maintained many of the grounds relied upon in the second objections and expanded upon the reasons for the debt having accrued.

[14] On 6 June 2024, the defender confirmed its original decision. A copy of its letter to that effect forms number 10 of the first inventory. In it, the defender maintained its decision to approve the DPP was fair and reasonable as: BDO had vouched Mr Cape's assets, income and expenditure; while Mr Cape owned several tenanted properties, the equity in them was unknown; in any case, the rent received formed Mr Cape's only income; the discretionary condition allowed him to pay the whole debt within three years, which was a reasonable period having regard to the amount due; if the discretionary condition was not met, the DPP could be revoked; it was not clear that sequestration would enable his debts to be paid any earlier; the nature of the debt was irrelevant.

[15] On 19 June, the pursuers appealed the defender's review decision to this court.

Procedural background

[16] The pursuers crave the court to quash the defender's decision on review, to revoke its original decision to approve Mr Cape's DPP and to substitute a determination that it was not fair and reasonable.

[17] They aver that in reaching its decision: the defender failed to take into account relevant factors, including the background to the case, the reasons for the debt; the defender failed to obtain information on the equity in the rental properties or to take it into account; the defender's decisions were plainly wrong and/or were taken as a consequence of either misdirection in law, misunderstanding of or misuse of material facts, took into account irrelevant considerations and failed to take into account relevant considerations. Consequently, the DPP was not fair and reasonable.

[18] In response, the defender pleads in law that the pursuers' averments are irrelevant and inspecific and, in any event, its decision was fair and reasonable. In support, the defender *inter alia* avers that the DPP provided for repayment by Mr Cape of the debt in question to the pursuers as his sole creditors.

[19] I heard submissions at a substantive hearing on the appeal on 27 January 2025. No evidence was led as the relevant facts were agreed, on record or informally.

[20] Parties agreed that the court could not allow the appeal simply because it would have reached a different decision on the application. The pursuer required to show that the defender did not exercise, or wrongly exercised, the discretion conferred on it by the Regulations, misdirected itself in law, misunderstood or misapplied material facts, took into account irrelevant considerations, failed to take into account relevant considerations or exercised discretion wrongly (Macphail, *Sheriff Court Practice* (4th Ed), 18.159 – 160;

Liquidator of Bon-Accord Supplies v *the Accountant in Bankruptcy*, unreported, 11 September 2019, Aberdeen Sheriff Court at 43)).

Pursuers' submissions

[21] In the context of the case, the defender ignored or attached insufficient weight to relevant factors in the exercise of the discretion that Regulation conferred on it.

[22] Paragraphs (za), (zb), (a) and (e) of Regulation 25(2) required the defender to have regard to Mr Cape's statements of income and expenditure, the Common Financial Tool, the debt due and his earlier application. There were substantial differences between the income and expenditure figures in each application. The £200 monthly instalment was a random amount. The three year term was a random period. It appeared Mr Cape could not afford to pay the instalments or to maintain payment. The amount due to his sole creditors was significant. The pursuers would not receive the full benefit of the instalments, as Regulations 5(3) and 17(2) compelled the defender to deduct 2% and 20% administrative charges from them. The defender ignored or attached insufficient weight to those factors.

[23] The defender failed to have regard to its Regulation 25(2)(c) and 25(2)(j) duties to consider the equity in Mr Cape's heritable assets and to have regard to any assets which could be sold to pay the debt. No reasons were given to explain those failures. As 12 of the 13 properties remained unidentified, the pursuers could not ascertain their values or any equity in them. As paragraph 4 of the application provided that "the equity position of the debtor's property has to be ascertained", it was impossible to assess what the defender had taken into account.

[24] The defender failed to consider some or all of the rented properties being sold, with or without vacant possession. Mr Cape was entitled to bring the tenancies to an end by

intimating that he wished to sell the properties with vacant possession. Alternatively, there was a market for the sale of tenanted properties. The context was analogous to that considered by the Sheriff in *Alexander* v *The Accountant in Bankruptcy*, unreported, 11 September 2019 at paras 48 to 49.

[25] The defender also failed to take account of, or attached insufficient weight to the uncertainty about the Kirriemuir land, as its sale depended upon an unidentified interested party obtaining a grant from the Scottish Land Fund to purchase an unidentified property.

[26] The factors in Regulation 25(2), the discretion conferred by Regulation 25(3) confirmed and as the defender accepted on page 2 of its review decision, Mr Cape's DPP required to be fair and reasonable to everyone, not just him. On the information provided, it appeared it only considered the application from Mr Cape's perspective. It was unreasonable to expect the pursuers to wait three years in the hope two assets might be sold. The DPP deprived them of the ability to do diligence on their decrees or to sequestrate Mr Cape. It was not certain that the DPP would be revoked if Mr Cape failed to maintain instalments or did not timeously sell the Dundee and Kirriemuir properties.

[27] In the circumstances, the pursuer's pleas should be sustained. If the court was not prepared to quash the decision to approve the DPP, the matter should be remitted to the defender for reconsideration.

Defender's submissions

[28] The defender's agent adopted her written submissions.

[29] Regulation 25(2) narrated 12 separate considerations which the defender required to consider. Regulation 25(3) was a mopping up provision which permitted it to have regard to any other factor it considered appropriate, a condition which was necessarily narrower

than one which permitted consideration of any other factor. If such factors pointed to a DPP being fair and reasonable, the defender was bound to approve it. No discretion was afforded to it in granting approval.

[30] The defender's review decision showed it had regard to various regulation 25 considerations. It summarised the pursuers' original objections and the further information BDO provided in response. It considered the proposed discretionary condition. It addressed a number of points: the Regulations enabled an error or imbalance to be corrected; it had no investigatory powers; the defender was not obliged to share the information BDO supplied with the pursuers; it required only to consider information supplied in relation to equity; the common financial tool was correctly applied; plainly, consideration was given to the heritable properties owned by Mr Cape; both the discretionary condition and the three year period afforded to Mr Cape were reasonable; his lack of engagement with the pursuers was not relevant; if Mr Cape failed to comply with the discretionary condition, the DPP would almost certainly be revoked; in that event, interest would be reapplied; as he had, to date, paid every £200 monthly instalment, the amount was self-evidently reasonable.

[31] The pursuer's averments did not attempt to engage either with the original determination or the review. They did not analyse either. They did not attempt to identify errors of law. As the point was not pled, the pursuer could not argue that the defender had failed to provide adequate reasons for its decision. To simply list a number of circumstances which might form a basis for a case based on error in law was irrelevant. That the pursuers disagreed with the defender's decisions was also irrelevant.

[32] In article 8, the pursuers did attempt to plead a relevant case. Those averments, read broadly, argued the defender failed to properly consider (a) annex C to the application, (b) the background to the debt and (c) the value of Mr Cape's heritable properties.

[33] The information in annex C made it plain that the pursuer's objections were considered. The defender and BDO correctly applied the Common Financial Tool. Regulations 3(1)(b) and (2)(a) provided that so long as his payments were not in arrears, Mr Cap's mortgage instalments for the residential tenancy properties were irrelevant. The three-year period of the DPP, interest, the potential revocation of the DPP and the reapplication of interest were all taken into account. Mr Cape's conduct during the court action was irrelevant, as it was inappropriate to consider it. In any event, the legislative provisions governing personal insolvency debt solutions did not provide for such considerations to be taken into account.

[34] If the appeal was refused, expenses should be awarded. If the appeal was upheld, the court should refer the issue back to the defender for reconsideration (*Chas Stewart Plumbing and Heating Engineers Ltd* v *the DAS Administrator*, unreported, Perth Sheriff Court, 9 June 2017 at 58 – 60; *Liquidator of Bon Accord Metal Supplies Ltd* at 59).

Assessment of submissions

[35] I agree an appeal such as this should not be upheld simply because the court would have reached a different decision from the defender. Similar conclusions were reached in *Bon-Accord Supplies* and *Chas Stewart Plumbing and Heating*.

[36] The context to the appeal is clearly disclosed by the productions. After the pursuers objected to the first application, BDO provided considerable further detail in the second application on Mr Cape's finances and responded to the pursuer's objections.

[37] Against that context, all but one of the pursuers' submissions fall to be rejected.

[38] Regulation 20 obliged BDO to both state in the second application that Mr Cape's proposed payments accorded with the Common Financial Tool and to send the defender any supporting evidence or explanation. As the pursuers did not specify in what respect BDO was said not to have done so, their submission on the point must be rejected.

[39] I reject the pursuers' submissions about Mr Cape's income and expenditure. Both applications were prepared and submitted by BDO as his Money Adviser. It obtained, considered and vouched Mr Cape's assets, income and expenditure in advance of submitting the second application. In terms of Regulations 3(1)(b) and (2)(a), his mortgage payments for the rented properties fell to be disregarded. As BDO had seen evidence that Mr Cape had never owned the cars, their existence was irrelevant.

[40] The defender did not err by failing to have regard to the effect of the deductions it made from the instalments. They are not among the factors which Regulation 25 obliges the defender to have regard. The defender is statutorily obliged to deduct those amounts. It has no discretion to vary or waive them. It follows it was not appropriate for the defender to have regard to them for the purposes of Regulation 25(3).

[41] I accept the defender's submission that the reasons for the debt were irrelevant to consideration of the second application. Again, they are not among the Regulation 25(2) factors which the defender required to consider. Nor was it appropriate for the defender to have regard to them in terms of Regulation 25(3). The debt was a consequence of familiar circumstances - Mr Cape's failure to satisfy a court decree and charge. It was not suggested the £2,000 he was said to have embezzled formed part of the DPP. A notable proportion of the debt was a procedural penalty imposed by the court.

[42] I also accept that in most respects, the defender had regard to the size of the debt. The amount is obviously substantial; the defender's agent confirmed that Mr Cape's DPP covers one of the highest sums considered under the Act. However, again in context, the defender balanced that relevant factor against three others – a DPP would afford Mr Cape relief from enforcement; BDO had independently vouched his assets, income and expenditure; finally, approving the DPP was at least likely to enable the whole debt to be paid in full in a relatively brief timescale.

[43] I reject the pursuers' criticisms of the instalment amounts and their term. Mr Cape's monthly surplus of income over expenditure was the result the application of the Common Financial Tool to his vouched finances. The amount of the instalment represented the majority of the surplus. It was clearly reasonable. As Mr Cape has maintained payment to date, it was clearly affordable. The length of the term was clearly related to the timescale described in the discretionary condition. In turn, the duration of that was directly linked to the uncertainty about the proposed sale of the Kirriemuir land.

[44] The pursuers' remaining submissions raise issues of more substance. Read short for the purposes of the analysis below, they argued that the defender failed to have regard to two relevant issues: first, the amount of equity in the 11 residential tenancy properties as required by Regulation 25(2)(c) and, second, whether some or all of the properties could be sold immediately, with or without vacant possession, to satisfy the pursuers' debt, as required by Regulation 25(2)(j). The defender's response, again read short, was that it could not have regard to the equity in all but one of the properties as that information was not provided to it, as it has no investigatory function and as it must rely on information provided to it by others.

[45] I accept the Regulations confer no investigatory function or power on the defender. In the context of this case, I also accept that Regulation 25(2)(c) required it only to have regard to information about the equity in Mr Cape's heritable properties if it was provided by the pursuers or by him.

[46] There is no suggestion the pursuers provided any information. However, the productions show Mr Cape, through BDO, provided the defender with a good deal more information than it had regard to.

[47] The debt due to the pursuers amounted to £293,000. The second application effectively proposed Mr Cape pay that sum in full before 1 June 2027 via a discretionary condition obliging him to sell the Kirriemuir land and the property in Thorter Row, Dundee, failing which, if the Kirriemuir sale could not be completed timeously, Mr Cape would be obliged to sell "further property" to meet the balance.

[48] The following points arise.

[49] In the second application, BDO vouched that there was £142,000 of equity in Thorter Row. It follows that for the remaining balance to be paid from the sale of the Kirriemuir land, there must have been equity in it of at least £151,000. However, if that was not sold by June 2027, the "further property" proposed to be sold must have had additional equity of at least the same amount. As such, the defender ought to have had regard to the fact that Mr Cape disclosed equity of at least £444,000 in the Kirriemuir land, Thorter Row and the "further" properties.

[50] Regulation 25(2)(c) obliged the defender to have regard to that equity. Regulation 24(2)(j) obliged the defender to have regard to have regard to selling some or all of Mr Cape's properties, as they were assets which could be sold to satisfy the only debt proposed to be included in his DPP.

[51] However, the defender did not do so. No submission was made to that effect. Moreover, it stated in the review letter that "it is not known if any of the other properties have any equity". As such, it erred in law by failing to have regard to relevant factors when it reviewed the second application. Its decision to confirm Mr Cape's DPP was arguably not fair and certainly not reasonable for that reason.

[52] For completeness, I reject the defender's submission that the pursuers' case is irrelevant - in Article 8, the pursuers aver that the defender's decision was not fair and reasonable having regard to Regulation 25(2) and failed to take the equity in Mr Cape's heritable properties into account.

Decision

[53] As the defender failed to have regard to Regulation 25(2) factors when it reviewed and confirmed its original decision to approve Mr Cape's DPP, the appeal must succeed.

[54] As the court should not substitute its own decision for that of the defender and that would be the outcome if the court rejected Mr Cape's DPP entirely, as the pursuers sought, I have granted orders allowing the appeal and remitting the second application back to the defender to review and reconsider.

[55] Expenses follow success.