SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS AT ABERDEEN

[2025] SC ABE 31

ABE-SQ43-19/ ABE-SQ44-19

NOTE BY SHERIFF ANDREW MILLER

in the cause

APPLICATIONS

by

RICHARD GORDON BATHGATE, Trustee of the Sequestrated Estates of David Black and Jennifer Black

Applicant

against

DAVID BLACK[1]

First Respondent

and

JENNIFER BLACK[2]

Second Respondent

Applicant: Mr Torrance, solicitor
Respondents: Self-represented

ABERDEEN, 5 March 2025

Introduction

[1] The respondents are a married couple. Each was the subject of a separate petition for sequestration at Aberdeen Sheriff Court. Each petition was at the instance of the same creditor and appears to have related to the same debt. In the case of each petition,

[1,2] 'David Black' and 'Jennifer Black' are pseudonyms

sequestration was awarded on 4 February 2021. In each case the date of sequestration in terms of section 22(7) of the Bankruptcy (Scotland) Act 2016 was 6 June 2019, being the date on which each petition was warranted under section 22(3) of that Act. In due course the original trustee in sequestration retired from practice and was replaced by his colleague Mr Bathgate, who was appointed in terms of section 66 of the 2016 Act with effect from 12 December 2023. Mr Bathgate is referred to here as "the applicant."

[2] The applicant's position, supported by a chronology lodged by him, was that efforts made by him and his predecessor during the course of the sequestrations to establish the assets and liabilities of the respondents were frustrated by their non-cooperation. Although the respondents disputed the assertion that they have been uncooperative with their trustees, they appear to admit that assertion in paragraph 4 of their answers and it seems clear that neither respondent has ever provided a completed Form 10 (statement of assets or liabilities) or signed Form 13 (statement of undertakings), as required by sections 41(2) and 51(14) respectively of the 2016 Act.

[3] On 8 July 2024 the applicant lodged identical applications in relation to each sequestration process, seeking authority in terms of section 113 of the 2016 Act to sell the respondents' family home. Having regard to the terms of section 112(2) of the 2016 Act and the lapse of time between the date of sequestration and the presentation of these applications, it appears that the option of presenting these applications was preserved in terms of section 112(3)(a)(iii) of the 2016 Act by the original trustee sending a memorandum under section 26(6) of the Act to the Keeper of the Register of Inhibitions on 26 May 2022.

[4] After further procedure, including the lodging of answers by each respondent, both applications called before me on 27 February 2025 for debate on the applicant's preliminary pleas to the relevancy and specification of the respondents' answers. The applications were

in substantially identical terms. With the consent of all parties, they were dealt with together in the course of a single debate, conducted via webex. The applicant was represented by Mr Torrance, solicitor. The respondents appeared personally, having advised me that they had been unable to secure legal representation, and told me that they intended to deal with the hearing without representation. With the agreement of Mrs Black, Mr Black took the lead in setting out the respondents' joint position.

[5] Mr Torrance had lodged written submissions which set out both his criticisms of the respondents' answers and the legal basis upon which he invited the court to sustain the applicant's preliminary pleas and grant the orders craved. Mr Torrance told me that his written submissions had been prepared and intimated to the respondents prior to a procedural hearing on 29 November 2024, at which he had intended to present, in effect, a motion for summary decree. However, the presiding sheriff had instead sent both matters for debate. Mr Torrance told me that, although the written submissions on which he relied at debate had been lodged with the court for the first assigned diet of debate on 27 January 2025, which had not been able to proceed, they were essentially the same as the versions intimated to the respondents in November 2024. The respondents confirmed that they had received and read Mr Torrance's written submissions. I explained the purpose of the hearing, namely to consider Mr Torrance's criticisms of the respondents' answers, and that it was open to the court to grant the orders craved if I accepted that those criticisms were well founded. Mr Torrance's written submissions are lodged in process. No written submissions were lodged by the respondents. In the course of the hearing I allowed Mr Torrance to amend each of the Records in order to correct minor clerical errors.

[6] At the conclusion of the debate I sustained the applicant's preliminary pleas, repelled the respondents' answers and granted the orders craved. This note explains in greater detail my reasons for so doing, which I summarised when I gave my decision.

The respondents' answers

[7] The answers lodged by the respondents were in identical, brief terms. Formal matters concerning the sequestration process were admitted. Each respondent also admitted (paragraph 3) that, as at the date of sequestration, they were the proprietors of the family home, that Mr Black had a 25% interest in the property, with Mrs Black having the remaining 75% interest in the property and that, by virtue of the sequestrations, the interest of each respondent in the family home had vested in the applicant *qua* trustee. In paragraph 5, each respondent admitted further matters, including: that the family home is the only asset of either respondent which is known to the applicant; that the applicant had obtained a valuation of the property of £540,000; that information from the respondents' mortgage lender indicated that the outstanding balance of the mortgage was approximately £286,000 as at 5 April 2024 and that there was therefore equity in the property at that date of approximately £254,000; that no mortgage payments have been made since 5 March 2020; that the sale of the property is necessary to generate funds to be applied to the respondents' debts, statutory interest and the costs of sequestration; that it is in the interests of creditors that the property be sold; and the value of outstanding creditors' claims in the sequestration, net of statutory interest, is £282,299.81.

[8] So far as the respondents' opposition to the applications was concerned, the substance of their position was to be found in paragraphs 4 and 5 of their answers, which raised a number of matters. Firstly, paragraph 4 asserted that each respondent has

"attempted" to commence proceedings to recall the award of sequestration but has not been in a position financially to do so, and that each respondent "remains aggrieved by the process which led to the debt which ultimately constituted apparent insolvency and led ultimately to the award of sequestration." Secondly, in paragraph 4, each respondent referred to a "potential conflict of interest," on the basis that Mr Torrance's firm were said to be creditors of the respondents in relation to fees for "historical work" carried out on behalf of Mrs Black prior to the award of sequestration against her. Thirdly, in paragraph 4, each respondent asserts that the sale of the family home "will cause extreme hardship and is prejudicial and extreme," on the basis that both respondents have:

> "…during a prolonged period encountered considerable mental and physical health problems. [Mrs Black] in particular has encountered severe facial pain for a lengthy period of time. No solution to treat the condition has been found as yet. This has also caused severe mental distress coupled with the anxiety of this protracted process. [Mrs Black] continues on a strong level of painkiller/anti-depressant … in order to attempt to combat these issues. [Mr Black] continues with his mental health counselling. The sale of the matrimonial home and the impact this would have on them and their family would result in a further deterioration in their medical conditions."

[9] Finally, in paragraph 5, each respondent avers that the sale of the family home would cause extreme hardship because both of their children reside at the property. One of their children (their son) is said to be in full-time education and to require the stability of the family home to "see him through his studies."

Applicant's submissions

[10] Mr Torrance adopted his written submissions, which he supplemented with further brief submissions during the debate. The respondents had failed to engage with their successive trustees to the extent of providing the requested details of their financial resources and liabilities. As a result, the family home was the only substantial asset in the

sequestration of which the applicant was aware. The respondents' averments with regard to their sense of grievance at the circumstances underlying the sequestration proceedings and with regard to their interest in seeking recall of sequestration, having regard to the time which had passed since the award of sequestration, were irrelevant. Their averments with regard to alleged conflict of interest were also irrelevant. Mr Torrance was instructed by the applicant in relation to these applications for orders under section 113 of the 2016 Act. He had not been instructed in the underlying sequestration petitions. His firm had been briefly instructed by Mrs Black in relation to matters in the background of the sequestration proceedings, but it was not suggested that that had resulted in Mr Torrance or indeed the applicant having or deploying information about the respondents' personal or financial circumstances, in the context of these applications, which had been obtained in improper or privileged circumstances. On the contrary, the applicant's position was that he had very little information about the respondents' financial position, as a result of their failure to co-operate with him or his predecessor. Although issues concerning a respondents' health or the potential impact of an order under section 113 of the 2016 Act on children of the family were potentially relevant, the respondents' averments in relation to those issues were so lacking in specification that they could not possibly constitute a proper basis for refusing to grant the orders sought. If the court accepted that the respondents' answers failed to meet the minimum requirements of relevancy and specification, decree *de plano* should be granted (MacPhail, *Sheriff Court Practice*, 4th edition, paragraph 9.28 *et seq*; *MacDonald* v *Glasgow Western Hospitals* 1958 SC 453 per Lord Cooper LP at page 465; *Lord Advocate* v *Johnston* 1985 SLT 533, per Lord Wheatley LJC at page 534). Mr Torrance relied on *Accountant in Bankruptcy* v *Brooks* 2020 SAC (Civ) 15 as a recent and authoritative source of guidance in relation to the proper approach to applications of this nature.

[11] Turning to the specific matters listed in section 113(2) of the 2016 Act to which the court was required to have regard in dealing with these applications, Mr Torrance submitted that the only matter which was the subject of appropriately specific pleading was (d), the interests of the creditors, which was addressed in some detail in the applicant's pleadings. However, none of the other items listed were addressed with anything approaching an acceptable level of specification in the respondents' answers.

Respondents' position

[12] The respondents maintained the position set out in their answers. Some further detail emerged in response to questions from me. I was told that the respondents have been married for 32 years. They have lived in the family home since 2011. They have two children. Their son is a student at university, where he lives during term time, returning to the family home during holidays. He is currently studying for a master's degree, in relation to which his final exams and dissertation are due in September 2025. He will require the stability of the family home in order to prepare for those during the summer of 2025, when he will not be at University. They also have an adult daughter who has completed her education and who lives with them in the family home. It was not suggested that either of the respondents' children suffers from any particular condition or vulnerability which might be affected by the sale of the family home or which might have been capable of impacting upon the outcome of these applications.

[13] I was told that the couple have no assets apart from the family home. Although I was initially told that the couple have no income, it emerged that Mr Black works part-time in a role which involves him in the mooring of ships and oil rigs and that Mrs Black works full-time as a teacher.

[14] I was told that Mr Torrance and his firm had acted on behalf of the respondents for a brief period at the time of petitions for sequestration which preceded the petitions which were granted on 4 February 2021, but that those earlier petitions had been dismissed, apparently for procedural reasons, and Mr Torrance's firm had withdrawn from acting at some point prior to their dismissal.

[15] I was told that, following the awards of sequestration on 4 February 2021, the couple sought assistance from their MP with a view to seeking the recall of their sequestrations. However, that did not progress and recall has never been sought.

[16] With regard to health issues, I was told that both Mr and Mrs Black have received counselling for stress and anxiety relating to their general financial situation, but that neither is prescribed anti-depressants. Mr Black was treated for some physical health issues in 2021 and referred to some lingering "side effects" of that treatment, on which he did not elaborate. He also developed an issue affecting his eyesight after the award of sequestration in 2021 which, I was told, his GP thought may have been due to a stroke. However no diagnosis to that effect was ever made. Mr Black told me that he still has an issue with his eyesight, the extent of which was not elaborated upon, but that he did not know what had caused it. Mrs Black told me that she suffers from intermittent facial pain which she thought may have been linked to dental treatment she received around 15 years ago and which sometimes flares up and interrupts her work as a teacher. No reports or letters from GPs or other health professionals were lodged or tendered by either respondent with regard to their stated medical issues or the potential impact of the sale of the family home on those issues.

[17] The respondents told me that they had repaid around 80% of the debt owed to the original petitioning creditor, that they believed that the petitions for sequestration were "driven" by a particular employee of that creditor, who no longer works for the company,

and that the respondents believed that the ultimate objective of the petitioning creditor had been to "get us out of our house." No payments had been made towards the mortgage on the family home since the award of sequestration because they had not received any correspondence from their lender since then.

Applicant's further submissions

[18] In a brief response, Mr Torrance observed that the respondents had not made any mortgage payments since March 2020, around 11 months prior to the award of sequestration, and that the applicant in relation to the orders now craved was not the original petitioning creditor but the trustee in sequestration, who was legally obliged to fulfil his functions in that capacity.

Decision and reasons

[19] It is clear that applications for authority to sell a family home under section 113 of the 2016 Act can competently be granted at debate where the court decides that the respondent's answers fail to meet minimum standards of relevancy and specification – see *MacLeod's Trustee* v *MacLeod* 2007 Hous LR 34 and *Accountant in Bankruptcy* v *Clough* 2010 WL 3515629, Edinburgh Sheriff Court, 8 September 2010, both of which relate to applications under the analogous provisions of section 40 of the Bankruptcy (Scotland) Act 1985, and *Accountant in Bankruptcy* v *Brooks,* supra.

[20] In deciding an application of this kind, the court is required by section 113(2) of the 2016 Act to have regard to all the circumstances of the case, including the matters specifically listed in that subsection. At para [20] of its opinion in *Accountant in Bankruptcy* v

Brooks, the Sheriff Appeal Court summarised the task of the court in dealing with an application of this kind thus:

> "The ultimate decision is entrusted to the court, which must reach a conclusion having regard to the material put before it. In our opinion, read as a whole, the ultimate calculus for the court to undertake is one of reasonableness, judged in the light of the particular facts and circumstances of the case."

[21] At para [22], the court made these observations with regard to the minimum requirements of a respondent's answers:

> "However, it is up to a defender to aver with sufficient particularity the facts which the defender says will enable the court, if they are proved, to exercise its powers in terms of section 113(2). Each case is fact specific; the adequacy of averments fall to be tested on their own merits. There have to be sufficient averments to satisfy the court that, if proved, authority to the trustee to sell or dispose of the debtor's interest in the family home should be tempered in one of the ways set out in section 113(2)."

[22] I agreed with Mr Torrance that the respondents' averments with regard to their sense of grievance in relation to the original sequestration petitions and their desire to seek recall of the award of sequestration were irrelevant to these applications (*Accountant in Bankruptcy* v *Clough*). I also agreed with Mr Torrance that the respondents' averments with regard to the issue of conflict of interest were irrelevant. On the information before me, I could not accept that such fleeting involvement as Mr Torrance and his firm may have had in historical matters in the background of the petitions for sequestration which were warranted in June 2019 and granted in February 2021 could have resulted in any prejudice which could conceivably have entitled the court to refuse to grant the orders craved. Far from relying on any privileged information about the respondents' financial circumstances which might hypothetically have been gathered by Mr Torrance or his firm from a brief, historical professional connection with the respondents, the applicant's position was that, due to their non-cooperation, he had virtually no information about those matters.

[23] It appears that orders of the kind sought in these cases will generally only be refused outright where there is a substantial justification for that course (McKenzie-Skene, *Bankruptcy*, paragraph 12 – 84). Reported examples of cases in which applications have been refused (both relating to applications under section 40 of the 1985 Act) include *Gourlay's Trustee* v *Gourlay* 1995 SLT (Sh Ct) 7, in which the sheriff accepted medical evidence that the stress which moving from the family home would cause the respondent carried the risk of inducing a potentially fatal stroke, and *Hunt's Trustee* v *Hunt* 1995 SCLR 973, in which the sheriff found that, even if the family home was sold, the benefit generated for creditors would be minimal.

[24] In fairness to the respondents and so that I could consider all potentially relevant circumstances, I allowed them to supplement their averments by providing further information during the hearing before me with regard to their health issues and the potential impact of the sale of the family home on their children, both of which I accepted were potentially relevant matters. Even having regard to the further information which was provided, I was satisfied that their averments in relation to those matters were fatally lacking in specification and were not capable, even if proved, of justifying the refusal of the orders sought, applying the approach taken by the sheriffs in *MacLeod's Trustee* v *MacLeod* and *Accountant in Bankruptcy* v *Clough* and by the Sheriff Appeal Court in *Accountant in Bankruptcy* v *Brooks*. Their answers to these applications failed to meet the minimum standards of relevancy and specification. There were no averments about any housing options which have been explored, or which might be available to them, in the event of the sale of the family home, or about any specific potential impacts of the sale of the family home on them or their children, apart from the obvious potential for practical upheaval which would be inherent in any grant of an order of the kind craved here. There were no

averments to indicate any medical basis upon which the court might conclude that the sale of the family home might aggravate any medical issues affecting either respondent to an extent which might justify refusal of the orders craved. Having regard to all the circumstances of these applications, so far as known to me, and applying the "ultimate calculus" identified by the Sheriff Appeal Court in *Accountant in Bankruptcy* v *Brooks*, I was left with no sufficient basis for refusing the orders craved by the applicant.

[25] In the case of each respondent, their interest in the family home is the only substantial asset known to the applicant, and no payments have been made towards the mortgage since March 2020. The equity in the family home indicates that the sale of the property is likely to generate substantial funds for distribution to creditors. These factors impact on the interests of the creditors, which is one of the factors the court is required to have regard to in terms of section 113(2) of the 2016 Act.

[26] Although by no means a decisive factor, the public interest in minimising delay in the conclusion of a sequestration process is another relevant factor in relation to an application of this kind (*Burn's Trustee* v *Burns* 2001 SLT 1383, per Lord Philip at para [16]). With that in mind, I note that in the case of each respondent, sequestration was awarded in February 2021, on petitions warranted in June 2019.

[27] For all of the reasons I have given, I sustained the applicant's second and third pleas-in-law in relation to each respondent and granted the orders craved in terms of section 113(1) of the 2016 Act authorising the applicant to sell the respondents' family home. However, having regard to the potential for the sale of the family home to negatively impact on the ability of the respondents' son to prepare for his final exams and to complete his masters dissertation, both of which I was told are due in September 2025, and having accepted the respondents' assertion that he will require to prepare for these at home during

the summer months, I attached a condition in terms of section 113(2) of the 2016 Act that the date of entry in relation to any sale of the family home should not be prior to 10 October 2025.

[28] The applicant having been successful at the hearing before me, I ordered that the expenses of each application be expenses in the sequestration.