



OUTER HOUSE, COURT OF SESSION

[2025] CSOH 97

P755/25

OPINION OF LORD RICHARDSON

in the Petition of

ACCOUNTANT IN BANKRUPTCY

Petitioner

against

ANDREW MICHAEL SPEIGHT and FRANCES MCGREGOR SPEIGHT

Respondents

Petitioner: E MacEwan (sol adv); Anderson Strathern LLP
Respondents: A Murdoch (sol adv); Murnin McCluskey

14 October 2025

Introduction

[1] The case concerns the regulation of the possession of a property in north Edinburgh.

The property is owned in the joint names of the respondents. The respondents are also currently occupying the property.

[2] The petitioner is the permanent trustee on the sequestrated estate of the first respondent. The date of sequestration is 17 October 2018. The first respondent's interest in the property is vested in the petitioner as permanent trustee for the benefit of his creditors in terms of the Bankruptcy (Scotland) Act 2016.

[3] The case came before me at three hearings in respect of the petitioner's motion for the regulation of the interim possession of the property and for interim interdict. On each occasion, I gave my decision at the hearing together with a brief summary of my reasons. I have prepared this opinion following the marking of a reclaiming motion to the interlocutor issued after the hearing on 2 October 2025.

The sheriff court proceedings

[4] The background to the petitioner's motions is the action for the division and sale of the property raised by the petitioner on 16 February 2022 at Edinburgh Sheriff Court. The procedural history of that litigation appears to have been protracted. For present purposes, the following events are of significance:

- On 21 March 2023, declarator was granted stating that the petitioner was entitled to insist on an action of division and sale. The petitioner was granted authority in terms of section 113 of the Bankruptcy (Scotland) Act 2016 for the sale of the property, the consent of the second respondent was dispensed with, and a surveyor was appointed to value the property.
- On 19 September 2023, the report of the surveyor was approved and warrant was granted for the sale of the property by private bargain.
- On 30 May 2024, the first respondent sought to appeal the interlocutor dated 21 March 2023. The appeal was refused on 3 June 2024 by the Sheriff Appeal Court on the grounds that it was late.
- On 7 August 2024, the second respondent also sought to appeal interlocutor dated 21 March 2023. That appeal was received though late but was ultimately refused on 10 December 2024 by the Sheriff Appeal Court.

Subsequent attempts to appeal this decision to the Inner House were refused both by the Sheriff Appeal Court and the Inner House itself.

- On 26 February 2025, warrant was granted to eject the respondents from the property. That decree was extracted on 18 June 2025.

The petitioner's attempts to enforce the warrant to eject

[5] The circumstances surrounding the petitioner's enforcement of the warrant to eject are contentious.

[6] The petitioner avers that a charge for removing and accompanying Form 4 Notice were served on the respondents by sheriff officers on 27 June 2025. The service of the Form 4 Notice is disputed by the respondents albeit, as I understand the respondents' position, they accept that charges for removing were served.

[7] The petitioner avers that on 17 July 2025, sheriff officers executed the decree for ejection. Entry was made to the property and the locks were changed. In response, the respondents aver:

"The Respondents were absent from Scotland on 17 July. They received a telephone call from a gardener they engaged to advise that there appeared to have been a forced entry to the house and some internal disruption although whether there had been any theft of items was not known. The gardener made arrangements to change the locks and to secure the house." (Answer 2)

[8] Thereafter, it is common ground that on 24 July 2025, a surveyor instructed by the petitioner attempted to access the property. He found the respondents in occupation. The respondents refused to remove from the property.

The present proceedings

[9] As a result, the petitioner raised the present proceedings seeking an order under section 46 of the Court of Session Act 1988 ordering the respondents to remove from the property.

[10] The case first called before me on 9 September 2025 on the petitioner's motion to grant the prayer of the petition. Having heard from counsel, I refused that motion *in hoc statu*. I did so on the basis that there was a dispute of fact as to whether the Form 4 Notice had in fact been served on the respondents which would require to be resolved first. It would only be if this issue were resolved in favour of the petitioner that the grant of the prayer could be considered.

[11] In the alternative, the petitioner moved me, at the bar, to grant an order under section 47(2) of the 1988 Act granting interim possession of the property to the petitioner and to grant interim interdict preventing the respondents from entering the property except with the consent of the petitioner. I continued these motions for 24 hours in order to enable the respondents' solicitor advocate to take instructions.

The continued motion hearing

[12] On 10 September 2025, I heard submissions on behalf of the petitioner and the respondents in relation to the petitioner's continued motions.

Submissions for the petitioner

[13] The petitioner's solicitor advocate began by addressing me on her motion for orders in terms of section 47(2) of the 1988 Act. For present purposes, this was the principal issue between the parties. The other orders sought were essentially consequential on the question

of interim possession. She referred me to *Dem-Master Demolition Limited v Alba Plastics Limited* [2014] CSIH 58 at paragraph 12 and *Scottish Power Generation Limited v British Energy Generation (UK) Limited* 2002 SC 517 at paragraphs 22 to 24. On the basis of these authorities, she submitted that the petitioner required to demonstrate three things: first, that the petitioner had demonstrated a *prime facie* case in respect of the existence of its right; second, that there is a continuing breach by the respondent; and third, that the balance of convenience favours the grant of the interim order.

[14] Addressing these issues in turn, it was submitted that the petitioner had a strong *prime facie* case. Against the background of the orders granted in the sheriff court proceedings, there could be no dispute that the petitioner had the right to remove the respondents from the property in order to proceed with its sale. The only defence disclosed in the respondents' answers related to the very narrow question of whether the Form 4 had been included in the papers served on the respondents. In this regard, the petitioner's solicitor advocate drew my attention to the affidavits prepared by the two sheriff officers who had carried out service on the respondents. These affidavits set out a clear evidential basis for the petitioner's position. The only response from the respondents was a bare denial in the pleadings.

[15] Second, in relation to the continuing threat of breach, I was referred to the respondents' conduct of the sheriff court proceedings together with the respondents' actions in relation to enforcement of the warrant to remove.

[16] Finally, in relation to balance of convenience, it was submitted on behalf of the petitioner that this issue required to be considered against the background of the orders issued during the course of the sheriff court proceedings: warrant to proceed with the sale of the property had been granted. In order to enable the sale process to proceed, it had been

necessary for the petitioner to apply for and be granted warrant to eject the respondents.

The petitioner required possession of the property in order to take further steps in the sales process such as, for example, obtaining an up-to-date valuation. Now that step had been thwarted by the respondents forcing re-entry to the property. The narrow factual dispute relied upon by the respondents as a defence to the present proceedings made little or no practical difference. Even if the respondents were correct, the sheriff court orders remained. In that eventuality, the petitioner would simply require to repeat service. The respondents would still be lawfully removed from the property and sale would proceed.

[17] Anticipating that the respondents would seek to argue that preservation of the *status quo* should result in the respondents remaining in possession of the property, my attention was drawn to paragraph 31 of *Scottish Power*:

“We accept that it is in certain circumstances appropriate to depart from the principle of the preservation of the *status quo*, but in general that will only be done where the interim order is employed to grant specific relief from what is *prima facie* an unlawful act. For example, in the case of a failure by one party to perform an obligation, relief may be given by way of an order to perform it.”

It was submitted that this precisely described the situation in which the respondents had unlawfully regained possession of the property following their lawful ejection.

Submissions for the respondents

[18] The solicitor advocate for the respondents began by candidly accepting that the petitioner had a strong *prima facie* case. In these proceedings, he could not take issue with the orders granted in the sheriff court proceedings. The respondents’ argument was that the process of ejection had not been carried out lawfully.

[19] Accordingly, the respondents’ solicitor advocate focussed his submissions on the issue of balance of convenience. He questioned what the removal of the respondents from

the property pending resolution of these proceedings would achieve. It would simply open the petitioner up to a potential damages action. He recognised that the process of selling the property had been protracted but, on that basis, queried what difference a further delay to the process would make. Finally, the respondents' solicitor advocate drew attention to the respondents' personal circumstances. They were elderly. They had lived in the property for more than 50 years. They had nowhere else in Edinburgh to go.

[20] On this basis, it was submitted that the balance of convenience favoured the refusal of the petitioner's motions.

Decision

[21] I considered that the petitioner was correct that the principal issue for me to address was the motion for an order in terms of section 47(2) of the 1988 Act. In that regard, I agree that the correct approach to the grant of orders under this section is as set out in *Dem-Master* and *Scottish Power*.

[22] Having considered each of the three parts of the test in turn, I was satisfied that it was appropriate to grant the petitioner's motion.

[23] First, in relation to the *prime facie* case, I considered that the petitioner had an extremely strong case. Following a protracted legal process, there was and could be no dispute that the petitioner had been granted lawful authority to remove the respondents from the property in order to proceed with the sale of the property. The only point raised by the respondents' answers was whether service of the Form 4 had been properly effected. In this regard, I considered the two affidavits lodged by the petitioner. Both of these speak to: the signature and service of the Form 4; the subsequent posting of the same documentation to the respondents; and the processes which the sheriff officers had in place which ought to

have identified any error in service. As against this, I have a bare assertion in the respondents' answers. No affidavits were submitted to provide any further explanation of the circumstances.

[24] Second, essentially for the same reasons, I considered that the petitioner had established a strong case that there was a continuing breach by the respondents of the petitioner's right to possession of the property.

[25] Turning finally to the question of balance of convenience, my starting point was the view which I had reached as to the strength of the petitioner's *prime facie* case. This factor is relevant to the issue of balance of convenience because, on the basis of the material available to me and without reaching a concluded view on the matter, I considered that the petitioner had good prospects of establishing its case. This factor points in favour of the grant of the interim order sought by the petitioner: *Toynar Limited v Whitbread & Co plc* 1988 SLT 433 at 434B-F.

[26] From this starting point, the principal factor which might be seen as weighing against the grant of the petitioner's motion was the fact that the respondents were presently in possession of the property and, therefore, that grant of the motion would disturb the *status quo*. In weighing up this factor, I agree with the solicitor advocate for the petitioner that it is important to take account of the immediate circumstances in which the respondents re-gained possession on 17 July 2025 following the actions of the sheriff officers on that day. *Prime facie* that appeared to me to be precisely the type of unlawful act that was envisaged by the Inner House in *Scottish Power* (at paragraph 31 quoted above at [17]). Accordingly, I did not attach significant weight to this factor.

[27] In assessing the balance of convenience, I also took account of the personal circumstances of the respondents. I was sympathetic to the submissions made on behalf of

the respondents as to the undoubted disruption which would result from the grant of the petitioner's motion. However, that sympathy was tempered by a recognition that, in truth, the disruption arose not from what was in issue in the present proceedings but, rather, from the orders that had been granted in the sheriff court proceedings. It appeared to me that, as was candidly recognised by the solicitor advocate on their behalves, the respondents had, for some time, simply been burying their heads in the sand.

[28] I was reinforced in these views by a consideration of the practicalities of the situation. In light of the orders which have been granted in the sheriff court proceedings, the petitioner has authority to sell the property and, in order to achieve that result, to remove the respondents from the property in the meantime. The respondents' continued possession of the property, pending the outcome of these proceedings, would merely be further prolonging what has already been, at least in part because of the respondents' actions, a very lengthy process. Granting the order would enable the petitioner to progress the lawfully authorised sale of the property in the meantime.

[29] I also recognised that if the respondents are ultimately able to vindicate their position in these proceedings, that might give rise to a liability on the part of the petitioner. However, in this eventuality, I could see no reason why an award of damages would not provide the respondents with an adequate remedy.

[30] For all these reasons, I considered it was appropriate to grant the petitioner's motion in terms of section 47(2) of the 1988 Act. Having reached that conclusion, I considered the further orders sought by the petitioner: the warrants to open shut and lockfast places and to remove the respondents together with interim interdict against entering the property without the petitioner's consent were also proportionate. In light of the personal circumstances of the respondents, I sought and recorded an undertaking by the solicitor

advocate, on behalf of the petitioner, that the petitioner would act reasonably in carrying out these orders.

The motion for recall

[31] On 2 October 2025, I heard a motion by the respondents for the recall of the interim orders which I had granted on 10 September 2025.

[32] The background to this hearing was as follows. On 1 October 2025, the respondents had enrolled a motion seeking: first, to dispense with the period of intimation and to fix an urgent hearing; and, second, to recall the orders granted on 10 September 2025 on the basis that there had been a material change in circumstances. The context for the motion was that the petitioner had instructed sheriff officers to remove the respondents from the property on 3 October 2025.

[33] The petitioner initially opposed dispensing with the period of intimation on the basis that the urgency was entirely of the petitioner's own making in delaying matters. However, in the event, the solicitor advocate for the petitioner was able to prepare for and attend the hearing on 2 October 2025 and so did not insist on that part of her opposition.

Submissions for the respondents

[34] The solicitor advocate for the respondents started by making clear that, as at the previous hearing, he did not seek to challenge the petitioner's *prime facie* case. However, he submitted that the considerations relative to balance of convenience had materially changed since the hearing on 10 September 2025. In short, it was submitted on behalf of the respondents that the change in circumstances was that the petitioner was acting

unreasonably in refusing to entertain an offer made on behalf of the second respondent to buy out the petitioner's interest in the property.

[35] Although possible settlement had first been initially discussed between the parties immediately prior to the hearing on 10 September 2025, neither the second respondent's offer nor the petitioner's response to it had formed any part of the submissions made to me at that hearing. Furthermore, the respondents' solicitor advocate argued that the initial discussion of the offer had been in quite general terms. It was not until the details of the offer had been set out in an email dated 15 September 2025 that matters became properly focussed. Accordingly, it was submitted that this represented a change in circumstances.

[36] Turning to the details of the offer, the respondents' solicitor advocate highlighted that the second respondent was offering the petitioner £50,000. This was, on the second respondent's calculation, a sum which was twice the value of the petitioner's interest in the property.

[37] It was submitted that the petitioner had not acted reasonably in response to this offer. The petitioner had responded to the second respondent's offer by email dated 24 September 2025. In that email, the petitioner had sought the sum of £250,000 but it was apparent from the terms of the email that the petitioner's position was unrelated to a consideration of the sums recoverable from the property. Instead, the petitioner sought a sum based on its assessment of the entire sequestration costs and outlays together with the outstanding creditors' debts.

[38] The respondents' solicitor advocate submitted that the petitioner's actions were a factor that fell to be considered in the context of the balance of convenience. Although he accepted that the sheriff court proceedings were separate and distinct from these

proceedings, he submitted that the consideration of the balance of convenience should not be conducted in a vacuum.

Submissions for the petitioner

[39] The solicitor advocate for the petitioner's first submission was that there had been no relevant material change in circumstances. In her submission, it was necessary to remember that the issues in dispute in the present proceedings were extremely narrow: they concerned solely the service of papers by the petitioner. The present proceedings did not involve a direct consideration of the action for division and sale or the warrant of ejection which had been granted in the sheriff court proceedings. In that regard, the respondents had a remedy in terms of section 50 of the 2016 Act to seek directions from the sheriff court if they were dissatisfied with the conduct of the petitioner.

[40] Furthermore, the petitioner's solicitor advocate submitted that in no way could the actions of the petitioner be properly characterised as being unreasonable. The petitioner was, in the best interests of creditors, seeking an open market sale of the property. As part of that process, the petitioner was seeking an up-to-date valuation of the property. It had been in order to obtain such a valuation that a surveyor had been instructed to attend the property on 24 July 2025 (see [8] above). In the absence of an up-to-date valuation, it was not unreasonable of the petitioner to have countered the second respondent's offer as had been done in the email dated 24 September 2025, albeit the petitioner's solicitor advocate acknowledged that the basis for the petitioner's position had not been set out as clearly as it might have been in the email correspondence.

Decision

[41] The first issue which I required to consider was whether there was a proper basis for the respondents' motion. In other words, whether the second respondent's offer by email dated 15 September 2025 and the petitioner's response to it truly represented a material change in circumstances. As I have noted above in my summary of the submissions made to me at the hearing on 10 September 2025, there was no discussion of any offer made by the respondents or of the petitioner's reaction to it. I noted also that although there was clearly some discussion of possible settlement in advance of that hearing, the correspondence was marked as being "without prejudice". In these circumstances, I was prepared, on balance, to conclude in the respondents' favour that I should consider whether the respondents' submissions had any impact on the conclusions I reached on 10 September 2025 as to the issue of the balance of convenience.

[42] Proceeding on this basis, the submissions made by the respondents give rise to two separate questions: first, can the actions of the petitioner in refusing the respondents' offer reasonably be characterised as being unreasonable; and, second, what impact does this have on the issue of balance of convenience.

[43] First, having considered the respondents' submissions together with the email correspondence against the whole background of this case, I was and remain entirely satisfied that the actions of the petitioner cannot be characterised as being in any way unreasonable. I consider that it would not be unreasonable for the petitioner to treat an offer made by the respondents at such a very late stage in proceedings without an up-to-date independent valuation with some degree of scepticism. This is particularly so where it appears that the petitioner's attempts to value the property have been thwarted by the respondents themselves. In these circumstances, although the email from the petitioner's

agents dated 24 September 2025 might have set out the basis for the rejection of the offer in more detail, I do not consider it to be unreasonable.

[44] Second, on this basis, I also did not and do not consider that the petitioner's rejection of the respondents' offer has any material impact on my assessment of the balance of convenience which I have set out above (at [25] to [28]). Having re-considered matters in light of the submissions made on behalf of the respondents at the recall hearing, I remained of the same view. Accordingly, I refused the respondents' motion.