SHERIFF APPEAL COURT

[2025] SAC (Civ) 25
GLW-CA66-23

Sheriff Principal N A Ross
Appeal Sheriff B A Mohan
Appeal Sheriff D O'Carroll

OPINION OF THE COURT

delivered by APPEAL SHERIFF O'CARROLL

in appeal by

SAGIR SARWAR

Pursuer and Respondent

against

CLEARWATER INVESTMENTS SCOTLAND LIMITED

First Defender

and

LIAQUAT ALI

Second Defender and Appellant

Pursuer and Respondent: Tosh, advocate; Mellicks
Second Defender and Appellant: Burke, solicitor; Burke Legal

22 August 2025

Introduction

[1] This appeal results from the decision of the Sheriff who, following a proof on the pursuer's action for count, reckoning and payment, found the defenders jointly and

severally liable to the pursuer for payment of £87,347.31. The appellant is the sole director of the first defender which did not enter the process from the outset and has had no involvement in the appeal.

[2] The action proceeded on a sale and buy-back contract whereby the pursuer, needing to raise funds, sold a commercial property to the first defender for £300,000 in 2017, retaining the right to buy the subjects after clearing the loan and other sums. Essentially, the property was used as security for that sum. The contract provided that, if that right was not exercised within 4 years, the defenders would have the right to sell the property on the open market to clear outstanding financial obligations. The contract also provided that any "surplus monies" from the sale of the property would be paid to the pursuer after deduction of certain sums.

[3] That right to buy was not exercised. The defenders sold the property elsewhere in 2022 for £300,000. The pursuer thereafter claimed that he was entitled to payment of "surplus monies" and sought count, reckoning and payment, the payment sought being £179,000. The second defender's position was that nothing was due.

[4] Following lengthy proceedings before the Sheriff, the Sheriff rejected a number of aspects of the pursuer's claim (none of which are challenged in this appeal) but nonetheless found the defenders liable as stated above. The second defender appeals against that decision.

Submissions for the parties

[5] The position of the appellant was that, since the property was sold in 2022 for the same price that the appellant paid in 2017, there were no "surplus monies" and therefore nothing was due to the respondent. As regards the proper construction of the contract, the

appellant relied on the decision of *Ashtead Plant Hire Co Ltd* v *Granton Central Developments Ltd* [2020] CSIH 2; 2020 SC 244 in which the court observed that commercial common sense was an important aid to the construction of contracts; that where a contractual provision was capable of bearing more than one meaning, the court should adopt the construction that best accorded with commercial common sense; and that the question for the court is how a reasonable person in business would be likely to conduct their affairs in a particular situation (paragraphs [12] to [14]). There were three relevant features of general business conduct, namely: (i) contracts were based on the principle of consideration or exchange, with broadly reciprocal obligations; (ii) parties expected to perform their obligations, so would normally avoid the risk of disproportionate burdens; (iii) predictability was generally important and parties would normally avoid arbitrary obligations.

[6] For the respondent it was submitted that the Sheriff: was entitled to reach the conclusions he did on the basis of the evidence before him; made no error of law in reaching his conclusions; had not gone plainly wrong; was entitled to reach the conclusions on the facts that he did; and there was no basis upon which this court could interfere with his decision.

Decision

[7] The task for the Sheriff was, in the light of the contract between the parties, to determine what, if any, "surplus monies" arose after the sale of the property. The property having been bought by the first defender in 2017 for £300,000 and sold again in 2022 for £300,000, at first blush it might appear that there could be no surplus monies. That was the appellant's proposition before the Sheriff and on appeal. On that logic, the Sheriff erred and nothing was due.

[8] However, that is not what the contract says. The correct approach was to construe the terms of contract and apply that analysis to the sums in issue. The contract is short and has evidently been drafted without the benefit of professional assistance. It could have been much better drafted. Nonetheless, a court is obliged to give effect to what the parties have agreed, construing its content against the commercial background, and giving effect to its meaning (*Ashstead*, above). Examined that way, the expressed intentions of the parties become tolerably clear.

[9] The starting point was clause 3 which provided, in short, that if the respondent failed to exercise his right to purchase the property (he did so fail), the appellant had the right to sell the property on the open market "in order to clear any outstanding loans and personal debts". Clause 5 further provided that:

> "any surplus monies from the sale of said property will be paid to Mr Sarwar less expenses and other borrowing personal or business".

[10] It is tolerably clear that "surplus monies" referred to genuine surplus, namely any excess profit made on the onward sale of the property. There is no indication, and no logical argument, that either side was to profit at the expense of the other. In context, the calculation therefore required to include the sale price, under deduction of expenses and of any other borrowings, outstanding loans and personal debts incurred in the purchase and sale.

[11] The calculation carried out by the Sheriff at paragraph [40] of his Note takes account of: (a) the balance of a loan of £208,857.34 (the sum still outstanding from the original £221,000 borrowed to finance the purchase); and (b) the expenses of sale (£2,801.80). There is no dispute about those figures being properly deductible.

[12] The Sheriff did not, however, account for two other sums. The first is the deposit of £79,000 paid by the defenders to the pursuer for the purchase price: see Finding in Fact and Law (7). That formed part of the total purchase price for the property which, taken together with the loan of £221,000 (above), totalled the £300,000 price paid to the pursuer. That sum of £79,000 must also fall into the calculation of surplus monies. It was paid by the defenders to the pursuer. If not taken into account, the pursuer would benefit from that sum as a windfall, for no discernible reason. Commercial sense does not afford any other interpretation to the contract. Any other construction would not represent a broad equivalence of obligations. That deposit was an expense (or could also perhaps be described as a loan or personal debt) within the meaning of the agreement and ought to have been deducted from the proceeds of the sale.

[13] The second item the Sheriff did not take into account results from the reduction of the outstanding loan balance which, as he noted, had reduced from the initial £221,000 to £208,857.34, a difference of £12,142.66. Finding in Fact (6) is that the first defender obtained the loan, and that the loan was secured by a standard security over the property together with a floating charge over the assets of the first defender. In addition, a personal guarantee was given by the second defender (the appellant). It follows that it was the defenders between them who had the entire legal liability to repay the loan and instalments due under the loan agreement. In the absence of any contrary argument or proof by the respondents that it paid the £12,142.66, it must have been the defenders who made that payment, from whatever source. That indeed was firmly the position of the appellant in the appeal before us and was not disputed by the respondent.

[14] Therefore, applying the *Ashtead* principles, it could not have been intended by the parties that the defenders would repay interest and capital payments so as to reduce the

outstanding amount of the loan, while on resale of the property donating that benefit to the pursuer. Again, this would mean that the pursuer would obtain a windfall after sale at the expense of the defenders for no discernible reason. That could not have been the intention of the parties in the agreement. That does not represent a broad equivalence of obligations. That sum must fall within one or more of the categories of deductions from sale proceeds envisaged by the agreement. It is at least an expense.

[15] Applying that analysis to the Sheriff's decision, the Sheriff erred in leaving out of account both the £79,000 deposit and the £12,142.66 repayment of the loan. Once that adjustment is made, the surplus due to the pursuer is not £87,347.31. In fact, the defenders suffered a loss of £6,597.15. Therefore, there are no surplus monies due to the pursuer. The contract does not, however, provide for recovery of that sum by the defenders from the pursuer.

Disposal

[16] We will allow the appeal. In order to reflect the foregoing, we make two further findings in fact, as follows. They are founded on a proper construction of the contract, inevitable inferences from the primary findings of the Sheriff and the positions of the parties on appeal as we explain above:

> "Insert a new Finding in Fact (21):
>
> (21) The defenders made payments towards the loan agreement with Assetz. The effect of these repayments was to reduce the outstanding capital sum due on the loan agreement from £221,000 to £208,857.34. The difference of £12,142.66 was an expense of the loan and properly deductible in terms of clause 5 of the buy-back agreement."
>
> Renumber the existing Finding in Fact (21) as (22) and add the following Finding In Fact (23) thereafter:

> (23) From that sum falls to be deducted: (i) the sum of £79,000 paid by the second defender to the pursuer and (ii) the sum of £12,142.66 of sums repaid under the Assetz loan agreement. There are accordingly no surplus monies following the sale of the property."

[17] We recall the Sheriff's interlocutor of 10 February 2025 together with the associated Finding in Law (1), of new we repel the pursuer's objections to the seconder defender's account; repel the 4th plea in law for the pursuer; and grant decree of absolvitor in favour of the second defender.

[18] As far as the expenses of proof are concerned, on 24 February 2025 the Sheriff found the second defender liable to the pursuer in the expenses of process as taxed, so far as not already dealt with. That interlocutor also falls to be recalled standing the result of this appeal.

[19] Expenses as regards these appeal proceedings are reserved. Parties are invited to agree the question of expenses between themselves as regards both the expenses in the sheriff court proceedings and this court which failing the appropriate motion should be made to this court within 21 days for those issues to be determined.

[20] Finally, as regards the motion made at the Bar by the respondent for sanction for the employment of junior counsel in this appeal, that is once again refused. Sanction was sought at an earlier stage in these appeal proceedings and was refused. Nothing since amounts to a change of circumstances or leads us to conclude that that decision was incorrect. In any event, the two bases on which sanction is sought (complexity and value) do not justify granting the motion. The appeal was not particularly complex and the value is not notably high for this level of proceedings.