SHERIFF APPEAL COURT

[2016] SAC (Civ) 9
SAC/XO100/16

Sheriff Principal D Pyle
Sheriff Principal D L Murray
Sheriff P Arthurson QC

SHERIFF APPEAL COURT

OPINION OF THE COURT

Delivered by Sheriff Principal D L Murray

In Appeal by

FIRST TIME LIMITED

Appellant

Against

ALEXANDER FRASER AS LIQUIDATOR OF DENMORE INVESTMENTS LIMITED

Respondent

Appellant: Bartos, Advocate
Respondent: Logan, Advocate

14 September 2016

[1] The court heard a motion for remit of this appeal on 14 September and having refused the motion intimated that we would issue written reasons. The statutory basis for the motion is section 112 of the Courts Reform (Scotland) Act 2014. This provides:

> **"112 Remit of appeal from the Sheriff Appeal Court to the Court of Session**
>
> (1) This section applies in relation to an appeal to the Sheriff Appeal Court against a decision of a sheriff in civil proceedings.
> (2) The Sheriff Appeal Court may—
> (a) on the application of a party to the appeal, and
> (b) if satisfied that the appeal raises a complex or novel point of law, remit the appeal to the Court of Session."

Submissions

[2] The appellant's submission focused on three aspects which the court should consider in a motion for remit: (i) the general importance of the point of law from a public point of view and its potential to have impact in future cases: an Inner House decision will create a binding precedent on the point of law of universal application beyond the sheriff courts; (ii) the likelihood that resolution of the appeal will have a decisive effect in the litigation and save further time and expense, it being noted that if the motion was unsuccessful at this stage, there is no further appeal from the Sheriff Appeal Court to the Inner House; and (iii) a decision of the sheriff at debate is appealable without leave, but as it is not a final judgment the terms of section 113 of the Act preclude a further appeal to the Court of Session, which is only available against a final judgment.

[3] It was submitted that if the appellant's argument prevailed it was a knock out point and would conclude the litigation, resulting in an expeditious and cost effective disposal without the need for proof. The underlying intention of section 112, it was submitted, was to accelerate the opportunity for the Court of Session to issue a binding judgment where the appeal raised a sharp legal point of considerable practical importance.

[4] The question to be resolved in the appeal was: what was the proper definition of alienation; and, flowing from that, was the grant of a personal guarantee an alienation. Mr Bartos submitted this was a point of general importance, which would also apply to guarantees in personal bankruptcy. He was however unable to advise the court whether the wider insolvency profession viewed the matter as being of significant practical importance. He also confirmed that the anti-avoidance arrangements as applied in England and Wales operated on a different regime and he submitted guidance was not to be found in English decisions.

[5] It was submitted for the appellant that the decision in *Jackson v Royal Bank of Scotland* 2002 SLT 1123 did not resolve the question raised in this appeal, which was the question of whether personal rights are granted on alienation. It was submitted that the appeal did raise a complex or novel point of law. Accordingly the first part of the statutory test was satisfied. Having regard to the prospective efficient disposal of the case, were the case to be remitted and the appeal upheld, which would be an end of the matter, it was reasonable in the circumstances for the court to exercise its discretion and remit the appeal.

[6] The motion was opposed. It was submitted that the point at issue was not particularly complex or novel. The case had a similar factual matrix to *Jackson v Royal Bank of Scotland supra*. There the interim liquidator had raised an action seeking reduction of a guarantee as a gratuitous alienation under section 242 of the Insolvency Act 1986. Lord Drummond Young sitting in the Outer House had found that section 242 could apply to an alienation which became completely effectual after the commencement of

the winding up. That view had been accepted by the sheriff as supporting his conclusion in this case. There had not been a proliferation of cases on the point following *Jackson* and Mr Logan submitted that insolvency practitioners considered the law settled. The instant case would be resolved by proof on whether there was adequate consideration such as to prevent the guarantee being treated as being gratuitous. The respondent submitted that this was the real issue to be resolved in this case, rather than the issue of whether the guarantee amounted to an alienation. In these circumstances it was submitted that the appeal did not raise a novel or complex point of law and the motion should be refused.

[7] With reference to the case of *Donnelly v Royal Bank of Scotland* [2016] SAC (Civ) X030/16, it was noted that the court said at para 23:

> "In other words while section 112(2) permits this court to remit an appeal to the Court of Session there is no necessity to do so even if the appeal raises a complex or novel point of law."

[8] It was submitted the *Donnelly* decision correctly recognised that even where there was a complex or novel point of law raised, the Sheriff Appeal Court had a discretion whether to remit an appeal. It was also noted that the court in *Donnelly* was not satisfied that the importance which it was said that case might have to banks and claims companies within the PPI industry equated to a scenario involving national or wide ranging public concern. It was submitted that the issues raised in *Donnelly* were of much greater potential significance than the point at issue in the instant case.

[9] Mr Logan also expressed concern at the potential for delay if the motion were granted at this stage. With reference to the time line, it was observed the note of appeal was lodged on 2 June, and an interlocutor ordering intimation of the appeal, allowing answers and provisionally appointing the case to the standard procedure was granted on 7 June. No representations having been made, an interlocutor confirming the order to the standard procedure was issued on 30 June. It was only on 26 August, some 8 weeks later, that the motion was intimated. A procedural hearing in the appeal was fixed for 27 September. Thus the appeal was likely to be heard by the Sheriff Appeal Court long before a date could be found for a hearing in the Inner House.

Decision

[10] The motion was refused. The court was not satisfied that the case raises a novel or complex point of law which satisfies the statutory test to warrant a remit to the Court of Session. For such to be the case this court requires to find that the case raises a point of wider interest which will have general application. We preferred the submission of the respondent to the effect that the case should not be viewed as having the prospect of establishing an important precedent.

[11] Useful factors for assessing the complexity or novelty of a point such as to warrant a remit include whether it may be said that there is a real likelihood that the issue may attract the attention of the Supreme Court at some later stage, or it may be said to give rise to a novel or complex point of law worthy of remit where there are conflicting Outer House decisions and an authorative Inner House decision would clarify the law.

[12] We did accept there to be some force in in the generality of the appellant's submission on the import of section 113 of the 2014 Act. Section 113 provides:

> **113 Appeal from the Sheriff Appeal Court to the Court of Session**
> (1) An appeal may be taken to the Court of Session against a decision of the Sheriff Appeal Court constituting final judgment in civil proceedings, but only—
> (a) with the permission of the Sheriff Appeal Court, or
> (b) if that Court has refused permission, with the permission of the Court of Session.
> (2) The Sheriff Appeal Court or the Court of Session may grant permission under subsection (1) only if the Court considers that—
> (a) the appeal would raise an important point of principle or practice, or
> (b) there is some other compelling reason for the Court of Session to hear the appeal.
> (3) This section does not affect any other right of appeal against any decision of the Sheriff Appeal Court to the Court of Session under any other enactment.

We agree that the effect of this section is to exclude consideration of a case by the Court of Session after a decision of the Sheriff Appeal Court but before final judgment. Thus a decision at debate which raises a crisp point of law which is novel or complex may well be viewed as suitable for remit.

[13] We wish to make the following observations on the timing of a motion to remit. Although the question of delay in this particular motion being enrolled does not form part of our consideration, it should be obvious from the outset that a complex or novel point is thought to arise. An appellant has, absent there being specific statutory provision on the time for appeal, in terms of rule 6(3)(1) of the Sheriff Appeal Court Rules 2015, twenty eight days from the date of a decision to lodge an appeal. An appellant may make a motion for remit at the point of lodging the appeal. It is

desirable that such a motion should be made as soon as possible. After the appeal is lodged a procedural appeal sheriff will then make a provisional order in terms of rule 6(7). Parties then have fourteen days to make representations. To allow expeditious progress of the appeal if a case is to be remitted, we consider that it will be good practice for any motion for remit to be made before the end of those fourteen days.

[14] The motion before this court having been refused, expenses in accordance with normal practice follow success and we awarded these to the respondent.