SHERIFF APPEAL COURT

[2023] SAC (Civ) 34
HAM-A1551-08

Sheriff Principal Catherine Dowdalls, KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL CATHERINE DOWDALLS, KC

in appeal by

BANK OF SCOTLAND

Pursuer/Holder

against

CROWN OFFICE AND PROCURATOR FISCAL SERVICE

First Defender/Claimant

DONNA McCAFFERTY

Second Defender/Claimant

BILL CLEGHORN

Party Minuter/Appellant

Party Minuter/Appellant: Owen KC; Morton Fraser LLP

22 November 2023

Introduction

[1] This is an appeal by the party minuter ("the appellant") against the decision of the sheriff at Hamilton of 24 May 2023 refusing the appellant's motion for a further diet of debate and allowing parties, before answer, a proof of their respective averments in an action of multiplepoinding. The appeal is not opposed.

[2] The appellant is the enforcement administrator appointed in terms of section 128 of the Proceeds of Crime Act 2002 ("the 2002 Act"), to take possession of, manage, realise and otherwise deal with certain property of the second defender, by interlocutor of the sheriff at Glasgow dated 22 July 2016.

[3] This action of multiplepoinding commenced in 2008. It has a lengthy procedural history. For the purposes of this appeal, the following procedural events are significant. The pursuer was exonerated and discharged from the process (in terms of Ordinary Cause Rule ("OCR") 35.15(2)) by interlocutor dated 1 September 2021, the fund in medio having by then been consigned to the sheriff clerk at Hamilton Sheriff Court. The appellant was sisted as a party to the action by interlocutor dated 1 October 2021. Following a period for adjustment of the parties' pleadings and various procedural hearings a diet of debate on the appellant's preliminary pleas took place on 30 May 2022. The first defender was represented at the diet of debate on 30 May 2022; no submissions were made on their behalf and the solicitor appearing confirmed that his attendance was by way of a "watching brief". The first defender subsequently withdrew from the process, on 24 May 2023.

[4] By interlocutor of 29 July 2022, the sheriff refused, *in hoc statu,* to grant decree for payment of the fund in medio in favour of the appellant in terms of the appellant's second crave and first plea-in-law; sustained the appellant's second, fifth, sixth and seventh pleas-in-law to the extent of excluding from probation certain of the second defender' averments; allowed a proof before answer on the claims made by the second defender and the appellant; found no expenses due to or by any party in respect of the diet of debate; and fixed a date for a hearing on further procedure. The second defender appealed the interlocutor of 29 July 2022 to the Sheriff Appeal Court. The appeal was subsequently abandoned. On 1 December 2022, the Sheriff Appeal Court allowed the appellant's minute

of amendment to be received, allowed time for the first and second defenders to lodge answers and remitted to the sheriff to proceed as accords.

[5] Following conclusion of the amendment procedure, on 24 May 2023 the sheriff, *inter alia,* refused the appellant's motion for a further diet of debate and allowed parties a proof before answer. It is against this interlocutor that the appellant now appeals. In terms of section 116(2) of the Courts Reform (Scotland) Act 2014, the marking of this appeal opens the earlier decisions in the proceedings for review, including the interlocutor of 29 July 2022, in respect of which the second defender's appeal was abandoned, thereby precluding any consideration of it (at that time) by an appellate court.

[6] The sheriff, in his note dated 7 July 2023, sets out the reasons for his decision of 24 May 2023. Reference is made throughout to his 29 July 2022 judgment, to which he expressly adhered. The sheriff maintained that the appeal, in substance, related to the 29 July 2022 decision, which he noted had not been appealed (by the party minuter) and referred to the paragraphs in that judgment relevant to the matters raised in this appeal.

[7] The sheriff noted that the only additional matter of substance raised in this appeal was the ninth ground of appeal, being that the second defender is entitled to the fund in medio and that, consequently, the appellant's first plea-in-law ought to be upheld and decree of declarator that the second defender is entitled to the fund in medio should be granted; as it is realisable property (in terms of section 128 of the 2002 Act), the appellant is then entitled to take possession of it. The sheriff observes that this argument was added by amendment (after the May 2022 debate), as an alternative to the appellant's primary case (for payment to him of the fund in medio), on which a proof before answer had already been allowed. Even had that not been the case, he would have determined that a proof before answer was the most appropriate procedure "at this stage".

[8] At debate in May 2022, the appellant argued that he had a right to take possession of the fund in medio by virtue of his appointment as enforcement administrator in terms of section 128 of the 2002 Act. He was unable to provide any authority for the propositions that (a) the whole of the fund in medio, which had been consigned in court, fell to be treated as "realisable property" in terms of section 128 of the 2002 Act or (b) it was appropriate to treat the appellant's contingent claim for expenses and costs as part of his claim on the consigned funds without appropriate vouching. The appellant referred to section 130 of the 2002 Act to clarify the legal regime for distribution of any funds in excess of the appellant's claim to the second defender.

[9] The sheriff was not satisfied in respect that, in particular, the interlocutor from Glasgow Sheriff Court dated 22 July 2016 did not identify the sums which had been held by the pursuer and came to form the fund in medio; and that it did not apply the language of section 128 of the 2002 Act. Instead, the interlocutor referred to "certain property" of the second defender. He concluded that the definition of "realisable property", in section 149 of the 2002 Act, being "(a) any free property held by the accused; (b) any free property held by the recipient of a tainted gift" was not habile to cover the second defender's contingent claim in the action of multiplepoinding before him. He considered it inconsistent with the nature and purpose of an action of multiplepoinding to characterise the fund in medio as "free property held" by the second defender. The sheriff also considered that the definition in section 149 of the 2002 Act ran contrary to the appellant's proposition that his appointment as administrator is sufficient in law for him to take possession of the fund in medio; the proper approach would be for him to fully specify the legal basis for his claim and properly vouch it. Only then would the court be in a position to issue a decree of ranking and preference, as required by OCR 35.17.

[10] The sheriff refused, *in hoc statu*, to grant decree for payment to the appellant of the fund in medio, in terms of the appellant's second crave and first plea-in-law. He described what was left of the second defender's case on record, after excluding certain averments from probation, as of doubtful relevancy and allowed a proof before answer on the claims made by the second defender and the appellant.

Submissions for the appellant

[11] The appellant submits that the sheriff has erred in respect that he proceeded on the basis that the appellant has no claim to the whole fund in medio. In particular, he erred by failing to take account of the terms of section 128 of the 2002 Act when reading the interlocutor of 22 July 2016 relative to the appellant's appointment as enforcement administrator. In particular, by reference to *McKellar* v *Dallas's Ltd* 1928 SC 503, the interlocutor requires to be read applying common sense and by reasonable interpretation. The appellant argues that the reference in the interlocutor to "certain property" can only refer to the "realisable property" of the second defender. Realisable property is defined in section 149 of the 2002 Act as "(a) any free property held by the accused, (b) any free property held by the recipient of a tainted gift". As the interlocutor makes clear, the appointment is "not restricted to" the property mentioned within it. As an order under section 128 can only be made to secure realisable property, it follows by necessary implication that the interlocutor is in respect of realisable property. The interlocutor is therefore unambiguous; its meaning is clear.

[12] The appellant has been given wide powers to realise, manage and take possession of realisable property. The interests of third parties are preserved in respect of the value of their interest in the property. Therefore, any such third party would receive funds reflecting

the value of their interest. Applying that analysis, there can be no legitimate objection to the administrator's recovery of the sum representing the value of the confiscation order.

[13] On that basis, the appellant argues that the fund in medio to which the second defender is entitled "becomes realisable property". The appellant is entitled to take possession of that realisable property in accordance with his appointment under the July 2016 interlocutor. It follows that the sheriff ought to have held that the appellant is entitled to the whole fund in medio in terms of section 130 of the 2002 Act. Thereafter, the fund falls to be administered by the appellant in accordance with section 130.

[14] The appellant sought to provide some assistance to the court in relation to what would occur in future as to implementation of the enforcement regime, including what would happen should a surplus be realised. Reference is made to section 130 of the 2002 Act, which provides, *inter alia*, that any surplus after payment of the expenses of the insolvency practitioner, payments as directed by the court and payments in satisfaction of the confiscation order must be distributed by the enforcement administrator (a) among such persons who held or hold interests in the property concerned as the court directs and (b) in such proportions as it directs. The distribution of sums under section 130 is governed by section 131 of the 2002 Act. Where a surplus is realised, the court (in this case Glasgow Sheriff Court) controls how and to whom payment is to be made.

[15] The appellant submits that the fund in medio is realisable property, to which the appellant's appointment relates and that therefore the appeal should be allowed and the appellant's first to seventh pleas-in-law should be upheld.

[16] Further, the appellant submits that the sheriff erred in allowing parties a proof before answer in respect of the second defender's averments as to the existence of the confiscation order and in relation to funds restrained in the Isle of Man.

[17] In the event of the appeal succeeding the appellant seeks an award of expenses.

Decision

[18] The court is required, in terms of OCR 35.10(1) to conduct hearings in actions of multiplepoinding with a view to securing the expeditious progress of the case. It is regrettable that this action, which commenced in 2008, is still ongoing some 15 years later. The only parties remaining in the process are the appellant and the second defender, the pursuer having been exonerated and discharged from the process by interlocutor dated 1 September 2021, following consignation of the fund in medio, and the first defender having withdrawn from the process on 24 May 2023. The second defender was not present or represented at the hearing on 24 May 2023 (though she was represented when the hearing was fixed) and does not oppose this appeal.

[19] By interlocutor dated 22 July 2016, the sheriff at Glasgow conferred the powers set out in section 128(6) upon the appellant. The interlocutor appointed the appellant as enforcement administrator in terms of section 128 of the 2002 Act, to take possession of, manage, realise and otherwise deal with "certain property" to meet the liabilities of [the second defender]". While the language of "realisable property" used in section 128(6) was not repeated in the interlocutor, it was perfectly clear what was intended. Read applying common sense and by reasonable interpretation, the interlocutor was sufficient to bring any free property held by the second defender under the enforcement administrator's powers.

[20] The appellant's interest in this action and in the fund in medio is in his capacity as enforcement administrator in terms of section 128 of the 2002 Act. His claim to the fund in medio is made in exercise of the powers conferred on him by interlocutor of the sheriff at Glasgow on 16 July 2022. Those powers, in terms of section 128(6) are:

(a) to take possession of any realisable property;

(b) to manage or otherwise deal with the property; and

(c) to realise any realisable property, in such manner as the court may specify.

"Realisable property" is defined in section 149 of the 2002 Act as:

(a) any free property held by the accused;

(b) any free property held by the recipient of a tainted gift.

[21] In exercise of his powers, the appellant advances a claim on the fund in medio in this process, so that he may take possession of the realisable property of the second defender, in terms of section 128(6)(a) of the 2002 Act. Once in possession of the second defender's realisable property, he may exercise his powers in terms of section 128(6)(b) and (c). Distribution of sums in the hands of the administrator, including any surplus, must be carried out in accordance with sections 130(3), (4) and (5) of the 2002 Act. The court which made the appointment must, in terms of subsection (5), give persons who held or hold interests in the property a reasonable opportunity to make representations before any distribution is made under subsection (4).

[22] The fund in medio comprises funds realised upon the sale of a property. There are no other competing claims to those funds, which belong to the second defender and have been consigned to the sheriff clerk at Hamilton. The value of the fund in medio is yet to be finally ascertained, as interest will have accrued on the consigned sum. OCR 30.2(1) requires that no warrant or order for payment to any person shall be granted until a certificate has been provided by the Inland Revenue stating that all payable taxes or duties have been paid.

[23] The second defenders' averments relating to the consignation order and funds retained in the Isle of Man are not relevant to determination of the competing claims of the

parties in this action of multiplepoinding. Insofar as they purport to relate to the value of the fund in medio and any part thereof in which the appellant may have an interest, they are irrelevant. The appellant's interest as enforcement administrator relates to the realisable property of the second defender. The value of that property is irrelevant. The appellant's power to take possession of the second defender's realisable property arises under the 2002 Act regime discussed above, which provides for the distribution, under the supervision of the court, of any surplus sums. The value of the fund in medio is of no moment in that context.

[24] The substantive decision of the sheriff on 24 May 2023 was the refusal of the appellant's motion for a diet of debate and the fixing, before answer, of a proof of the parties' respective averments. In this respect, the sheriff erred. The second defender avers that she is entitled to the whole of the fund in medio, by reason of the fund being comprised of the proceeds of sale of property in which only she had an interest. What those averments amount to is admission that the fund in medio is comprised of property belonging to her. That is not challenged and is the basis for the appellant's claim. There is therefore no extant issue of fact upon which proof is required. Otherwise, the second defender's averments relate, in effect, to the competency of the appellant's claim. That claim is competent by reason of the powers conferred upon him by the July 2016 interlocutor. There is no need to look behind that interlocutor. Those averments are therefore irrelevant. There is no plea taken by the second defender as to the relevancy of the appellant's pleadings. The basis upon which the appellant advances his claim to the fund in medio has been discussed. For the reasons set out above, the sheriff also erred in reaching the conclusion that he did, following debate, as set out in his judgment of 29 July 2022, to fix a diet of proof before

answer. There is therefore no matter of fact or law upon which proof or debate is now required.

[25] It follows from the above that:

(i) The fund in medio is comprised of property belonging to the second appellant;

(ii) The appellant is entitled, by reason of his appointment as enforcement administrator, to take possession of the fund in medio;

(iii) Once the appellant has taken possession of the fund in medio, being an amount which is the realisable property of the second defender, it must be applied by the appellant in terms of section 130 of the 2002 Act. Subsection (4) provides that sums remaining in the enforcement administrator's hands after any confiscation order has been fully paid must be distributed among such persons who held (or hold) interests in the property concerned as the court directs and in such proportions as the court directs. As such, the appellant's powers of distribution are not unfettered and the second defender's interest in any surplus funds is preserved.

[26] I would allow this appeal. It is not possible for me to dispose of the action until the requirements of OCR 30.2 have been met; therefore I shall make the following orders at this stage:

[27] I shall uphold appellant's first and second pleas-in-law under deletion, in the second plea-in-law, of "or any part thereof", and grant decree of declarator in terms of the appellant's craves 3, under deletion of the words "or any part thereof", and 4(a), also under deletion of the words "or any part thereof".

[28] I shall repel the second defender's pleas-in-law;

[29] Certain further steps require to be taken in terms of OCR 30.2 before decree may be granted in terms of the appellant's second crave, or alternatively crave 4(b). Accordingly, I shall remit the cause to the sheriff for further procedure. In doing so, I record that the purpose of this remit is to take such steps as are required, including meeting the requirements of OCR 30.2, prior to granting decree for payment to the appellant, in his capacity as enforcement administrator, of the fund in medio.

[30] The appellant's remaining pleas-in-law fall away on the granting of decree for payment to him of the fund in medio. The second defender's pleas-in-law have been disposed of and she has no outstanding craves.

[31] Thereafter an award of expenses should be made, finding the second defender liable to the appellant in the expenses of, and incidental to, his Minute (including the expenses of this appeal), as taxed, and payment of said expenses shall be made from the fund in medio.