SHERIFF APPEAL COURT

[2024] SAC (Civ) 31
GLW-L63-22

Sheriff Principal A Y Anwar

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL A Y ANWAR

in the appeal

OLIVER COLLINGE & STRATFORD HAMILTON
as joint liquidators of AYMA IOT LIMITED (IN LIQUIDATION)

Noters/Respondents (in appeal)

against

JOHN MACMILLAN

First Respondent

TANVIR AHMAD

Second Respondent/Appellant

and

GRACE ANNE MACMILLAN

Third Respondent

Noters/Respondents: Vaughan, (sol adv); Morton Fraser MacRoberts LLP
Second Respondent/Appellant: Glass, solicitor; Gilson Gray LLP

19 July 2024

Introduction

[1] The respondents are the joint liquidators of AyMa IOT Ltd ("the Company"). The appellant, John MacMillan, and Grace MacMillan were the directors of the Company.

[2] Logistics Plus Inc ("LP"), a company incorporated in the USA supplied the Company with a significant volume of personal protective equipment ("PPE") during 2020. The Company failed to pay. LP obtained judgement in the High Court of England and Wales in the sums of USD 5,275,527 and £372,600 against the Company. LP sought to enforce the judgement against the Company in Scotland by serving a demand letter seeking payment of £6,165,368.93. The Company failed to pay. LP presented a petition seeking a winding up order in respect of the Company. The Company was placed into liquidation on 19 August 2022.

[3] The joint liquidators allege that, prior to the liquidation, the directors received significant sums from the Company without justification. In July 2023, the respondents lodged a Note in the liquidation process seeking payment of various sums from the directors. The respondent sought (a) £824,114.75 from John MacMillan as second craved (b) £359,984.51 from the appellant as third craved; (c) £50,321.19 from Grace MacMillan as fourth craved; (d) £761,460 from the appellant and his co-directors jointly and severally as fifth craved; and (e) £232,599.94 from the appellant and his co-directors jointly and severally as sixth craved. The sums second, third, fourth and fifth craved were sought in terms of section 212 of the Insolvency Act 1986 ("the 1986 Act") or alternatively in terms of section 242 of the 1986 Act. The sums sixth craved were sought in terms of section 214 of the 1986 Act.

[4] Warrant for service upon each of the directors was granted on 9 August 2023 appointing them to lodge Answers within 21 days.

[5] The Note was served upon the appellant on 11 August 2023. On 30 August, the appellant tendered a letter to the court. On 20 September, decree in absence was granted against the appellant's co-directors; they had failed to lodge Answers.

[6] On October 2023, at a procedural hearing, the appellant appeared personally and without legal representation. The sheriff ordained the appellant to lodge Answers in proper form within 21 days under certification that if he failed to do so, he may be found in default and decree may be granted against him.

[7] On 20 November 2023, the appellant tendered a further document entitled "defences and counterclaim" dated 19 November 2023. At a further hearing on 27 November, the sheriff found the appellant in default, in respect that he had failed to lodge Answers in the proper form and granted decree against him.

[8] The appellant appeals that decision.

The sheriff's note

[9] The sheriff explained that the two documents tendered (the letter tendered on 30 August and the "defence and counterclaim") did not constitute Answers in proper form. The letter did not seek to address the issues in the Note, did not answer any of the averments and had no pleas-in-law. The second document bore no relation to the numbered statements of fact in the Note, the pleas-in-law were inept and unrecognisable as proper pleas-in-law and it contained a counterclaim which was *ex facie* incompetent and was liable to cause genuine prejudice to the respondents and to the proper administration of justice. The second document did not serve the purpose of allowing the issues in dispute to be readily identified and thereafter adjudicated upon by the court. The respondents could not reasonably have been expected to address and answer the content or prepare for proof.

[10] The sheriff noted that during the hearing on 2 October, he had explained to the appellant that he required to lodge Answers in proper form and had advised him to seek legal advice.

[11] The appellant had had two opportunities to lodge Answers in proper form and ample time to take legal advice. The sheriff concluded that he should not be afforded another opportunity to do so. He noted that there was nothing of any *prima facie* substance in the content of the two documents to persuade him that the appellant had a substantive defence to the respondent's claim.

Submissions

[12] The appeal proceeded by way of written submissions.

[13] The appellant is now represented. Put shortly, it was submitted on his behalf that there is no "proper form" of written Answers to a Note in liquidation proceedings. While it may be the practice of the sheriff court to expect parties to adopt the formatting of numbered paragraphs corresponding to the Note, there was no statutory requirement for any particular format. The sheriff ought to have allowed the appellant, as a party litigant, a greater degree of latitude. In any event, the Ordinary Cause Rules (OCR) did not apply. Sections 212(3)(a) and (b) of the 1986 Act empowered a sheriff to make financial awards against directors where "the court thinks fit"; justice was the core test. To arrive at a just outcome, the sheriff required to be reasonably satisfied that what the director said in response to a Note was relevant in law, was sufficiently specific to put the liquidator on notice of the director's position or, where the director criticises the liquidator's Note for lack of specification or legal relevancy, whether further procedure was necessary.

[14] The sheriff did not refer to, and by implication did not consider, the terms of two further documents lodged by the appellant dated 28 September 2023 and 23 November 2023. Taken together, the four documents lodged by the appellant were sufficient to put the respondents on notice that the appellant: (a) alleged that the respondents had failed in their own duties to recover assets; (b) alleged that the respondent had failed to take account of the value of the Company's assets when assessing the financial difficulties facing the Company; (c) contended that monies received by the appellant were legitimate payments including by way of salary and bonus; (d) called upon the respondents to produce evidence to justify their claims; and (e) asserted the presumption available to him under the Corporate Insolvency and Governance Act 2020.

[15] The sheriff had determined the issue of default on the basis of the style of the Answers, rather than the content. Enforcement of the court rules should not be allowed to frustrate the ends of justice (*Semple Cochrane plc* v *Hughes* 2001 SLT 1121). The appellant had a colourable defence, or at least the prospect of pleading one if the respondents would produce documentary evidence to justify their claims.

[16] The counterclaim was no longer insisted upon.

[17] The court was invited to allow the appeal, recall the interlocutor of 27 November 2023 and remit the cause to the sheriff court for further procedure. Further Answers were tendered on behalf of the appellant for the purposes of this appeal.

[18] On behalf of the respondents the court was reminded of the appellate court's role in determining an appeal against decree by default; the appellate court can exercise its own discretion and not simply decide whether the decision of the sheriff was reasonable (*General All Purpose Plastics Ltd* v *Young* [2017] SAC (Civ) 30*).* It was submitted that the sheriff

exercised his discretion reasonably and having regard to the circumstances, this court should exercise its discretion in the same manner.

[19] Despite there being no formal court form for a note in a liquidation or Answers thereto, it has long been the practice of the sheriff courts for written pleadings to be in the form of numbered paragraphs responding to the articles contained within the initiating writ. The sheriff had left the appellant in no doubt of what was required of him. The second document, namely the "defence and counterclaim" provided no *prima facie* defence. Beyond a passing reference to the 2020 Act, no statutory defence was asserted. There was no fair notice of the appellant's position. While the appellant now refers to two further documents which the sheriff did not refer to in his note, the first was an email to the sheriff clerk and not intimated to the respondents. The second was headed "plea in law". Neither disclosed a genuine defence.

[20] Unrepresented parties require to comply with the rules of court (*Aslam* v *Royal Bank of Scotland plc* [2018] CSIH 47). The sheriff had given the appellant latitude; he had been afforded two opportunities to lodge Answers in proper form, what was required of him had been explained to him. Any further indulgence would have prejudiced the respondents.

[21] The proposed Answers lodged during the appeal whilst in proper form disclose little more than bare denials. The court was invited to refuse the appeal and adhere to the sheriff's interlocutor.

Decision

[22] Parties were agreed that the proper approach of an appellate court when reviewing a sheriff's decision to grant decree by default was that set out by the court in *General All Purpose Plastics Ltd* v *Young* [2017] SAC (Civ) 30. As Sheriff Principal Stephen QC observed

> "A party who appeals a decree by default is, in effect, seeking to be reponed or to have the case put back on track with further procedure allowed. Whether or not the appellant should be reponed involves a broad consideration of the circumstances surrounding the default and whether there is a proper or meritorious defence to the action. The correct question is whether the interests of justice require that the appellant be reponed … Accordingly, reponing involves the exercise of a broad discretion. The appellate court may entertain an explanation for the default; why there was no appearance and give consideration to the question of whether there is a *prima facie* defence and the strength and substance of that defence."

[23] In the present case, decree by default was granted following a failure to lodge Answers in proper form. Rule 30 of the Act of Sederunt (Sheriff Court Company Insolvency Rules) 1986/2297, in so far as relevant, provides as follows:

> "An application under the Act of 1986 or rules made under that Act in relation to a winding up by the court not specifically mentioned in this Part…shall be made by note in the process of the petition."

[24] While there is no prescribed form of Answers to a Note lodged in an insolvency process, I am not persuaded that some "freer form of informal procedure" ought to be adopted, as suggested by the appellant. It has long been recognised as the practice of the sheriff courts that Answers should be set out in numbered paragraphs corresponding to the averments in the Note. More importantly, the Answers must serve the purpose and function of written pleadings. They must identify with precision the matters upon which the parties differ and those on which they agree and they must provide notice to the opponent and to the court of the matters which require to be proved, and the arguments which require to be presented, in order for the defence to succeed (MacPhail, *Sheriff Court Practice,* 4th ed para 9.03-9.04). While the courts may be prepared to a grant a degree of latitude to party litigants in relation to both the form and content of written pleadings, those pleadings must nevertheless focus the real issues of controversy between the parties and provide fair notice of the relevant legal and factual matters upon which the court is to adjudicate.

[25] To describe the sheriff's decision as one which focussed on form over substance is to mischaracterise it. In his detailed note, the sheriff has explained why he granted decree by default. The sheriff did note that the documents lodged were "not in proper form"; however, it is clear that the sheriff was referring to the general form of written pleadings, not simply the style or format required of Answers to a note. He observed that the letter of 30 August did not seek to address the issues in the Note in any intelligible way. The "defences and counterclaim" subsequently lodged by the appellant was so generic as to be meaningless, failed to address the specific factual allegations and the legal bases of the respondents' claims, and failed to specify the legal basis upon which the appellant sought to resist the remedies sought by the respondents. Notwithstanding the appellant's agent's attempts to interpret, unpick and add some colour to these documents, it is difficult to identify any rational basis upon which to disagree with the conclusions reached by the sheriff.

[26] The sheriff also considered the counterclaim which invited the court to "reconsider the winding up process" was *ex facie* incompetent; unsurprisingly the appellant's agent conceded that the counterclaim was no longer insisted upon and there is no reference to it in the proposed Answers lodged for the purposes of this appeal.

[27] The appellant's agent correctly noted that the sheriff did not make any reference to two further documents lodged by the appellant dated 28 September 2023 and 23 November 2023. The document of 28 September which is the form of a letter addressed to the sheriff pre-dated the "defences and counterclaim" and was not intimated to the respondents. The latter was lodged following a hearing ordaining the appellant to lodge Answers, the sheriff having explained the nature and purpose of the Answers to the appellant. The sheriff was

entitled to disregard the former communication and to accept the appellant's "defences and counterclaim" as his Answers.

[28] In relation to the document of 23 November, as the appellant's agent candidly accepted, it was not clear what the document of 23 November purported to be. It was entitled "preliminary plea". It made reference to the Corporate Insolvency and Governance Act 2020 and appeared to suggest that the appellant could not be found personally liable for wrongful trading. Section 12 of the 2020 Act, introduced during the Covid-19 pandemic, requires the court, when determining the question of liability for wrongful trading, to assume that a director is not responsible for any worsening of the financial position of the company or its creditors that occurs during the relevant period, being 1 March 2020 to 30 June 2021. Beyond referring to the 2020 Act, the document of 23 November failed to specify the relevance of the rebuttable presumption created by section 12. The appellant appeared to assert that allegations of wrongful trading attributed to him occurred entirely within the relevant period. That is not the case. The respondents sought recovery of sums paid to the appellant between 8 April 2020 and 24 March 2022, averred that the appellant had acted in breach of his duties as a director between 31 March 2020 and 19 August 2022 and averred that the company had traded wrongfully from 29 January 2021 to the date of liquidation. While he has not addressed this document in his note, the sheriff would, in my judgment, have been justified in concluding that it suffered from the same deficiencies as the other material before him; it was unintelligible, irrelevant, failed to address the case against the appellant and failed to provide the court and the respondents with fair notice of his defence.

[29] I am not persuaded that the sheriff failed to pay due regard to the appellant's status as a party litigant. The sheriff did not grant decree by default on 2 October 2023. Instead, he

took time to explain why the letter tendered on 30 August could not be treated as Answers. He explained what was required of the appellant, urged him to seek legal advice and warned him of the consequences of failing to lodge Answers by the next hearing. He attached a note to the interlocutor to ensure that the appellant had a written record of what was required of him. He granted the appellant an appropriate degree of latitude. A further continuation or further procedure would have caused delay and prejudice to the respondents and to the proper administration of justice.

[30] It follows that I am not satisfied that the sheriff has erred or exercised his discretion unreasonably in granting decree by default on 27 November 2023.

[31] Do the interests of justice require that this court should exercise its own discretion in the appellant's favour? The appellant has now instructed a solicitor. Amended Answers have now been lodged. The appellant now denies that he has breached any duties incumbent upon him or received payments which might constitute gratuitous alienations. He avers that he had relied upon his co-director to advance a defence (and subsequently an appeal) in relation to the proceedings instigated against the Company by LP. He believed that the claim could be successfully defended. He avers that prior to the dispute with LP, the Company had traded successfully and that the payments he received were legitimate payments of salary and bonus. He has placed calls upon the respondents to explain the basis upon which they have calculated the losses sustained by the Company as a result of alleged acts and omissions on the part of the appellant and his co-directors and the losses the Company is alleged to have suffered when liability for wrongful trading was not suspended. While not expressly stated in the form of any statutory defence, it is reasonably clear that the appellant wishes to assert that the condition specified in section 214(2)(b) of the 1986 Act is not satisfied and that any alienation was made for adequate consideration,

namely in return for his services as director (see section 242(4)(b) of the 1986 Act). He has a *prima facie* defence.

[32] Unlike the circumstances in *General All Purpose Plastics*, the appellant has sought to engage in the court process. He attended the hearings on 3 October and 27 November. Although woefully inadequate, he attempted to produce Answers. He has now engaged the services of a solicitor. His conduct has inevitably caused a delay in the resolution of these proceedings; however, there is no basis for concluding that he intended to do so. I accept that there is prejudice to the respondent in any further delay. That prejudice can be addressed to some degree by an award of expenses. The prejudice to the appellant, if he is unable to assert his defence is significant; decree will pass in the sum of £1,354,044.45.

[33] For these reasons, I shall grant the appeal, recall the interlocutor of 27 November 2023, allow the amended Answers to be received and remit the cause to the sheriff to proceed as accords. I shall grant the expenses of the appeal in favour of the respondents.