SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2019] SC EDIN 30

SQ362/15

JUDGMENT OF SHERIFF WILLIAM HOLLIGAN

in the cause

THE REMIT BY THE ACCOUNTANT IN BANKRUPTCY IN TERMS OF SECTION 17F OF THE BANKRUPTCY (SCOTLAND) ACT 1985 (AS AMENDED)

in the sequestration of

VCY

and

THE ADVOCATE GENERAL FOR SCOTLAND FOR AND ON BEHALF OF THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS, Victoria Quay, Edinburgh, EH6 6QQ (Creditor)

Accountant in Bankruptcy, Ower, Advocate, instructed by Harper Macleod
Roxburgh, Advocate, instructed by the Solicitor for the Advocate General

_____

Edinburgh, 4 April 2019

The sheriff, having resumed consideration of the cause, puts the matter out by order as to further procedure and assigns 18 April 2019 at 10 am at Edinburgh Sheriff Court as a diet therefor.

NOTE

[1] This matter concerns an application for recall of a sequestration. The sequestration pre-dates the Bankruptcy (Scotland) Act 2016 ("the 2016 Act"). It is governed by the Bankruptcy (Scotland) Act 1985 in its amended form as at 2015 ("the 1985 Act"). Put very shortly, the trustee in the sequestration, the Accountant in Bankruptcy ("AIB"), says that the sequestration ought to be recalled: the creditor (HMRC) says it should not.

Facts

[2] The parties to this matter (the AIB and HMRC – the debtor did not participate) entered into a joint minute of admissions. Paragraphs 1 to 14 record the relevant facts:-

> "1. On 8 December 2015, [HMRC] acting in their capacity as a qualified creditor lodged a petition for the sequestration of [the debtor] at Edinburgh Sheriff Court. The petition debt was £17,377.58 plus interest.
> 2. On 3 March 2016 [the debtor] was sequestrated at Edinburgh Sheriff Court in accordance with the [1985 Act]. The date of sequestration for the purpose of creditors' claims was 10 December 2015. [The debtor] was found liable for [HMRC's] expenses for raising the sequestration petition ("petition expenses").
> 3. The interlocutor of 3 March 2016 appointed the Accountant in Bankruptcy (the Applicant) as the trustee in the sequestration. The Applicant appointed Wylie & Bisset on 29 March 2016 to be his agent.
> 4. On 22 June 2016, [HMRC] submitted their claim "Final Proof of Debt" in the sum of £17,886.16 to the agent for the trustee. The difference between the "petition debt" and "Final Proof of Debt" is explained by the accrual of interest under the Taxes Acts on elements of the petition debt between the date of lodging the petition and the date of sequestration.
> 5. On 8 December 2016 [the debtor] applied for recall of sequestration on the basis that he could pay his unsecured debts in full. That application was refused by … the Applicant on 17 February 2017. The Accountant did not receive confirmation that all debts and the Trustee's fees and outlays had been paid. The application was therefore refused.
> 6. On 6 September 2017 [the debtor] applied for recall of sequestration on the basis that he could pay his unsecured debts in full. That application was refused by the Applicant on 22 November 2017. The application was refused because, again, the Accountant did not receive confirmation that all debts and the trustee's fees and outlays had been paid.
> 7. On 10 July 2018, [the debtor] applied to the Accountant in Bankruptcy under section 17A(1) of the Act for recall of the award of sequestration on the ground that he was able to pay his debts in full. In accordance with section 17A(3) of the Act, the application was intimated on [HMRC] on 10 July 2018.
> 8. On 25 July 2018 [HMRC] emailed the agent for the trustee intimating the view that statutory interest must be paid in order to secure a recall of sequestration.
> 9. On 25 July 2018 the agent for the trustee replied to [HMRC] confirming that in line with the Applicant's view, they did not consider that [HMRC] were entitled to statutory interest.
> 10. On 26 July 2018, the agent acting as Trustee on behalf of the Applicant submitted a statement in accordance with section 17B of the Act. The statement confirmed that [the debtor] had agreed to pay the Trustee's fees and outlays and had sufficient funds. The Trustee recommended that recall was not granted as the Trustee had not received evidence of payment to the creditors…
> 11. On 26 July 2018 £17,886.16 was paid to settle [HMRC's] claim through an online transaction by a debit card.

> 12. On 30 July 2018 [HMRC] intimated to the trustee an objection to the recall of the sequestration on the ground that the debtor had not paid and had no intention of paying the statutory interest on the debt that was due to [HMRC] under section 51(1)(g) of the Act.
> 13. On 14 September 2018, [HMRC's] petition expenses, which amounted to £671.10 were paid by a third party on behalf of [the debtor].
> 14. On 17 September 2018 the agent acting on behalf of the trustee submitted to the Accountant in Bankruptcy a second statement in accordance with section 17B of the Act and confirmed that their position was that the petition debt had been paid…"

[3] On 19 September 2018 the application for recall of the sequestration was remitted by the AIB in terms of section 17F of the 1985 Act. In accordance with rule 5 of the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008 I ordered intimation of the application to the debtor and to HMRC. HMRC lodged answers to the application. The matter called for a hearing before me. The issue is largely one of the interpretation of the 1985 Act.

[4] The relevant parts of the 1985 Act are as follows:

> "**Section 17 – Recall of sequestration by sheriff**
> (1) The sheriff may recall an award of sequestration if he is satisfied that in all the circumstances of the case (including those arising after the date of the award of sequestration) it is appropriate to do so and, without prejudice of the foregoing generality, may recall the award if he is satisfied that –
> (a) the debtor has paid his debts in full
> …
> (2A) Where the sheriff intends to recall an award of sequestration on the ground that the debtor has paid the debtor's debts in full the order recalling the award may not –
> (a) be made before the payment in full of the outlays and remuneration of the interim trustee and the trustee,
> (b) be subject to any conditions which are to be fulfilled before the order takes effect.
> (3) On or before recalling an award of sequestration, the sheriff
> (a) shall make provision for the payment of the outlays and remuneration of any interim trustee and the trustee…
> (4)… The effect of the recall of an award of sequestration shall be, so far as practicable, to restore the debtor and any other person affected by the sequestration to the position he would have been in if the sequestration had not been awarded.
> **Section 17A – Application to Accountant in Bankruptcy for recall of sequestration**
> (1) An application for recall of an award of sequestration may be made to the Accountant in Bankruptcy on the ground that the debtor has paid or is able to pay the debtor's debts in full.
> (2) An application may be made by -
> (a) the debtor
> …

Section 17B – Application under section 17A: further procedure

(1) This section applies where an application is made under section 17A.

(2) The trustee must prepare a statement on the debtor's affairs, so far as within the knowledge of the trustee.

(3) The trustee must submit the statement to the Accountant in Bankruptcy –

(a) at the same time as the trustee makes the application under section 17A or

(b) where the application is made by another person, before the expiry of the period of 21 days beginning with the day on which the notice is given under section 17A(3)(b).

(4) The statement must –

(a) indicate whether the debtor has agreed to –

(i) the interim trustee's claim for outlays reasonably incurred and for remuneration for work reasonably undertaken by the interim trustee (including any outlays and remuneration which are yet to be incurred), and

(ii) the trustee's claim for outlays reasonably incurred and for remuneration for work reasonably undertaken by the trustee…

(b) state whether or not the debtor's debts have been paid in full (including the payment of the outlays and remuneration of the interim trustee and the trustee),

(c) where the debtor's debts have not been so paid –

(i) provide details of any debt which has not been paid, and

(ii) indicate whether, in the opinion of the trustee, the debtor's assets are likely to be sufficient to pay the debts in full (including repayment of the outlays and remuneration of the interim trustee and the trustee) before the day which is eight weeks after the day on which the statement is submitted, and

(d) provide details of any distribution of the debtor's estate.

(5) The trustee must notify every creditor known to the trustee that an application has been made –

(a) that the application is made by the trustee, before the expiry of the period of seven days beginning with the day on which the application is made,

(b) where the application is made by another person, before the expiry of the period of seven days beginning with the day on which the notice is given under section 17A(3)(b).

Section 17D – Recall of sequestration by Accountant in Bankruptcy

(1) The Accountant in Bankruptcy may grant a recall of an award of sequestration if –

(a) the trustee has notified the Accountant in Bankruptcy in the statement submitted under section 17B that the debtor's debts have been paid in full (including the payment of the outlays and remuneration of the interim trustee and the trustee), and

(b) the Accountant in Bankruptcy is satisfied in all the circumstances of the case, it is appropriate to do so.

…

(3) The effect of the recall of an award of sequestration is, so far as practicable, to restore the debtor and any other person affected by the sequestration to the position the debtor or as the case may be, the other person would have been in if the sequestration had not been awarded.

Section 17E – Recall where Accountant in Bankruptcy the trustee

(1) This section applies where the Accountant in Bankruptcy –

(a) is the trustee, and
(b) considers that recall of an award of sequestration should be granted on the ground that the debtor has paid or is able to pay the debtor's debts in full (including the payment of the outlays and remuneration of the interim trustee and the trustee).
(2) The Accountant in Bankruptcy must notify the debtor and every creditor known to the Accountant in Bankruptcy that the Accountant in Bankruptcy considers subsection (1) applies.
…
(5) Before granting a recall of an award of sequestration the Accountant in Bankruptcy must -
(a) take into account any representations made by an interested person before the expiry of the period of 21 days beginning with a day on which the notice is given under subsection (2) and
(b) make a determination of the Accountant in Bankruptcy's fees and outlays calculated in accordance with regulations made under section 69A.
(6) The Accountant in Bankruptcy may grant a recall of an award of sequestration if the Accountant in Bankruptcy is satisfied that -
(a) the debtor has paid the debtor's debts in full (including the payment of the outlays and remuneration of the interim trustee and the trustee),
…
(c) in all the circumstances of the case it is appropriate to do so.
(7) Subsections (3) and (4) of section 17D apply in relation to a recall of an award of sequestration granted under subsection (6) as they apply in relation to a recall of an award of sequestration granted under that section.

Section 17F – Reference to sheriff

(1) The Accountant in Bankruptcy may, at any time before deciding under section 17D(1) whether to grant an application for recall of an award of sequestration, remit to the sheriff an application made under section 17A.
(2) The Accountant in Bankruptcy may, at any time before deciding under section 17E (6) whether to grant a recall of an award of sequestration, remit the case to the sheriff.
(3) If an application is remitted to the sheriff under subsection (1) or (2) the sheriff may dispose of the application or the case in accordance with section 17 as if it were a petition presented by the Accountant in Bankruptcy under section 16.

Section 51 - Order of priority in distribution

(1) The funds of the debtor's estate shall be distributed by the trustee to meet the following debts in the order in which they are mentioned –
(a) the outlays and remuneration of the interim trustee in the administration of the debtor's estate.
(b) the outlays and remuneration of the trustee in the administration of the debtor's estate.
…
(d) the expenses reasonably incurred by a creditor who is a petitioner or concurs in a debtor's application for sequestration;
(e) ordinary preferred debts (excluding any interest which has accrued thereon to the date of sequestration);

(ea) secondary preferred debts (excluding any interest which has accrued thereon to the date of sequestration);
(f) ordinary debts, that is to say a debt which is neither a secured debt nor a debt mentioned in any other paragraph of this subsection;
(g) interest at the rate specified in subsection (7) below on
(i) the ordinary preferred debts.
(ia) the secondary preferred debts;
(ii)the ordinary debts,
between the date of sequestration and the date of payment of the debt.
(h) any postponed debt.
(2) In this Act:
(a) "preferred debt" means a debt listed in Part 1 of Schedule 3 to this Act,
(b) "ordinary preferred debt" means a debt within any of paragraphs 4 to 6B of Part 1 of Schedule 3 to this Act,
(c) "secondary preferred debt" means a debt within paragraph 6C or 6D of Part 1 of Schedule 3 to this Act and
Part II of that Schedule shall have effect for the interpretation of Part 1.
(2) In this Act "postponed debt" means –
(a) a loan made to the debtor in consideration of a share of the profits in his business which is postponed under section 3 of the Partnership Act 1890 for the claims of other creditors;
(b) a loan made to the debtor by the debtor's spouse or civil partner;
(c) a creditor's right to anything vesting in the trustee by virtue of a successful challenge under section 34 of this Act or to the proceeds of sale of such a thing.
Section 73 Interpretation
…
"ordinary debt" shall be construed in accordance with section 51(1)(f) of this Act;"
Schedule 1 – Determination of amount of creditor's claim
Amount which may be claimed generally
1. Subject to the provisions of this Schedule, the amount in respect to which a creditor shall be entitled to claim shall be the accumulated sum of principal and any interest which is due on the debt as at the date of sequestration".

[5] It is important to record the basis upon which the matter proceeded before me. It was agreed that by application dated 10 July 2018, the debtor made an application to the AIB for recall of the sequestration, all in terms of section 17A. The AIB began considering the matter under and in terms of section 17A. However, before reaching a decision on the matter, in terms of section 17F, the AIB remitted the matter to the sheriff for determination. In terms of section 17F(3) the sheriff may dispose of the application in accordance with the terms of section 17. Counsel had, I think, prepared their submissions on the wording in

section 17A. However, when I raised the issue of section 17F(3), and having reflected on it, the agreed position was that I require to deal with this matter in terms of section 17. The wording which is key to resolution of this matter appears in sections 17 to 17G and nothing turns upon the specific wording of section 17. Counsel for both parties also invited me to consider this matter as being similar to a petition for directions. In essence, both parties seek a direction on the issue to which I will shortly refer. Counsel helpfully lodged notes of argument which are lodged in process which I shall summarise.

Submissions for the AIB

[6] The issue for consideration by the court is whether or not statutory interest requires to be paid on debts due in a sequestration in the event that an application for recall of a sequestration is presented on the grounds that the debtor is able to pay his debts in full. The AIB considers that in terms of sections 17-17G of the 1985 Act no statutory interest is payable on any of the debts in the sequestration in the event of an application for recall of the sequestration on the grounds that the debtor is able to pay his debts in full. HMRC are of a different view.

[7] Miss Ower began by setting out the procedure to be followed wherever there is an application for recall of the sequestration by a debtor on the basis of payment of debts in full. That procedure was followed in the present case until the point at which the AIB decided to remit the matter to the sheriff. The effect of a recall of an award of sequestration is, in so far as practicable, to restore the debtor to the position the debtor would have been in the sequestration if it had not been awarded. There is no provision made in any part of sections 17-17G (or any other section) with regard to the application of interest. The relevant provisions specify expressly that the debtor requires to pay the trustee's outlays and

remuneration. Parliament could have made express provision for the payment of statutory interest on the relevant dates should the intention of Parliament have been that statutory interest requires to be paid as a pre-requisite to the granting of an application for recall of sequestration in terms of section 17A. The AIB may grant the debtor's application for recall of sequestration if he has paid his debts in full. "Debts" is not defined in the recall provisions. In terms of section 73 of the Act, "ordinary debt" is to be construed in accordance with section 51(1)(f) of the Act. Section 51(1)(f) provides that an ordinary debt is a "debt which is neither a secured debt nor a debt mentioned in any other paragraph or subsection". "Debts" are those which are due at the date of sequestration. That follows from paragraph 1 of Schedule 1. Accordingly, statutory interest cannot then form part of the "debtor's' debts" which require to be paid in full for the purposes of an application in terms of section 17A, since such interest cannot, and does not, form part of the debt due as at the date of sequestration. Such an interpretation (contrary to that advanced by HMRC) is one which has the effect so far as practicable, of restoring the debtor and his creditors (being other persons affected by the sequestration) to the position the debtor or creditor would have been in if the sequestration had not been awarded.

[8] Had the sequestration not been awarded, the creditor would not have been entitled to payment of interest at the rate of 8% per annum on any debt owed by the debtor (subject to any contractual provision). The AIB submits that the relevant provisions cannot have been intended to have the effect that a debtor, upon seeking recall of his sequestration, ought to be burdened with additional debt (statutory interest) which debt did not exist, and could not have existed as at the date of sequestration. Such an interpretation does not mean that the creditor's entitlement to interest is automatically extinguished. If for example, the creditor had been entitled to interest at a contractual rate, in terms of the contract between

the parties, then that creditor's entitlement to interest revives upon the grant of recall of the sequestration. It follows that, following upon recall of the sequestration, the creditor can simply chose to apply interest at the contractual rate on the date from which the debt fell due for payment, until the date of payment, and seek payment of that sum from the debtor, at any time following upon recall of the debtor's sequestration. Alternatively, the creditor may be entitled to payment in terms of the Late Payment of Commercial Debts (Interest) Act 1988.

[9] The expression "has paid or is able to pay the debtor's debts in full" has to be read the same way throughout the Act. The date for calculating the debt is the date of sequestration which is the date of the warrant to cite. Although a number of authorities have been lodged as part of a joint bundle, there is no decision which is of great assistance and none deals expressly with this point.

Submissions for HMRC

[10] For HMRC, in Miss Roxburgh's submission, the key issue for the court to determine is the proper interpretation of "debts" in the context of a recall of a sequestration. The position of HMRC is that the phrase "debts" in section 17 to 17G includes all debts that rank for payment of a dividend where a trustee in sequestration makes a distribution to creditors under section 51 of the 1985 Act. Accordingly "debts" includes a reference to interest payable on ordinary and preferential debts. Therefore, section 51 applies to section 17.

[11] The matter is one of statutory interpretation. In determining the legal meaning of any statutory provision the court requires to go through a number of stages. Firstly, it requires to identify the interpretative criteria which are relevant in the instant case. Secondly, it must determine by reference to those criteria the specific interpretative factors

which are decisive. Finally, it must weigh the factors put forward by either party with a view to determining the correct construction. Reference was made to Bennion on *Statutory Interpretation (6th edition)* at page 504; *McMillan* v *T Leith Development Limited (In Receivership and Liquidation)* [2017] CSIH 23 at paragraph [54]. The first and most important principle of statutory interpretation is that the correct meaning of a statutory provision is that which the legislature can be taken to have intended by using the statutory words in their context. That context includes the whole statute and the setting in which the provision was enacted. The court looks to identify the ordinary meaning of language in the general context of the statute. Other principles of interpretation may also be relevant and the court may be looking to strike a balance between considerations which may conflict (*R* v *Secretary of State for the Environment, Transport in the Regions, Ex Parte Spath Homes Limited* [2001] 2 AC 349). Where the same word is used throughout the statute there is a presumption that it has the same meaning unless the context otherwise requires (*Madras Electric Supply Corporation Limited* v *Borland* [1955] AC 667 at page 685). If the statutory words, when considered in context, do not have a clear meaning, the correct meaning is that which gives an effect to the legislative purpose of Parliament (*R* v *Secretary of State for the Environment* (above) at page 397D-F). The legislative purpose of Parliament is particularly important when considering technical areas such as bankruptcy and insolvency. In the case of *Liquidators of Grampian MacLennan's Services Limited* v *Carnbroe Estates Limited* [2018] CSIH 7 at paragraph [35] Lord Drummond Young observed that in technical areas, such as insolvency law, detailed analysis of the relevant legal provisions and their underlying policy is of the greatest importance. Reference may be made to reports in Hansard and explanatory notes to the legislation, Law Commission reports and other similar documents (*R S* v *Chief Constable of South Yorkshire Police* [2004] 1WLR 2196 per Lord Steyn at page 2199). Where legislation

consolidates former law it will be assumed to have been intended to have the same meaning. Reference to that former law may be made where the provisions of the consolidating Act are ambiguous or where an understanding of its meaning can only be ascertained by considering the circumstances in which it was first used (*R* v *Secretary of State for the Environment* above).

[12] The recall provisions originally contained within the 1985 Act were extensively amended by the Bankruptcy and Diligence (Scotland) Act 2007 ("the 2007 Act") and the Bankruptcy & Debt Advice (Scotland) Act 2014 ("the 2014 Act"). The effect of this was to move from the Court of Session and, eventually, to the Accountant in Bankruptcy, the power to recall a sequestration. The Explanatory Notes to the 2014 Act describe the provisions as "generally straightforward and uncontentious", going on to say that "all other costs" should be met before recall can be granted (paragraphs 58 and 59 of the Explanatory Notes to the 2014 Act).

[13] Where an application has been made for recall of sequestration by the debtor, in terms of section 17B of the 1985 Act the trustee must prepare a statement of the debtor's affairs so far as known to him which must confirm whether the debtor's debts have all been paid in full. Where they have not been, the statement must set out the details of which debts have not been paid and whether the trustee considers that they will be paid in a specified period. Section 17B also provides that the statement must set out details of any distribution made to creditors by the trustee. Distributions are covered by section 51 of the 1985 Act. To be included in the statement prepared by the trustee a creditor, who has not already done so, must set out a claim. The AIB may grant recall of a sequestration where two criteria are met: (1) the trustee has notified the AIB in a statement submitted under section 17B that the debtor's debts have paid in full; (2) that in all the circumstances of the case it is appropriate

for recall to be granted. The effect of the recall on award of sequestration is to restore the debtor and any person affected by the sequestration to the position they would have been in had sequestration not been awarded.

[14] Accordingly, the proper interpretation of "debts" in section 17 and 17A of the 1985 Act is a reference to the debts as defined in section 51 of the 1985 Act. Where an application is made for recall of sequestration, the trustee in sequestration requires to prepare a statement of the debtor's affairs. That is to include a reference to the debts of the debtor in any distribution that is being made to creditors. It is clear that Parliament intended the trustee to set out details of all of the claims which he would require to meet if he made a distribution under section 51 of the 1985 Act together with details of the distributions which have in fact been made by him. The outlays of a petitioning creditor are a debt in the sequestration in terms of section 51(1)(d). The only reason for the quantum of that debt being fixed would be if it were a debt for the purposes of section 17 of the 1985 Act. When an application for recall is made it is the trustee who makes the necessary distributions to creditors and in so doing he requires to comply with the statutory order or priority set down in section 51 of the 1985 Act. The debtor's debts will not have been paid in full until both interest and postponed debts have been paid. That is a natural reading of the provisions but it is clearly the conclusion which makes sense in the context of the 1985 Act. It is clear that the intention of the provision is to enable a sequestration to be recalled where a debtor has paid all of the debts which rank in the sequestration. That of itself does not relieve the debtor of any liabilities. Any liabilities not met in the sequestration will remain outstanding following the recall that would arise where a sequestration is being recalled because of a procedural irregularity.

[15] The alternative interpretation proposed by the AIB is based on the assertion that debts are restricted to claims submitted by creditors under paragraph 1 of Schedule 1 to the 1985 Act. In Miss Roxburgh's submission that is misconceived. Paragraph 1 does not provide a definition of "debts". That provision sets out the manner in which a creditor is to calculate his claim for the purposes of lodging his claim in the sequestration. Such claims, if accepted, are debts. However, as is clear from section 51(1) they are not the only category of debt in a sequestration. The interpretation for HMRC involves interpreting the words "debts" consistently throughout the statute. Secondly, the AIB argues that there would be no need for the legislation to refer to outlays and remuneration of the trustee in sequestration if these were already covered by the term "debts". That is to ignore the statutory context. A trustee and sequestration is only entitled to take payment of his outlays and remuneration where these had been approved in terms of the 1985 Act. Unless a trustee makes an interim application for approval of these fees and outlays these would be approved at the end of each accounting period. Accounting periods are normally 12 months. There will therefore be cases where an application is made for recall before the trustee has had his outlays and remuneration fixed. It is for that reason that the legislation makes it explicit that the outlays and remuneration are payable and must be either agreed or fixed before the sequestration is recalled. Reference was made to *Crawford's Trustee* v *Crawford* 2002 SC 464, a case which dealt with a claim by a trustee for payment of shortfall in his fees and outlays which application was rejected. During the consultation period preceding the enactment of the 2014 Act, views were sought as to amendment of the legislation to ensure that all costs and creditors were met before the recall was granted. It could be seen that Parliament intended to make clear that sequestration should not be recalled prior to finalisation and payment of the trustee's fees. That does not evidence an

intention to restrict the categories of debts to be paid prior to recall being granted. Section 17C(4) provides for the AIB determining the expenses incurred by petitioner and creditor. These expenses constitute debts in terms of section 51(1)(d). The purpose of having the debt fixed is in order for it to be paid. It could only be paid if it were a debt. Thirdly, the AIB says that debts refer only to claims submitted by creditors. Ms Roxburgh gave an example of a creditor holding a payment for decree for payment of a sum of money plus interest. If the debt is later recalled on payment of the debt but not interest, a creditor will still have a claim for interest which he may use to pursue a subsequent petition for sequestration. That cannot have been what was intended by Parliament. Finally, section 51(5) provides that a trustee cannot make a reversion to the debtor unless all his debts, as defined in section 51(1) have been paid in full. The AIB's position would involve the trustee remitting assets to a debtor prior to all those debts being paid. It does not explain why they should occur on a recall of sequestration but not on completion of the sequestration without recall being sought.

[16] The 1985 Act provides that interest on preferred and ordinary debts in a sequestration is payable at the higher of the (1) rate payable on the debt other than the sequestration and (2) the prescribed rate (see section 51(7) of the 1985 Act). The prescribed rate is currently 8 per centum per annum (paragraph 18 of the Bankruptcy (Scotland) Regulations 1985). Following consultation no changes were made to the provisions regarding statutory interest. That supports the view that Parliament did not intend to remove a creditor's right to statutory interest. If Parliament had intended to do so one would have expected clear language to be used.

[17] Accordingly, the reference to "debts" in section 17 and other similar sections, is a reference to the debts in section 51(1) of the 1985 Act. That includes interest on ordinary

debts between the date of sequestration and the date of payment of the debt in terms of section 51(g)(ii) and (7) of the 1985 Act. As the debtor has not made payment of interest on the ordinary debt as above the application for recall is to be refused.

Reply

[18] In her response, Ms Ower submitted that interest is in a stand alone category. Section 51 does not assist HMRC; it separates interest and debt. The approach of HMRC requires the court to read in to the words debts "to include interest at the statutory rate". The words of the statute are clear and unambiguous. The court would require highly persuasive reasons why it is supposed that a fundamental error of draftsmanship has occurred (*Scottish Water* v *Clydecare Limited* 2003 SC 330 at paragraph [30]). The court should only add words where there is plainly a drafting mistake (*Inco Europe* [2000] 1WLR 586 at 592). Remuneration and outlays are dealt with specifically, particularly to take account of the problem in *Crawford's Trustees*. There is no definition of "debts". The legislation is increasingly weighted towards debtors in terms of debt relief. The construction contended for by the AIB is in accordance with that direction of policy. It is not the position of the AIB that only ordinary debts require to be paid on recall. On recall of sequestration, any postponed debts would also require to be paid.

Decision

[19] In order to resolve this matter it is necessary to consider the procedure adopted. The debtor applied to the AIB by application dated 10 July 2018. The application was brought in terms of section 17A of the 1985 Act (production 9/2). The application stated (in the plea in law) that the debtor was "able to pay his debts in full". In support of this plea the statement

of facts referred to sums held by the trustee and other funds held by a third party. In accordance with section 17A(3) intimation of the application was made to HMRC. As paragraphs 10-13 of the joint minute of admissions referred to above narrate, in the subsequent procedure, in a letter dated 30 July 2018 HMRC objected to recall of the sequestration as statutory interest had not been paid (production 12). In accordance with section 17B(4) the agent for the AIB issued a statement dated 17 September 2018. Paragraph (iii) of the statement (production 13) stated "All debts and the trustee's fees and outlays have been paid in full". Accordingly, with the exception of interest which is the subject matter of this dispute, by whatever means, by the date of the issue of that statement the agent for the AIB was of the opinion that the debts had been paid. The application was remitted to this court on 19 September 2018 two days after the issue of the statement by the agent for the AIB. The remit was made before the AIB made a decision in accordance with section 17D.

[20] As I have said, it is important to note that in terms of section 17F(3) when the matter is remitted the sheriff is directed to dispose of the matter in accordance with section 17. Read short, section 17(1) provides that the sheriff may recall the sequestration if he is satisfied that in all the circumstances of the case (including those arising after the date of the award of sequestration) it is appropriate to do so. The subsection goes on to provide that without prejudice to the foregoing generality he may recall the award if he is satisfied that the debtor "has paid his debts in full".

[21] As counsel pointed out, there is no appeal against an award of sequestration (section 15(4)). The procedure is by way of recall. Recall is broader than appeal. The pool of persons able to seek recall is wider than those who might appeal (the parties). The power to recall is discretionary. It may arise for different reasons, including a defect in procedure (*Hodgson* v *Hodgson Trustees* 1984 SLT 97). As I read section 17(1) the reference to payment

of debts is but one example of the bases upon which sequestration may be recalled. However, even if the debts have been paid in full the court retains a discretion as to whether to grant the recall. The discretionary nature of the remedy to recall did not feature greatly in the debate before me but it does seem to me to be of some significance. The court's discretion as to whether to grant recall of the sequestration is matched by the court's broad power to make consequential orders should it decide to do so (section 17(3)(c)). That power may be required to deal with matters which have arisen during the course of the sequestration, particularly where third parties are involved.

[22] Although recall provisions were to be found in the Bankruptcy (Scotland) Act 1913 (section 30), the 1985 Act set out more detailed and extensive provisions. The 1985 Act was largely the result of a report from the Scottish Law Commission (*Report on Bankruptcy and Related Aspects of Insolvency and Liquidation, Scottish Law Commission Number 68, 1982* – Chapter 8 deals with recall of sequestration. It was common ground that the recall provisions of the 1985 Act were modified, firstly by the 2007 Act, and then by the 2014 Act and are now to be found in sections 29-38 of the 2016 Act. Put shortly, the 2007 and 2014 Acts have transferred jurisdiction in petitions for recall from the Court of Session to either the Accountant in Bankruptcy or to the sheriff and have expanded the procedure.

[23] The issue in this matter is the meaning of "debts" in section 17(1) and, in particular, whether it includes a reference to statutory interest. "Debt" is not a defined term. Section 73 provides that "ordinary debt" is defined in accordance with section 51(1)(f) which provides that an ordinary debt is a debt which is neither a secured debt nor a debt mentioned in any other paragraph in section 51(1). It does not help in resolving the present issue. Paragraph 1 of Schedule 1 sets out what amount a creditor may claim (which affects voting and ranking): the accumulated sum of principal and any interest which is due on the debt as at the date of

the sequestration (being the date of the warrant to cite as per section 12(4)). Firstly, it seems to me that paragraph 1 distinguishes a debt from interest; secondly, it provides a point beyond which interest may not be claimed in the sequestration. At the point of distribution of the estate, interest reappears in section 51(1)(g) which provides for payment of interest between the date of sequestration (the cut-off point) and payment of the debt. Interest is only payable after payment of the debts set out in section 51(1)(a) to (f); and within section 51(1)(g) there is a hierarchy in relation to payment of interest. Given the structure of section 51 the effect is that interest is only payable when all other debts have been paid. In practical terms it seems to me that is the same as saying that statutory interest is only payable in a solvent sequestration. The interest which is paid is at the "rate specified", currently 8%. It is a statutory right and it arises on distribution.

[24] Section 17 requires the sheriff to be satisfied that the debtor has paid his debts in full. For all the somewhat elaborate procedure set out in the 1985 Act, it is effectively silent as to how the court is to be satisfied the debts have been paid in full. There is of course the certificate from, in this case, the agent for the AIB, saying that the debts had been paid in full. I say that because it does not seem to me it follows that the trustee will always be the person paying the creditors. There may be a number of ways in which the creditors are paid. In the present case, the paperwork would suggest that at least part of the money was coming from a third party. Accordingly, it does not follow that section 51 must necessarily apply in the sense of the trustee making a formal distribution. All that the section requires is that the debts have been paid in full. Whether there has been a distribution at some earlier date does not seem to me to be of significance.

[25] I am not persuaded that the provisions as to the remuneration and outlays of the trustee are particularly helpful in deciding this issue. These may or may not be known. I can

see why special arrangements require to be made to cater for them, particularly in ensuring that they are paid before the sequestration is recalled (*Crawford's Trustee)*. In enacting section 17 Parliament has made no specific provision for the payment of interest as a condition of recall. It seems to me the AIB is correct to say that express provision could have been made for the issue of interest. The omission, if it is an omission, is of some significance. I am not persuaded that statutory interest is included within the word "debts" as it appears in section 17 and other cognate provisions. Other parts of the statute clearly distinguish between debts and interest. The right to interest is carefully regulated by the Act. It is properly described as statutory interest – sometimes moratory interest. Absent such a statutory provision a creditor would not receive such interest. He receives it on distribution under section 51 and does so in particular circumstances. I accept Miss Roxburgh's proposition that recalling the sequestration (which puts parties back in the position they were before the sequestration occurred) may open up a debtor to contractual claims which were suspended by the sequestration in the sense that all debts are calculated as at the date of sequestration. If there is a contract entitling a creditor to interest which has not been paid since the sequestration began, recalling the sequestration may revive the right and the corresponding liability. That seems to me to be a risk which the debtor takes in seeking recall.

[26] However, I return to the question of discretion. I can foresee that there may be circumstances in which recall of the sequestration without some payment of interest might be inequitable *quoad* the interests of a creditor. For example, a petition for recall may come a long time after commencement of the process which may have particular adverse effects upon a creditor. I reserve my opinion as to whether it would be open to the court, in the

exercise of its discretion, to refuse to recall the sequestration in order to avoid such an inequitable outcome.

[27] It follows, that in my opinion, in this case the debts have been paid in full. As requested, I shall put this matter out by order for parties to address me as to further procedure.