SHERIFFDOM OF GRAMPIAN, HIGHLANDS AND ISLANDS AT PETERHEAD

[2021] SC PHD 23

SQ36-10

JUDGMENT OF SHERIFF CHRISTINE P McCROSSAN

in the cause

The Accountant in Bankruptcy , 1 Pennyburn Road, Kilwinning, Ayrshire, KA13 65A, Trustee on the sequestrated estate of PETER A DAVIES, residing at 3 Netherhill Lane, St Fergus, Peterhead, AB42, 3EE, conform to Award of Sequestration granted by the Sheriff of the Sheriffdom of Grampian Highland and Islands at Peterhead dated 1 October 2010

Pursuer

against

PETER A DAVIES, residing at 3 Netherhil lLane, St Fergus, Peterhead AB42 3EE

Defender

Pursuer: Ms Ower, Counsel, Crawford, for AiB
Defender: Mr Dunlop, Counsel, Brown, Blackadders LLP

PETERHEAD 4 December 2020

The sheriff, having resumed consideration of the cause, Repels the pursuer's second and third pleas-in-law, repels the defender's first, second, third, fourth and fifth pleas-in-law; thereafter allows the parties a proof on their remaining pleas, the sheriff clerk to issue an interlocutor ordaining parties to attend a procedural hearing on 5 January 2021 at 1130 am in order that a suitable date for a Proof diet can be identified.

NOTE

[1] An order for the sequestration of Mr Peter Davies was granted at Peterhead Sheriff Court on 1 October 2010. On 8 October 2020, a date self-evidently more than 10 years later I heard parties on the question of whether an Application by the Accountant in Bankruptcy (AiB) made under section 40 of the Bankruptcy (Scotland) Act 1985 should be dismissed on the grounds set out in the following pleas-in-law for Mr Davies:

(i) the date of sequestration having been over three years prior to the commencement of the present proceedings the family home is re-invested in the defender in accordance with section 39A(2) of the Bankruptcy (Scotland) Act 1985, and accordingly the present proceedings are not competent and should be dismissed;

(ii) the subjects being a family home, and the applicant having failed to renew the memorandum in accordance with section 14(4) of the Bankruptcy (Scotland) 1985, *et separatim*, having failed to properly exercise any of the actions under section 39A(3) the present proceedings are not competent and should be dismissed;

(iii) the applicant by its words and actings represented to the defender that the recovery of possession proceedings under court reference SD60/12 were not proceedings in respect of a family home under the Bankruptcy (Scotland) Act 1985; and the defender having relied upon the representations to his detriment the applicant is personally barred from maintaining that commencement of proceedings under court reference SD60/12 prevent the operation of section 39A of the Bankruptcy (Scotland) Act 1985.

[2] Parties lodged very helpful written submissions in advance of the diet of debate. I was addressed on 8 October by Ms Ower for the AiB and Mr Dunlop for the defender, Mr Davies.

[3] There is no dispute between the parties that the subjects at 3 Netherhill Lane, St Fergus, Peterhead AB42 3EE are a "family home" as defined in the legislation. My understanding is that Mr Davies lives there with his long term partner and his adult son.

[4] Parties were also in agreement that if I found against the defender on these preliminary issues the application under section 40 would require to proceed to an evidential hearing. I was specifically not being asked to dismiss the defender's case on the grounds of relevancy or lack of specification. I thus repelled the Applicant's preliminary pleas. Given the date of this sequestration we are of course dealing in this case with section 40 notwithstanding the subsequent repeals and amendments to the legislation.

[5] Mr Dunlop made the point that there are no reported legal authorities which are of assistance in relation to the specific issues before the Court. The authorities referred to in the Applicant's submission related to applications under section 40. I did consider these in the event that they could provide any assistance regarding the application of section 39A. They did not. Indeed a number pre-dated the introduction of section 39A. However given that what was required in this case was essentially a matter of statutory interpretation I found the cautionary reminder by Lord Prosser at paragraph C-D, page 1096 in *McMahon's Trustees* v *McMahon* [1997] SLT 1096 helpful in determining how to approach my task in this case, (particularly as the court was being asked to consider the recommendations of the Cork report):

> "Unless scrutiny of the statutory provisions leaves one in some doubt as to meaning, there should be no need to go to background documents to discover some mischief or other aid to interpretation."

[6] Having said that I was also mindful of the fact that there had been a very considerable change in the law in this area. I therefore did take notice of what parties set down in their submissions about why Parliament had introduced these changes. I am satisfied that in doing so I applied a purposive interpretation to the relevant statutory provisions. Mr Dunlop provided a very useful chronology of various changes to the relevant statutory provisions. I also had regard to the recent decision of the Sheriff Appeal Court in *Brooks* v *Brooks* FAL-A96-19; this again dealing with an application under section 40(1)(b).

[7] Section 40 relates to the power of the trustee in relation to the debtor's interest in a family home. A family home being defined as:

> "any property in which the debtor had a right or interest being property which was occupied … as a residence by the debtor and his spouse or civil partner, or by the debtor's spouse or civil partner or former spouse or civil partner (in any case with or without a child of the family) or by the debtor with a child of the family".

It is accepted that the adult child of Mr Davies' falls within the definition of child in the Act and it is his presence which makes the subjects a family home as whilst Mr Davies has a long-term partner, he is not married to her.

[8] The definition of "family home" does not extend to a situation where it is shared by the debtor and a cohabitee, nor are the circumstances of a cohabitee included in the list that a court must take into account when determining an application under section 40(2). However clearly the situation of a cohabitee affected by the sale of a family home can be put forward as part of the relevant circumstances for a sheriff to consider.

[9] Notably a property which the debtor resides in by himself, notwithstanding that he may view this as his home or principal residence, does not fall within the statutory

definition and thus is not protected by the provisions of section 40, nor section 39. Indeed a property owned by the debtor may be a family home even if he does not reside there. Hardship to the debtor is a circumstance that can legitimately be taken into account by the sheriff when determining an application under section 40; however the principal purpose of sections 40 and 39 is to provide some protection and certainty to individuals other than the debtor; namely those family members who will be adversely affected by the trustee's actions in in-gathering the debtor's sequestrated estate. Thus the issues a court has to consider under a section 40 application are wholly distinct from those under a straightforward action for recovery of heritable property.

[10] The effect of section 39A is that the trustee requires to sell or otherwise dispose of the debtor's interest in a family home within a period of 3 years from the date of sequestration, otherwise the property will revert, by operation of law, to the debtor's own estate. This automatic, statutory reversion is triggered only by the passage of that particular time period: not by anything else. Effectively therefore the operative part of section 39A is the triggering of this automatic reversion of the family home on the arrival of the third anniversary from the date of sequestration. Section 39A(3) provides that this reversion does not apply if, "at the end of the period of 3 years beginning with the date of sequestration" the trustee has taken one or more of the actions listed in its paragraphs (a) to (f). Accordingly section 39A(3) is concerned only with what the trustee *has* done by that date; what the trustee may or may not do on a date thereafter cannot affect what happens on the date of the third anniversary. It reverts on that date or it does not.

[11] In this case the AiB says he has complied with subsection 39A(3)(c) and (e)(iii), in which circumstances 39A(2) does not apply and the debtor's family home remains vested in

the sequestrated estate. The current application under section 40(1)(b) is thus competent. The defender's position is set out in his pleas-in-law set out *supra.*

[12] For reasons I set out below I find that the trustee has complied with section 39A(3)(c) but not section 39A(3)(e)(iii).

Memorandum

[13] Specifically I find that the AiB, in compliance with section 39A(3)(c) of the Bankruptcy (Scotland) Act 1985 did send " a memorandum to the keeper of the register of inhibitions under section 14(4) of the Act"; accordingly subsection (2) of section 39A does not apply and the family home of Mr Davies, being the subject matter of the section 40 application, does not reinvest in him but remains part of his sequestrated estate.

[14] I find that the AiB sent this memorandum on 3 July 2013, some months before the expiry of the 3 year period referred to in subsection (2) of section 39A; in this case being the 30 September 2013.

[15] The debtor's position in this regard is that the trustee cannot rely on the sending of one single memorandum. Section 39A(3)(c) requires the trustee to comply with section 14(4) and that section - section 14(4) - requires the trustee to send a memorandum on the expiry of every subsequent three year period. Otherwise the family home will re-invest in the debtor. That is in my view an incorrect interpretation of the position. Section 39A(3) specifically provides:

> "subsection 39A(2) shall not apply if **during the period mentioned in that subsection** the trustee sends a memorandum to the keeper of the register of inhibitions under section 14(4)."

The period mentioned in subsection (2) is "the period of 3 years beginning with the date of sequestration." Accordingly section 39A(3) is only concerned with whether the trustee has sent a memorandum within that period – and thus dis-applied the automatic reversion effected by subsection (2). It is not concerned with whether the trustee sends any future memoranda.

[16] Section 14 of the Act deals with a wholly separate issue from section 39A; but the third anniversary date has relevance here also. Section 14 provides that the recording of a warrant of sequestration in the Register of Inhibitions and Adjudications shall have the effect of an inhibition and of a citation in an adjudication of the debtor's heritable estate. It therefore imposes an obligation on the sheriff clerk to forward a certified copy of the order of the sheriff granting warrant to the keeper of the Register. Section 14(3) provides that this effect will expire "at the end of the period of 3 years beginning with the date of sequestration". However this is "subject to subsection (4)". Subsection (4) provides that if the trustee:

> "before the end of the period of 3 years mentioned in subsection (3) above sends a memorandum in a form prescribed by the Court of Session by act of sederunt to the keeper of the register of inhibitions and adjudications"

that effect shall be renewed. The trustee has no obligation to do so. If he chooses to do so then not only does his action have the renewal effect mentioned in subsection (4) but it also brings him within section 39A(3)(c). The remaining provisions of section 14, which Mr Dunlop states the trustee must comply with to bring his action within section 39A(3)(c) simply outlines that this effect will extinguish after the expiry of this three year period, unless renewed again at that time by the trustee sending a further memorandum, and so on at three yearly intervals. No continuing obligation is placed on the trustee by section 14(4).

It merely iterates what the effect of the memorandum is and what the trustee has to do if he wants that effect to continue. Section 39A(3)(c) is concerned only with whether the trustee has sent this memorandum before the trigger date. If he fails to renew the memorandum before the end of the subsequent three year period that is not a fresh trigger of the statutory re-investiture. Section 39A(2) sets one date for this and one date only.

[17] A prudent trustee is unlikely to allow a memorandum to lapse; however that is what happened in this case. Accordingly from July 2016 until a date in 2019 (when the AiB sent a further memorandum to the Keeper) there was no effective inhibition on the debtor's family home. This exposes the trustee to a real risk that the debtor could deal with the property and a third party acting in good faith could obtain good title thereto. However this is a quite separate issue and does not alter the fact that during such a period the debtor's interest remains vested in the trustee.

Proceedings in respect of the family home

[18] I do not accept that the trustee has complied with any of the other provisions of section 39A(3); in particular I find that he did not commence proceedings in respect of the family home prior to the third anniversary of the sequestration of Mr Davies.

[19] The AiB claims that the action raised in 2012 for recovery of possession of heritable property was the commencement of such proceedings. I do not accept that to be the case at all. The 2012 proceedings were not proceedings as defined in section 39A(3)(e)(iii). Certainly these proceedings are in relation to the heritable property which is the subject matter of the present section 40 application and they are proceedings for recovery of possession, but they are very specifically not proceedings in respect of those subjects *qua* a family home.

[20] These proceedings were raised against the debtor solely, specifically averring that he was the owner of the property and resided there. No reference was made to his living in the property with anyone else, certainly not his partner or child. Indeed Statement of Claim paragraph 5 is unequivocal in its terms: **The property is not a family home in terms of section 40 of the Bankruptcy (Scotland) Act 1985.**

[21] Section 40 is very clear. Before a trustee can sell or dispose of a debtor's interest in a family home he must either obtain the relevant consent or the authority of the court. (No consent has been obtained in this case). If an application is made to the court, section 40(2) provides:

> "Where the trustee or the trustee acting under the trust deed requires to obtain the authority of the sheriff in terms of subsection (1)(b) above, the sheriff after having regard to all the circumstances of the case, including—
>
> (a) the needs and financial resources of the debtor's spouse or former spouse;
>
> (aa) the needs and financial resources of the debtor's civil partner or former civil partner;
>
> (b) the needs and financial resources of any child of the family;
>
> (c) the interests of the creditors;
>
> (d) the length of the period during which (whether before or after the relevant date) the family home was used as a residence by any of the persons referred to in paragraphs (a) to (b) above,
>
> may refuse to grant the application or may postpone the granting of the application for such period (not exceeding 3 years) as he may consider reasonable in the circumstances or may grant the application subject to such conditions as he may prescribe. "

Section 40(3) makes it clear that the terms of section 40(2) apply to an action brought by the trustee: *(b) for the purpose of obtaining vacant possession of the debtor's family home,* ***as that subsection applies to an application under subsection (1)(b).***

[22] The debtor lodged defences in this summary cause application for recovery of possession of his heritable property. In these he averred that the property was a family

home. Thereafter the proceedings were to all intents and purposes abandoned by the trustee. At no time, and specifically not before the end of the three year period provided for in section 39A(2), did the trustee amend the proceedings to correct this error. Indeed no adjustment was made whatsoever to the court action, nor was any attempt made to progress it. It lay dormant until the AiB applied to have it dismissed before the current section 40 application was raised.

[23] The action as pled was not a competent action under section 40. The trustee has conceded that by a date in 2012 he knew the subjects were a family home; therefore he could not have sought decree for possession of the subjects on the basis of the averments in the Statement of Claim. He was stating the subjects were not a family home. Certainly it was open to the trustee to remedy this by amending the summary cause action into proceedings which would fit the definition under section 39A(3)(c)(iii); but that had to be done before the expiry of the three year period. The trustee did not do so. On the third anniversary of Mr Davies' sequestration the action, containing a bald averment that the subjects were not a family home, could in no way be described as "an action for the purpose of obtaining vacant possession of a family home."

[24] In his submission the AiB characterises the effect of 39A as placing on the trustee a requirement *to take steps* ***to evidence*** *to the debtor that the trustee* ***intends*** *to take action in respect of the family home.* I consider this reference to evidencing intent as placing a gloss on the words of the statute. A plain reading of the section indicates that steps require to have been taken. The matter for determination by the court under section 39A(3) is whether as a matter of fact a particular step has been taken or not. However if one considers the issue of "intent" and looks at what has been done by the trustee here: it could hardly be said that the raising of proceedings for the recovery of subjects specifically on the basis that they were

NOT a family home (as clearly averred) would in any way evidence to the debtor or his family that the trustee intends to take steps to recover the debtor's family home. Particularly in circumstances when on being appraised that the property is a family home (in the defences) the trustee takes no steps whatsoever to progress the action or amend it to reflect the reality.

Personal Bar

[25] The defender has presented a personal bar argument in respect of these proceedings, claiming that as a result of a communication made by the trustee to the defender's partner in 2012 the trustee can no longer claim that these proceedings were compliant with section 39A(3)(e)(iii). The letter referred to is one dated 17 October 2012 addressed to the debtor's partner. The communication is as follows:

> "As explained in our letter of 14 August 2012, when the summons was raised, although we were aware that your son lived in the property, we were not aware that your son was dependent in terms of Insolvency legislation and therefore we did not advise our legal agents that he lived in the property. The wording of the summons is the standard wording included in all of our agents applications to court, where the property is not a family home. However given that your son is living in the property, it is deemed a family home. Accordingly if legal action is to continue, this first court action will be removed and a new action will be raised under Section 40 of the Bankruptcy (Scotland) Act 1985. We would like to apologise for any distress this has caused."

[26] I do not consider a relevant plea of personal bar can be pled here. We are dealing with a statutory rule. Either the prescriptive circumstances which trigger the statutory mechanism have occurred or they have not. It is to be resolved as a matter of fact. What the trustee may or may not have said to the debtor in correspondence cannot alter whether he has or has not taken certain steps by a due date and thus triggered an automatic consequence.

[27] Nor am I satisfied that the circumstances as averred by the debtor amount in law to a relevant plea of personal bar at common law; in particular I am not persuaded that unfairness has been made out in the sense suggested under items (iii) or indeed (iv).

[28] However that is not to say that this correspondence is wholly irrelevant. It may well be that the defender is able to persuade a sheriff that the content of this communication is a relevant circumstance which he should have regard to when determining whether to give authority to the trustee under the substantive section 40(1)(b) application.

Observation

[29] This preliminary issue has been determined due to the trustee complying with section 39A(2)(c). However I consider this subsection to be something of an outlier here. The purpose of section 39A is to ensure that the trustee deals with the debtor's family home within a reasonable period. This is achieved in the first instance by a rule that it automatically re-invests in the debtor after a period of three years. This rule can be dis-applied on the trustee taking one or more of the steps set down in section 39A(3). Generally speaking if the trustee has taken one of these steps by the third anniversary he has (barring setbacks) already gone some distance towards realising the debtor's interest in the family home. The sending of a memorandum to the Keeper is not such a proactive step. It does not by itself ensure the realisation of the debtor's interest in the family home within a reasonable time. Nor does it provide certainty to the debtor's family.

[30] Indefinite delays offend the underlying intent of parliament. The purpose of section 39A may be better served by the trustee being required to take a different route if he finds himself unable by the third anniversary to take a proactive step towards realising the debtor's family home. Rather than seeking to dis-apply section 39A(2) by the rather blunt

instrument of the memorandum, section 39A(7) could be utilised to request the court to substitute a longer period in subsection (2) before the family home automatically reverts to the debtor. If the difficulty had been occasioned by a lack of cooperation on the part of the debtor then a fairly extended period could be substituted. This process would have the benefit of providing a known time line and more certainty to the debtor's family.