SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT DUNDEE

[2022] SC DUN 17

DUN-A290-18

JUDGMENT OF SHERIFF GREGOR MURRAY

in the cause

THE ACCOUNTANT IN BANKRUPTCY

Pursuer

against

(FIRST) GRAEME ALLAN
(SECOND) ANNA RAGNARSSON

Defenders

Act: Ower, Advocate, instructed by Harper McLeod
Alt (Second Defender): Logan, Advocate, instructed by MML Law

Dundee, 25 April 2022

Background

1. The Pursuer is the Trustee in Sequestration of the First Defender. The Second Defender was the First Defender's partner and is now his wife.

2. Following a series of events in 2017, the Pursuer seeks reduction of a Disposition of heritable property in favour of the Defenders ("the 2017 Disposition") and an order ordaining them to execute a fresh Disposition in his favour. The underlying facts are not in dispute and can be briefly narrated.

Events in 2017

3. On 5 May, after proof, a colleague issued a judgement by which the First Defender and his first wife Kathleen Allan ("Mrs Allan") were divorced and ancillary financial orders made under the Family Law (Scotland) Act 1985 to achieve fair sharing of the net value of their matrimonial property.

4. The majority of their matrimonial property comprised the equity in the former matrimonial home at 63 Hawick Drive Dundee ("Hawick Drive"), the title to which lay in joint names of the First Defender and Mrs Allan, subject to a joint Standard Security in favour of Royal Bank of Scotland plc ("RBS").

5. The judgement contained a finding in fact that RBS was willing to advance funds to the First and Second Defenders to pay Mrs Allan a capital sum of up to £25,000. Based on that, after applying the principles of the 1985 Act, the ancillary financial orders made were for (i) transfer of Mrs Allan's interest in Hawick Drive to the First Defender (ii) execution by Mrs Allan of a Disposition to that effect and (iii) payment by the First Defender to her of a compensating capital sum of £22,288.64.

6. On 29 and 30 August, the First Defender and Mrs Allan executed the 2017 Disposition. Mrs Allan delivered the 2017 Disposition in exchange for payment to her of the capital sum, which was funded by RBS advancing the present Defenders a sum sufficient to redeem the original mortgage and to pay Mrs Allan the capital sum. The 2017 Disposition and a new Standard Security by the Defenders in favour of RBS were both recorded in the Land Register on 1 September.

7. On 21 December, the First Defender was sequestrated and the Pursuer appointed his Trustee. The date of sequestration for the purposes of the Bankruptcy (Scotland) Act 2016 was 22 September.

The current action

8. The Pursuer submits that the 2017 Disposition was a gratuitous alienation as defined by section 98(1) of the Bankruptcy (Scotland) Act 2016 and that the orders craved are appropriate redress for the purposes of section 98(5). In response, the Defenders plead that in terms of section 98(6)(b) of the 2016 Act, the transfer to the Second Defender was made for adequate consideration.

9. After another Sheriff previously granted decree in this case, the Defenders successfully appealed to the Sheriff Appeal Court following amendment. Thereafter, at debate before me on 7 February 2022, the Pursuer sought decree *de plano* of new and the Second Defender offered a proof before answer. Though the First Defender was not represented at the debate, his absence was immaterial as both Defenders' pleadings are identical.

10. At *avizandum*, I requested and received additional submissions on whether these proceedings should be intimated to Mrs Allan as a co-granter of the 2017 Disposition. I address those below.

Pursuer's submissions

11. Counsel for the Pursuers adopted her written submissions and Rule 22 Note.

12. The Pursuer's case arose under section 98(1)(a)(ii). The facts were self-explanatory – in terms of the divorce judgement, the First Defender ought to have title to Hawick Drive, the net value of which was around £95,000. However, the 2017 Disposition, effectively a transfer for no consideration, left his estate with an asset worth only half that amount.

13. It was irrelevant that the Defenders regarded the outcome as unfair. That was often the result when the law was applied to the facts following an insolvency event.

14. On a plain reading, the divorce decree separately made provision for transfer of Mrs Allan's interest in Hawick Drive and for payment of a capital sum. The fatal flaw in the Defender's argument was illustrated by consideration of the legal effect of the divorce decree if the First Defender had been sequestrated the day after decree was granted. The effect would have been identical - the Trustee would have inherited his right to enforce the order granted and Mrs Allan would have had a claim in the sequestration.

15. Whether adequate consideration had been given had to be assessed in light of authority that:-

(1) consideration is something given or surrendered in return for something else which required to be "*of material or patrimonial value which could be vindicated in a legal process, whether by being claimed or possibly by being pled in answer to another's claim*" (*MacFadyen's Trustee* v *MacFadyen* 1994 S.C. 416 at 421);

(2) it is for a Defender to establish that any consideration given was adequate (*Joint Liquidators of Grampian Maclennan's Distribution Services Ltd* v *Carnbroe Estates Ltd* 2020 S.C. (U.K.S.C.) 23 at para 20);

(3) whether any consideration given was adequate fell to be tested objectively (*ibid*);

(4) assessed objectively, any consideration given should not be less than would reasonably be expected in the circumstances, assuming that persons in the position of the parties were acting in good faith and at arm's length from each other (*Lafferty Construction Ltd* v *McCombe* 1994 SLT 858, as approved in *Carnbroe* per Lord Hodge at para 30);

(5) any consideration given must properly fall to be regarded as the "counterpart" of the alienation (*O'Boyle's Trustee* v *Brennan* 2020 S.C. 217 at para 20).

16. The Defenders did not offer to prove that any relevant consideration was paid. At highest, they pled that without the Second Defender's assistance, the First Defender would have been unable to fulfil the order to pay the capital sum. As the Second Defender neither gave nor surrendered anything to the First Defender, it followed that no consideration was given. Moreover, the Defenders did not offer to prove something which was capable of meeting the test in *MacFadyen*. For these reasons, the Defenders' averments in Answer 6 were irrelevant.

17. In any event, the basis of the Defenders' argument was erroneous - on a plain reading of the divorce interlocutor, the obligation to make payment to Mrs Allan was not conditional on her transferring her interest in Hawick Drive to the First Defender. The Defenders' averment in Answer 6 that: "*A proof took place following which the Sheriff ordered the transfer of the half share of the subjects on the condition that a capital sum was paid to the former Mrs Allan*" was irrelevant for that reason.

18. *Esto* some form of consideration was given, the Defenders did not offer to prove, construed objectively, that it was adequate. The Defenders only offered to prove that in return for assisting in securing the release of £22,288.64 from RBS, the Second Defender was entitled to receive a one-half of Hawick Drive, an asset reasonably valued at approximately £48,000, in other words over double the amount paid to Mrs Allan. Those averments neither addressed the *Lafferty* test that adequate consideration, assessed objectively, should not be less than would reasonably be expected in the circumstances, assuming that persons in the position of the parties were acting in good faith and at arm's length from each other nor a

further fatal difficulty for the Defenders - the funds were advanced by RBS, not the Second Defender.

19. In any event, the Second Defender did not offer to prove that any consideration advanced could amount to the counterpart of the benefit conferred on her by the alienation. Her offers to prove she paid some of the First Defender's mortgage and household expenses prior to 2017 neither amounted to a counterpart to the alienation, as they came prior to the transfer, before any obligation to make such payment arose, nor did they equiparate to the £48,000 benefit which the alienation conferred on her. Consequently, the Defenders' averments did meet the *O'Boyle* test.

20. The Defenders' averments at answer 6, that if there was a "*gain in the transaction, it was made at the cost of the former Mrs Allan, not the estate of the First Defender. The estate of the First Defender was, at worst, reduced by half of the new lending but in return he received a new joint and several debtor for the whole of his mortgage debt which has allowed the mortgage to continue to be paid*" were similarly misconceived and irrelevant, as they bore no relation to the statutory test - the effect, if any, of the alienation on Mrs Allan was irrelevant to the adequacy of any consideration given. The true position was that by the alienation, the First Defender's sequestrated estate was deprived of title to the whole of Hawick Drive. The alienation was to the detriment of his creditors and was to the benefit of the Second Defender, who gave no adequate consideration for it.

Second Defender's Submissions

21. The Second Defender offered a proof before answer with all pleas standing.

22. The Pursuer's claim was that by virtue of section 98(1)(a)(ii), the Second Defender discharged or renounced his claim to the whole title to Hawick Drive. However, such claim

undid the Sheriff's decision in paragraphs 52 – 70 of the divorce judgement to make a series of orders which reflected the assets, liabilities and conduct of the parties and sundry other issues.

23. The Pursuer's submission that the Sheriff's financial orders were capable of being enforced independently proceeded on the false premise that the First Defender's obligation to pay the capital sum only arose following transfer of the half share of the house. The analogy that the effect would have been identical if the First Defender had been sequestrated the day after the divorce was equally false. The true result was that the Trustee would have inherited a contingent right to enforce the transfer of Hawick Drive in exchange for payment to Mrs Allan of the capital sum.

24. The Pursuer also assumed that the First Defender had an unconditional obligation to make payment to Mrs Allan. However, the Sheriff sought only to fairly divide the parties' matrimonial property in accordance with ss.9 and 15 of the Family Law (Scotland) Act 1985. To contend that these legal rights were in some way severable or not contingent upon each other was simply wrong.

25. The Sheriff was told that the First Defender had agreement in principle that his lender would advance him up to a further £25,000. That persuaded her that it was practicable to make the financial orders. Unfortunately, as the Second Defender offered to prove, that was optimistic. RBS would not lend to the First Defender, but were willing to lend to the Second Defender as she had better credit, provided it was secured over her interest in the home and she became jointly and severally liable for the increased mortgage.

26. For the purposes of section 98(1)(a)(ii), all that formed part of the First Defender's estate at the relevant date was a claim that he was not capable of enforcing. As there was no ascertainable market for the sale of a half interest in a house, it was difficult to value.

Mrs Allan's half share of Hawick Drive never formed part of the First Defender's estate. If he had not come up with the money and the Second Defender had not been willing to step in, the house would likely have been sold and his half share, now vested in the Pursuer, would have been lost.

27. Separately, the Second Defender did give consideration. First, she accepted joint and several liability for the increased mortgage. Second, the financial state of the First Defender's business was such, as transpired to be the case, that it was entirely foreseeable that she would bear the responsibility of paying that mortgage. Valuation of her contribution was a difficult issue, best dealt with after proof.

28. While it was accepted the Second Defender required to prove the consideration was adequate, this was not a case where it could be safely concluded that she had no prospect of doing so. The historic perception that courts were quite robust in ascertaining whether adequate consideration was given had been altered by *Carnbroe,* in which a distressed company urgently needed liquid funds and sold a property for significantly less than it was worth on the open market. When the company's liquidators later challenged the transaction on the basis that it was under value, the question essentially became whether or not the company's circumstances at the time of the sale could be taken into account.

29. While lower courts took the original, rigorous approach in earlier hearings, the Supreme Court did not. Lord Hodge, with whom all the other Justices concurred, held that the issue depended on the facts and circumstances of each case (*paras 31 – 34*).

30. Here, the First Defender urgently needed £22,288, could not get it on his own and required the creditworthiness of the Second Defender to complete the transaction to allow him to remain in his home. Put more crudely, to judge whether there had been adequate consideration required the facts and circumstances of the transaction as it occurred to be

considered, not what it might have been worth to an objective third party bystander with deep pockets.

31. While the Pursuer was entitled to aver he does not know and does not admit the circumstances, was entitled to put the Second Defender to proof and to contend that the onus lies with her to show that the obligations she took on amounted to adequate consideration, there was a purpose to such a proof. That was to prove that the only way the First Defender could return to his home was to complete a transaction that the Second Defender was willing to undertake in exiguous circumstances.

Discussion

32. Section 98 provides, so far as relevant:-

> *98 Gratuitous alienations*
> *(1) Subsection (2) applies where—*
> *(a) by an alienation …by a debtor—..*
> *(ii) any claim or right of the debtor has been discharged or renounced…*
>
> *(b) any of the following has occurred—*
> *(i) the debtor's estate has been sequestrated…*
> *(c) the alienation took place on a relevant day.*
>
> *(2) The alienation is challengeable by—…*
> *(b) … the trustee in the sequestration…*
>
> *(3) For the purposes of paragraph (c) of subsection (1), the day on which an alienation takes place is the day on which the alienation becomes completely effectual…*
>
> *(5) On a challenge being brought under subsection (2), the court must grant decree—*
> *(a) of reduction, or*
> *(b) for such restoration of property to the debtor's estate, or such other redress, as may be appropriate.*
>
> *(6) Except that the court is not to grant such decree if the person seeking to uphold the alienation establishes—…*
> *(b) that the alienation was made for adequate consideration…*

33. In this case, three questions arise – i) was there an alienation? ii) if so, was consideration given? iii) if so, was it adequate?

Was there an alienation?

34. I did not understand Counsel for the Second Defender to dispute that the 2017 Disposition was an alienation for the purposes of section 98. I agree. I also accept his submission that the Sheriff's orders for financial provision were interlinked. In brief, the divorce judgement conferred a right on the First Defender to acquire Mrs Allan's interest in Hawick Drive in exchange for payment of the capital sum. It is accepted that the capital sum was paid. As its wording shows ("*IN IMPLEMENTATION of Court Decree dated Fifth May Two Thousand and Seventeen*" (*sic*)), the 2017 Disposition was intended to perfect his right.

35. However, it did not; instead, as it transferred the whole title to Hawick Drive to both Defenders, the First Defender either renounced or discharged his right. I do not regard any difference between the two as material.

Was consideration given?

36. Counsel agreed that Lord Hodge's judgement in *Carnbroe* altered the law. However, as noted, they differed on the effect of its application to the facts in this case. In addition, as counsel for the Pursuer explained, because *Carnbroe* ultimately settled after the Supreme Court remitted the action back to the Court of Session, the wider impact of Lord Hodge's judgement has yet to be ascertained.

37. The basis of Lord Hodge's judgement was his approval (*para 31*) of an amended version of a definition of adequate consideration given by Lord Eassie in *Kerr* v *Aitken*

(CSOH 0/11/16A/97)). The amendment was necessary to enable it to apply to personal insolvencies. The original and amended versions read:-

> *"adequate consideration means the giving of a consideration which might objectively be described as being a reasonable prestation for the property conveyed by the bankrupt to the transferee had the transaction taken place between parties acting at arm's length ~~in ordinary commercial circumstances~~* ***in the circumstances of the case****"*

38. To apply that test in this case, it is first necessary to correct the Second Defender's submission that the Sheriff in the divorce case was persuaded that the financial orders were practicable because RBS had optimistically agreed in principle to advance £25,000 to the First Defender. That is not quite accurate.

39. The Sheriff found that for the purposes of the 1985 Act, the First Defender and Mrs Allan's net matrimonial property was all jointly owned and that special circumstances existed to justify unequal sharing of it in the First Defender's favour. The First Defender was found entitled to £73,338.64 and Mrs Allan £22,288.64 (*Sheriff's Note, para 70*).

40. In determining which financial orders were apt to give effect to that split, the Sheriff accepted evidence that RBS was prepared to lend the present Defenders £25,000 (my emphasis) <u>provided the mortgage was put in joint names</u> (*Sheriff's judgement, Finding in Fact 30*). She felt able to make the property transfer order and the order for a capital sum on that evidence and, as the action had been intimated to RBS, it had chosen not to enter the process, the Defenders had resided in Hawick Drive with their young children for some years and as Mrs Allan would be paid whether or not the house was sold (*Sheriff's Note, paras 67 and 68*).

41. It is in those circumstances that the Defenders' averments of consideration fall to be assessed. While I accept counsel for the Pursuer's analysis as quoted above, other points also arise as regards adequacy, which I discuss below.

42. The Defenders aver in Answers 6 and 7:-

> *"The additional funds raised by the new loan amounted to £22,288.84. This sum was paid in full to the agents for the former Mrs Allan in exchange for the transfer of her interest. In addition, the second defender accepted, by her execution of the new standard security demanded by the Royal Bank liability for the new mortgage of £91,796.26. Given the collapse of the first defender's business she has been responsible for the payment of the mortgage since 2018, having made substantial contributions prior to that date. The first defender would not have been able to acquire his former wife's half share of the property without the financial assistance of the second defender. He would not have been able to raise the additional funds required to buy her out in accordance with the Sheriff's order. Her half share would never have formed a part of his estate and would not have vested in the pursuer. Esto there was a gain in the transaction (which is not admitted given that there is no market for a one half share of a house) the gain was made at the cost of the former Mrs Allan, not the estate of the first defender. The estate of the first defender was, at worst, reduced by half of the new lending but in return he received a new joint and several debtor for the whole of his mortgage debt which has allowed the mortgage to continue to be paid."*

> *"Believed to be true that the property was valued at around £190,000 in January 2018. Admitted that the first and second defenders granted a standard security in favour of the Royal Bank of Scotland plc which was registered on 1st September 2017. Believed to be true that in January 2018 that the mortgage secured over the Subjects was approximately £91,796.26. Quoad ultra denied. Reference is made to the preceding answer for the sake of brevity. The first defender was unable to give effect to the transfer of property order in his favour. It would therefore never have formed a part of his estate."*

43. In my opinion, the averment that the First Defender was unable to give effect to the property transfer order is irrelevant. Further, it is plain that he discharged or renounced his right to that order gratuitously. Both conclusions are a consequence of the means by which the Defenders chose to have the title to Hawick Drive transferred to themselves, a means which prevented the Second Defender from giving any consideration.

44. To explain those conclusions, it is necessary to consider the admitted steps taken after the divorce orders were pronounced and to compare them with those which ought to have been taken for the Second Defender to have a basis upon which to plead a relevant defence for the purposes of Lord Hodge's judgement.

45. To enable RBS to provide funding for the capital sum, its lending over Hawick Drive needed reconfigured - the original mortgage account needed to be redeemed, the Standard

Security by Mrs Allan and the First Defender needed discharged and replaced with one by both Defenders.

46. In terms of the Sheriff's judgement, for the First Defender's right to the property transfer order to be perfected, the capital sum needed paid to Mrs Allan in exchange for a valid Disposition of her interest in Hawick Drive. Though the property transfer order specified no disponee, the First Defender was the only competent beneficiary - the Disposition was to be delivered in exchange for him paying the capital sum; the Second Defender was not a party to the divorce action and no order to transfer the title to Hawick Drive to both Defenders was craved (nor does it appear it could have been, as it would not have been apparently justified by the principles of the 1985 Act).

47. It is important to recognise that the Defenders were in control of the process to transfer the title to Hawick Drive. Their agent (or agents if they were separately represented) were acting for the nominal "purchaser" and would have been responsible, subject to instructions from the Defenders and RBS, for drafting the 2017 Disposition, a Discharge of the existing Security and a fresh Standard Security by both Defenders.

48. It is in that context that the 2017 Disposition needs considered. It was significantly different to that provided for in the property transfer order, both as it was granted by the First Defender and Mrs Allan and as it directly disponed the whole title to the Defenders. As noted, the Defenders must be deemed to have determined that course of action. However, as is obvious, despite its protestation to the contrary, the 2017 Disposition did not implement the property transfer order.

49. There appear to have only been two reasons for that course of action - either the Defenders instructed their agent to place the title in their joint names or RBS made that outcome a condition of the new loan.

50. However, in either case, and crucially, that outcome and implementation of the property transfer order could easily have been achieved - by the 2017 Disposition *in gremio* granting "back to back" transfers to the First Defender then to both Defenders or by two Dispositions being granted, one by Mrs Allan to the First Defender, then another transferring title to both Defenders. In either event, the true intention of the property transfer order and the desire outcome would have been properly reflected in the Land Register.

51. Neither course would have affected RBS. If its lending criteria specified that title be placed in joint names, either of the same routes would have achieved the same end. If there was no such condition, RBS would have been fully secured provided both Defenders granted it a Standard Security over Hawick Drive and the Second Defender granted it a Personal Bond.

52. Had the First Defender not been sequestrated, no difficulty might have arisen. However, as he was, section 98 was triggered. In circumstances in which the First Defender could have perfected his right to take title to Hawick Drive, he and the Second Defender opted to take a course which bypassed transferring title to him first.

53. For that reason, there could never have been any question of the Second Defender giving consideration as, in the circumstances of this case, no property was conveyed by the bankrupt to the transferee for the purposes of Lord Hodge's test in *Carnbroe*. While it clearly evidenced the First Defender's decision to renounce or discharge his right to the property transfer order, it is equally clear that the First Defender received nothing in exchange.

54. By contrast, had the property transfer order been implemented and the title to Hawick Drive then been separately transferred by the First to both Defenders in either of the ways outlined above, the issue of whether the Second Defender gave consideration might

have enabled a relevant defence of adequate consideration to be pled. Any consideration of that type would then have been the counterpart of the alienation.

55. For these reasons, the Defenders' case that the First Defender could not have implemented the property transfer order himself without financial assistance from the Second Defender and that Hawick Drive would never have formed a part of his estate is irrelevant.

56. In these circumstances, I find that no consideration was given or received.

Adequacy

57. It follows that the issue of adequacy does not arise. However, if I am wrong in that, I also regard consideration of the sort relied upon by the Defender to have been inadequate.

58. In *Carnbroe*, Lord Hodge made two further points - for an alienation to survive challenge, it is necessary to show that adequate consideration was obtained in the interests of the creditors (*para 33*) and that the purpose of the alienation could be objectively justified (*para 34*). In my opinion, the Defenders' averments meet neither test.

59. On the first point, the 2017 Disposition simply maintained the extent of the First Defender's interest in Hawick Drive when it ought to have been extended. In combination that deed and RBS's funding of the capital sum increased the amount he was due to his creditors and reduced the net value of his interest in Hawick Drive, thereby reducing the value of his estate for his other creditors. This was not an example of a debtor divesting himself of an asset at the best price that could be obtained in constrained circumstances, as occurred in *Carnbroe*.

60. Nor, regarded objectively, was the purpose of the 2017 Disposition justified. As the Second Defender avers, she was aware of the First Defender's business difficulties. In the

absence of any averment that RBS insisted on the title to Hawick Drive being placed in joint names, the only true purpose of the transfer to both Defenders was to preserve their right to occupy the property. As that could not have been achieved in the divorce action and other means could have perfected the First Defender's right, however understandable the Defenders' desire to remain in Hawick Drive, the purpose of the alienation was not justified; as counsel for the Pursuer submitted, insolvency often has unfortunate consequences.

Disposals

61. It follows, in my opinion, that no relevant defence is pled. As section 98(5)(a) is peremptory, the 2017 Disposition falls to be reduced in terms of the Pursuer's first crave.

62. The Pursuer's second crave, which seeks an order for the title to Hawick Drive to be transferred to the Pursuer, may only be granted if the court considers it appropriate (*2016 Act, section 98(5)(b)*). After considering that point at *avizandum*, I sought supplementary submissions on whether the action should be intimated to Mrs Allan, who is presumably unaware of it.

63. The supplementary submissions for the Second Defender recognised the point was mainly for the Pursuer to address. They also submitted that the failure to intimate on Mrs Allan highlighted the Pursuer's failure to recognise that reduction ought to mean Mrs Allan's interest in Hawick Drive should revert to her. Whether she required to repay the capital sum was not an issue in this action. In the absence of any application under ss.99 or 100, the Pursuer was simply trying to reduce one side of the transaction at the expense of the Second Defender. Whether it was appropriate that the Second Defender pay the Trustee any benefit which the 2017 Disposition conferred on her could be determined at proof.

64. In his supplementary submissions, the Pursuer accepted Mrs Allan is entitled to retain the capital sum. Even if that was not the case, it was uneconomic for any claim under ss.99 or 100 to be pursued. The effect of decree being granted in the second crave would be to place the title to Hawick Drive in the Pursuer's name, leaving Mrs Allan with the capital sum, as ordered by the Sheriff in the divorce action and as ought to have occurred in the 2017 Disposition. Consequently, it was appropriate that order be made.

65. I accept the Second Defender's submission that the issue is primarily for the Pursuer to address. However, in light of the Pursuer's acceptance that Mrs Allan is entitled to retain the capital sum, intimation on her would serve no useful purpose.

66. Equally, in light of the same acceptance and as the 2017 Disposition falls to be reduced, the order second craved would prevent the expense of the Trustee seeking to implement the property transfer order. Consequently, it is appropriate to grant decree in terms of that crave.

67. Expenses follow success.