



SHERIFF APPEAL COURT

[2024] SAC (Civ) 19

Sheriff Principal Pyle

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL PYLE

in the appeal in the cause

GORDON MACLURE, INSOLVENCY PRACTITIONER, as Trustee on the sequestrated
estate of GG

Pursuer and Respondent

against

GG

Defender and Appellant

Act: Party

Alt: Garden; Shepherd & Wedderburn LLP

26 April 2024

Introduction

[1] This is an appeal by way of stated case in which an issue arises about the proper construction of the statutory provisions for the sale by the trustee in bankruptcy of heritable property owned by the debtor. I indicated to parties that the appeal would be refused but that I would issue an opinion setting out the reasons.

Background

[2] The appellant, the debtor, was sequestrated on 19 December 2012. The need arose from the non-payment of council tax to the local authority. The reasons given by the respondent, the trustee, for the delay in raising these proceedings were opaque. Up to 2015, there was correspondence between the parties but from then until 2021, a period 6 years, there was none. The summary sheriff was advised only that there were difficulties communicating with the appellant and accusations made by the appellant about the respondent after a difficult first meeting. No further explanation was provided.

[3] There is no dispute that the heritable property in question is the family home of the appellant and her son and was such as at the date of sequestration. Sale of the property is expected to realise sufficient funds for payment in full of the creditors and the costs of the sequestration.

Legislation

[4] The relevant parts of the Bankruptcy (Scotland) Act 1985 are as follows:

“Section 31 - Vesting of estate at date of sequestration

- (1) Subject to section 33 of this Act... the whole estate of the debtor shall, by virtue of the trustee’s appointment, vest in the trustee as at the date of sequestration for the benefit of the creditors.

[...]

Section 39A - Debtor’s home ceasing to form part of sequestrated estate

- (1) This section applies where a debtor’s sequestrated estate includes any right or interest in the debtor’s family home.
- (2) At the end of the period of 3 years beginning with the date of sequestration the right or interest mentioned in subsection (1) above shall—
- (a) cease to form part of the debtor’s sequestrated estate; and
 - (b) be reinvested in the debtor (without disposition, conveyance, assignation or other transfer).

- (3) Subsection (2) above shall not apply if, during the period mentioned in that subsection, —
- (a) the trustee disposes of or otherwise realises the right or interest mentioned in subsection (1) above;
 - (b) the trustee concludes missives for sale of the right or interest;
 - (c) the trustee sends a memorandum to the keeper of the register of inhibitions under section 14(4) of this Act;
 - (d) the trustee registers in the Land Register of Scotland or, as the case may be, records in the Register of Sasines a notice of title in relation to the right or interest mentioned in subsection (1) above;
 - (e) the trustee commences proceedings—
 - (i) to obtain the authority of the sheriff under section 40(1)(b) of this Act to sell or dispose of the right or interest;
 - (ii) in an action for division and sale of the family home; or
 - (iii) in an action for the purpose of obtaining vacant possession of the family home;
 - (f) the trustee and the debtor enter into an agreement such as is mentioned in subsection (5) below;
 - (g) the trustee has commenced an action under section 34 of this Act in respect of any right or interest mentioned in subsection (1) above or the trustee has not known about the facts giving rise to a right of action under section 34 of this Act, provided the trustee commences such an action reasonably soon after the trustee becomes aware of such right...
- (6) If the debtor does not inform the trustee or the Accountant in Bankruptcy of his right or interest in the family home before the end of the period of 3 months beginning with the date of sequestration, the period of 3 years mentioned in subsection (2) above—
- (a) shall not begin with the date of sequestration; but
 - (b) shall begin with the date on which the trustee or the Accountant in Bankruptcy becomes aware of the debtor's right or interest.
- (7) The sheriff may, on the application of the trustee, substitute for the period of 3 years mentioned in subsection (2) above a longer period—
- (a) in prescribed circumstances; and
 - (b) in such other circumstances as the sheriff thinks appropriate...
- (9) In this section, '*family home*' has the same meaning as in section 40 of this Act.

Section 40 — Power of trustee in relation to the debtor's family home

- (1) Before the trustee or the trustee acting under the trust deed sells or disposes of any right or interest in the debtor's family home he shall—
 - (a) obtain the relevant consent; or
 - (b) where he is unable to do so, obtain the authority of the sheriff in accordance with subsection (2) below.
- (2) 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.
- (3) Subsection (2) above shall apply—
- (a) to an action for division and sale of the debtor's family home; or
 - (b) to an action for the purpose of obtaining vacant possession of the debtor's family home, brought by the trustee or the trustee acting under the trust deed as it applies to an application under subsection (1)(b) above and, for the purposes of this subsection, any reference in the said subsection (2) to that granting of the application shall be construed as a reference to the granting of decree in the action.
- (3A) Before commencing proceedings to obtain the authority of the sheriff under subsection (1)(b) the trustee, or the trustee acting under the trust deed, must give notice of the proceedings to the local authority in whose area the home is situated.
- (3B) Notice under subsection (3A) must be given in such form and manner as may be prescribed by the Scottish Ministers.
- (4) In this section—
- (a) '*family home*' means any property in which, at the relevant date, the debtor had (whether alone or in common with any other person) a right or interest, being property which was occupied at that date 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;
 - (b) '*child of the family*' includes any child or grandchild of either the debtor or his spouse or civil partner or former spouse or civil partner, and any person who has been brought up or accepted by either the debtor or his spouse or civil partner or former spouse or civil partner as if he or she were a child of the debtor, spouse or civil partner or former spouse or civil partner whatever the age of such a child, grandchild or person may be;
 - (ba) '*local authority*' means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c. 39);
 - (c) '*relevant consent*' means in relation to the sale or disposal of any right or interest in a family home—
 - (i) in a case where the family home is occupied by the debtor's spouse or civil partner or former spouse or civil partner, the consent of the spouse or civil partner, or, as the case may be, the former spouse or

- civil partner, whether or not the family home is also occupied by the debtor;
- (ii) where sub-paragraph (i) above does not apply, in a case where the family home is occupied by the debtor with a child of the family, the consent of the debtor; and
 - (d) '*relevant date*' means the day immediately preceding the date of sequestration or, as the case may be, the day immediately preceding the date the trust deed was granted."

[5] These provisions have been superseded by the Bankruptcy (Scotland) Act 2016, but the relevant provisions in that Act, which did not apply in the current appeal, are in so far as material in the same terms (section 78 (vesting of estate); sections 112 and 113 (debtor's family home and powers of trustee in relation to it)).

Stated case

[6] In a comprehensive and carefully prepared stated case, the summary sheriff (Johnston) sets out the arguments put by the appellant for the court not to grant the order sought by the respondent to sell the family home. It is unnecessary in this appeal to set out these arguments in detail. The sheriff rightly concluded that much of what was submitted by the appellant (and her son whom the summary sheriff allowed to speak on her behalf, she being a party litigant) was irrelevant. For the purposes of this opinion, of more relevance is the approach the sheriff took to the task before her. She noted that section 40(2) of the 1985 Act gave the court a wide discretion. The factors set out in that section are not exhaustive and accordingly each case necessarily turns on its own facts. The debtor's averments regarding needs and resources of her and her family require to be adequately specified (*Macleod's Trustees v Macleod* 2007 Hous LR 34; *Accountant in Bankruptcy v Clough and Ors*, unreported, Edinburgh Sheriff Court, 8 September 2010). The creditor's interest is an issue of significant importance, it being fundamental to the purpose of a sequestration

that the debtor's estate be ingathered and distributed for the benefit of the creditors. Refusal of an application outright will be only in exceptional circumstances. The summary sheriff accepted, under reference to *Accountant in Bankruptcy v Davies* 2022 SLT (Sh Ct) 136, that hardship to the debtor and the debtor's family is a factor which can legitimately be taken into account, but she disagreed with certain *obiter* remarks of the sheriff in that case about the need for the trustee to make an application within 3 years of the date of sequestration and that the sending of a memorandum to the Keeper was not of itself sufficient. Rather, any untoward delay by the trustee in making an application to the court is just one part of the court's overall consideration of the circumstances of the case. She concluded that in this case the greater prejudice lay with the creditors. Throughout the period of the sequestration the appellant had refused to engage with the respondent. She had continued to reside in the property, over which there was no mortgage and during which time she had not paid any funds to the trustee or to the creditors. The period of delay had given the appellant ample time to attempt to find some alternative to the sale of the property. It was in the public interest to have the sequestration completed and the creditors paid.

Discussion

[7] The fundamental purpose of a sequestration is the ingathering of the debtor's estate by the trustee and the payment of the creditors in so far as the ingathered funds allow and after settlement of the costs of the sequestration itself. The overall process is subject to the supervision and control of the Accountant in Bankruptcy. It is self-evident that in discharge of their function trustees in bankruptcy should act with due expedition. That is because they have a primary duty to safeguard the interests of the creditors. Delay in the discharge of that function is to be deprecated. The reasons for the delay in this case are not

satisfactorily explained. That is doubly concerning given that the trustee must have had in his contemplation on now two occasions - before the summary sheriff and before this court - that questions would be asked. It is not sufficient to seek to blame the appellant for the delay. Some debtors may be of a state of mind to assist the trustee in sequestration over and above what they are required to do in terms of the legislative provisions, but many debtors, perhaps the majority, will not. A delay of many years is likely to result in an uninformed debtor thinking that the trustee had lost all interest in pursuing the matter. That might be particularly so for the debtor's family, never mind a former spouse who might have no contact at all with the debtor. The full passage of the sheriff in *Accountant of Bankruptcy v Davies* is as follows:

"[29] 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 of 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."

[8] I can understand why the summary sheriff might think that the sheriff was suggesting that the sending of the memorandum might be insufficient. I do not agree that this was the sheriff's intention, as indeed is clear from her decision on the merits. All

she was inviting trustees to do is timeously to lodge the application and then propose to the sheriff that an extended period be allowed before the sale. I doubt if that would be realistic if the sheriff's intention was to produce a solution to unsatisfactory delay. The situation in that case and indeed in the present one is that for unknown reasons the trustee took no steps at all to progress matters, other than to protect his rights to proceed at a later date. The duty of the trustee is to proceed diligently to protect the interest of the creditors. If there is a desire to give further time to the debtor and his family, it can indeed be done by way of representations before the sheriff. But it is unlikely to arise if the problem is lack of engagement by the debtor. The real mischief is unwarranted delay by trustees. The solution for that is for it to stop. Each case depends on its own facts and circumstances but it is difficult, if not impossible, to imagine circumstances where the court to express its displeasure would refuse an application, however late, for that reason alone. Instead, provision might be made for a further period to allow the debtor or his family to make other arrangements.

Grounds of Appeal

[9] In her written submissions, the appellant's grounds of appeal, in so far as relevant, are difficult to follow. Much of her argument is a rehearsal of matters she raised before the sheriff, albeit with a further allegation of a conspiracy involving the trustee, his solicitor, the local authority and the Department for Work and Pensions, the nub of which appeared to be the proposition that the trustee delayed making the application in the hope that the appellant's state pension entitlement would improve. None of this is a proper basis for an appeal which is against a discretionary decision of a court of first instance. No error of law is identified. In any event, I agree with the summary sheriff's reasoning. I agree with

Sheriff Mitchell in *Macleod's Trustees* that such applications will be refused on the ground of hardship only in exceptional circumstances. I agree with the summary sheriff that the appellant failed to make out a case for such exceptional circumstances to apply in her case. Given that this opinion will be published and in the interests of the appellant's right to confidentiality, I do not set out what those alleged circumstances were. They are in any event immaterial to the general point of principle which arises.

Disposal

[10] There are two questions posed in the stated case:

- “1. Was I entitled to hold that the action against the defender was competent?
2. Was I entitled to grant decree for the defender's eviction from the property at [...] and to grant authority to the pursuer to sell the property in terms of section 40(1)(b) of the Bankruptcy (Scotland) Act 1985?”

I answer both questions in the affirmative and refuse the appeal.

[11] Expenses should follow success in the normal way, but I will allow parties 14 days to lodge written submissions on the issue.