SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS AT ABERDEEN

[2018] SC ABE 36

ABE-B67-18

JUDGMENT OF SHERIFF GRAEME NAPIER

in the cause

APPLICATION UNDER SECTION 63(1) OF THE BANKRUPTCY (SCOTLAND) ACT 1985

by

GORDON MACLURE, Insolvency Practitioner, Johnston Carmichael, Bishops Court, 29 Albyn Place, Aberdeen AB10 1YL formerly trustee on the sequestrated estates of David Johnston, formerly residing at 9 Beattie Place, Kirkside, Laurencekirk, now known as David Johnston-Oates, residing at 17 Burnside Croft, Drumlithie, Aberdeenshire

Applicant: Campbell;
Debtor/Respondent: Fairbridge;

ABERDEEN, 31 May 2018.

The Sheriff having resumed consideration of the application grants same, Appoints the said Gordon MacLure as trustee in the sequestration of David Johnston otherwise known as David Johnston-Oates in terms of section 63 of the Bankruptcy (Scotland) Act 1985; Finds the expenses of this application as the same may be taxed to be expenses in the sequestration; Allows an Account to be given in; and Remits the same, when lodged, to the Auditor of Court to tax and to report.

NOTE

[1] This application called before me on 22 May 2018. Miss Campbell, Solicitor, Edinburgh appeared for the applicant. Mr Fairbridge, Solicitor, Glasgow appeared for the debtor/respondent, David Johnston who opposed the application.

[2] When the hearing had been fixed it was agreed that no evidence would be heard and that the matter would be decided on legal submissions on the pleadings. A record of the written pleadings (the Application and Answers) had been prepared. Agents had helpfully provided me with a Joint list of authorities and written submissions in advance of the hearing. As the submissions now form part of the process I will not repeat them *ad longum*.

[3] At the hearing the applicant's agent adopted her written pleadings. The defender's agent adopted his written submissions in part. He departed from the written submissions to the extent that he may be considered to have suggested that a sequestration where there has not been settlement in full or a compromise has an end date.

[4] I was referred to the following joint list of 'authorities':

> The Bankruptcy (Scotland) Act 1985;
>
> The Bankruptcy (Scotland) Act 2016;
>
> *Accountant in Bankruptcy, Appellant* [2017] SAC (Civ) 5;
>
> *Pattullo, Petitioner* [2017] SC GLA 44;
>
> *Accountant in Bankruptcy v Grant,* 2010 GWD 40-812;
>
> *Coull's Trustee, Petitioner*, 1934 SC 415;
>
> McBryde, *Bankruptcy*, 2nd Edn;
>
> McKenzie-Skene, *Bankruptcy;*
>
> and also to The Notes for Guidance for Trustees by the Accountant in Bankruptcy (Version 7).

Background

[5] The debtor applied to the Accountant in Bankruptcy for his sequestration on 30 December 2009. At that time he lived at 9 Beattie Place, Kirkside, Laurencekirk which would at that time have fallen within the territorial jurisdiction of Stonehaven Sheriff Court.

He now resides at 17 Burnside Croft, Drumlithie. Both that and his former address now fall within the territorial jurisdiction of Aberdeen Sheriff Court.

[6] At the time of his application for sequestration the Bankruptcy (Scotland) Act 1985 was still applied. That Act was repealed by the Bankruptcy (Scotland) Act 2016 from 30 November 2016 (subject to savings and transitional provisions in terms of section 234 of the 2016 Act). These transitional provisions provide that the 1985 Act regime continues to apply to pre-30 November 2016 awards of sequestration, such as this.

[7] When he applied for sequestration the debtor used the name David Johnston. On 30 December 2009 the Accountant in Bankruptcy awarded sequestration in that name, with the Accountant in Bankruptcy as trustee. All of the correspondence relating to the sequestration (including emails from the debtor) use that name. This includes an interlocutor from Stonehaven Sheriff Court. On record it appears to be accepted that the debtor now uses the name David Johnston-Oates. It was explained to me at the outset of the hearing that the debtor has incorporated his current partner's surname with his own. It was agreed that it would be appropriate for me to refer to the debtor as "Johnston now known as Johnston-Oates".

[8] At the time of submitting his application for sequestration the debtor declared that he had no significant assets; an income from benefits of £95 per week; 4 credit card debts totalling £52,942.98; an overdraft of £7,600; and one other liability to a non-institutional creditor amounting to £1,940. He made no mention of any liability to Capelrig Limited, a company he had been employed by and had embezzled monies from. In terms of a decree granted against the debtor in favour of that company on 15 October 2009 he was liable to make payment to the company £1,208,059.93 with interest (at 8%) and taxed expenses.

[9] The substantial liability to Capelrig was first drawn to the attention of the trustee by the creditor company in January 2010. Despite this apparent breach of section 67 (1) of the 1985 Act by the debtor, no criminal proceedings have been taken against him therefor. He was, however convicted of embezzlement at Peterhead Sheriff Court and sentenced to 5 years imprisonment.

[10] A meeting of creditors was held on 24 February 2010, the outcome of which was reported to the Sheriff at Stonehaven and the current applicant was appointed as replacement Trustee by interlocutor dated 12 March 2010. In terms of section 31(1) of the 1985 Act the debtor's estate vested in the Applicant upon his appointment as trustee.

[11] Other than the claim on behalf of Capelrig in the sum of £1,296,761.32 the only other claim in the sequestration received by the Trustee was from a company Wood Floor Centre in the sum of £1,920. The Trustee anticipated further claims totalling £61,109.13 in relation to the credit card debts and bank overdraft. It is not unusual for such financial institutions not to actively pursue claims in a sequestration where it appears that there are no funds available for distribution. That was the position at that time. Nonetheless the Trustee in exercise of his responsibilities kept all creditors and the debtor advised of progress with the sequestration.

[12] It appears that the Trustee and Capelrig subsequently became involved in litigation in the Court of Session in relation to an alleged gratuitous alienation of property to the debtor's former partner. Although I am not privy to all the details I am told that the Trustee and Capelrig took an economic decision not to pursue the matter further after the debtor's partner appealed an unfavourable decision from the Outer to the Inner House of the Court of Session. It was told that Capelrig had agreed to underwrite the Trustee's expenses in that litigation as a condition of the Trustee conjoining in the action.

[13] The debtor was discharged on 30 December 2012 as provided for in terms of section 54 of the 1985 Act. In this case creditors were not paid either in full or in part and the debtor did not enter into a composition with creditors. Accordingly notwithstanding that discharge the applicant argues that the sequestration has not been brought to an end, a point now conceded by the debtor's agent.

[14] The applicant subsequently sought and was granted his discharge as Trustee. I had sight of the letter sent by the Trustee to each of the creditors (not only those who had submitted a claim), the debtor and the Accountant in Bankruptcy on 12 December 2013 confirming that he proposed to apply for discharge in terms of section 57(2) of the 1985 Act. As at that date the Trustee was still dealing with all of the creditors as if they had a continuing interest in their debts. Not only does that circular letter point out to creditors and the debtor that they had a right to make representations to the Accountant in Bankruptcy as to why the applicant should not be discharged but also that his accounts had been audited by the Commissioner. Had any of the creditors or debtor concerns about those accounts they could have made representations to the Commissioner.

[15] It appears that he Trustee's fees and outlays in the sequestration, which amounted to £23,162 inclusive of VAT, were paid by the main creditor, Capelrig Ltd on the basis that they would be repaid if any recovery was made.

[16] Following the debtor's discharge the applicant became aware in July 2016 that the debtor had pursued claims against the Bank of Scotland for repayment of payment protection insurance premiums (PPI). In due course the Bank sent cheques totalling £36,249.88 to the applicant in respect of these claims, which cheques were returned by the applicant as he had been discharged and had no locus to intromit with them. It is in relation

to laying claim to these funds on behalf of the creditors that the applicant applies to this court for re-appointment as Trustee.

[17] It appears that the Trustee had instructed agents on his behalf to investigate potential PPI claims as part of what the applicant describes as a "bulk exercise and not specifically in relation to this case". These agents were provided with the information provided by the debtor in his application for sequestration and were pursuing potential claims in relation to the credit card and bank overdraft debts. They (that is the Trustee and his agents) were unaware of the earlier loans in respect of which the debtor ultimately pursued claims.

[18] Having returned the cheques to the bank the applicant did not immediately seek re-appointment to the estate. It appears that the debtor initially advised the applicant that he wished the applicant to seek re-appointment in order to ingather these claims for the benefit of creditors. However, subsequently he stated objections to such an application. I have seen correspondence between the applicant and the debtor between July 2016 and March 2017 and also the applicant's solicitors and the debtor between July 2017 and October 2017 in an apparent effort to understand the debtor's concerns so that if they were justified the Trustee might avoid costly protracted litigation. However the applicant found that the debtor's position shifted over time and indeed some of his correspondence was contradictory and some raised irrelevant matter. He made lengthy submissions about liability of other employees of Capelrig in relation to embezzled sums. A meeting was offered but the debtor declined. The applicant's legal adviser offered to speak to the debtor's solicitor but the debtor initially declined to provide information for his solicitor and the meeting only took place on 20 December 2017 following which the writ was lodged with this court within 6 weeks (being warranted on 2 February 2018) with a first hearing fixed for 8 March at which date the hearing to which this note relates was fixed.

[19] I am advised that the company Capelrig has changed its name to Semco Maritime Limited and that its ownership structure has altered. The debtor suggests that the new owners may no longer be interested in pursuing their claim but the Applicant has not been advised of such a decision.

[20] The applicant's position is that the value of these PPI claims will exceed the costs of his re-appointment and recovery, management, realisation and distribution of the newly discovered assets. The applicant proposes, if reappointed as Trustee, to repay to Capelrig (or its successor) the funds they reimbursed to him and anticipates having funds of approximately £13,000 left available to pay to creditors and to cover his fees in pursuing this application and ingathering and distributing the monies. He estimates his legal fees in respect of reappointment to be in the region of £3,000 and his own costs for recovery, management, realisation and distribution to be around £3,150 plus VAT and outlays (including the Accountant in Bankruptcy's audit fee).

[21] The balance of the monies due from the Bank of Scotland will then be available for the benefit of creditors but until re-appointed the now discharged Trustee has no right to deal with these monies in any way.

The hearing

[22] Miss Campbell for the applicant invited me to grant the application. The Trustee was, she argued, in a similar position to that as the Accountant in Bankruptcy in *Accountant in Bankruptcy, applicant.* Her client's application satisfied the requirements set out by the appeal court in that case. He had identified not just one but at least 2 (and possibly more) creditors who might benefit from the ability of the applicant to ingather and distribute these funds. This was not just a procedure that would benefit the professionals involved in the

case. The applicant had identified what was available for distribution. Even if most benefit went to Capelrig, which company had covered his costs to date, that was benefit to a creditor and even then there would be a balance available for distribution to those creditors wishing to pursue their claims. If re-appointed his intention was to write to each creditor and invite them to indicate whether they wished to pursue their claim once he could advise them of what was available for distribution. Miss Campbell accepted that the Sheriff retains a discretion in these cases as to whether to make the appointment (*Pattullo, petitioner* per Sheriff Deutsch). In this case she argued there was good reason not to do so. The alternative was that the debtor obtained a windfall of £36,249.88.

[23] For the debtor Mr Fairbridge accepted the competence of the application but suggested in both his written and oral submissions a number of reasons why I should not grant the application. Latterly he advised that his client's instructions were that if a distribution to creditors without reappointment of the Trustee could be achieved he would be content. Mr Fairbridge could not identify any such mechanism. His grounds for opposition might be summarised as follows:

a. In order that I would be justified in exercising my discretion to make the appointment sought I would require to be satisfied that there will be a real benefit to creditors. Mr Fairbridge criticises the failure of the applicant to identify in his application to the court details of all creditors; and to set out in detail how the balance of £5,000 or thereby would be distributed. Given the sums involved in the sequestration he argued that any dividend to creditors is liable to be negligible. If, as he suggested was the case, the real benefit here is to the Trustee then the application should be refused (*Pattullo, Petitioner*).

b. Although he did not accept this in his written submissions, in oral submission he accepted that a sequestration does not have an end date and therefore he did not seek to argue that any prescriptive period ran on re-appointment. However he drew attention to Section 58B – D of the 1985 Act which provide an administrative method for re-appointment of a trustee via the Accountant in Bankruptcy. Such an application can only be made within 5 years of the date of sequestration (**Section 58B**). In this case that 6th anniversary occurred on 30 December 2014. Whilst Mr Fairbridge accepted that this mechanism does not exclude the power of the court to make a re-appointment under Section 63 of the 1985 nonetheless he suggested I should be slow to make a late application and invited me to examine carefully the reasons for the Trustee not having sought re-appointment within that period and then having discovered about the PPI funds not having made any application until 8 years after the date of sequestration. I should, he submitted, examine the reasons for the Trustee not having discovered this PPI claim before his discharge. Once the claim had been disclosed to him in 2016 the applicant had delayed for an inordinate period in making the application. This delay in identifying the existence of such a claim; returning the cheques to the Bank of Scotland; and the lateness of the application itself were all reasons for the court not exercising its discretion in favour of the applicant.

c. Section 63(1) is not, he argued, sufficiently wide in application to excuse the failure of the Trustee to investigate and realise assets that could have been discovered with what he called "reasonable diligence". No authority was

produced for this proposition which was not, in fairness, pursued to any extent in oral submissions.

d. Further if the Trustee is now re-appointed after all the delay in this process it would have a potentially detrimental effect on the debtor's attempts to improve his credit rating following his discharge from the sequestration. Mr Fairbridge was, however, unable to suggest in what way this disadvantage would operate.

e. Finally, Mr Fairbridge suggested that the company Capelrig having changed its name and with a new ownership structure may not be interested in pursuing its claim.

Discussion

[24] Section 63 of the 1985 Act under the title "Power of court to cure defects in procedure" provides:

> "(1) The sheriff may, on the application of any person having an interest— (a) if there has been a failure to comply with any requirement of this Act or any regulations made under it, make an order waiving any such failure and, so far as practicable, restoring any person prejudiced by the failure to the position he would have been in but for the failure;(b) if for any reason anything required or authorised to be done in, or in connection with, the sequestration process cannot be done, make such order as may be necessary to enable that thing to be done. (1A) An order under subsection (1) may waive a failure to comply with a requirement mentioned in section 63A(1)(a) or (b) only if the failure relates to— (a) a document to be lodged with the sheriff, (b) a document issued by the sheriff, or (c) a time limit specified in relation to proceedings before the sheriff or a document relating to those proceedings.
>
> (2) The sheriff, in an order under subsection (1) above, may impose such conditions, including conditions as to expenses, as he thinks fit and may—(a) authorise or dispense with the performance of any act in the sequestration process; (b) appoint as [...] trustee on the debtor's estate [the Accountant in Bankruptcy or] a person who would be eligible to be elected under section 24 of this Act, whether or not in place of an existing trustee; (c) extend or waive any time limit specified in or under this Act…."

[25] From 30 June 2014 until the repeal of the 1985 Act section 58B under the title "Assets discovered after trustee discharge: appointment of trustee" provided an alternative route to the appointment sought in this action without application to the court as follows:

> "(1) This section applies where, after the trustee's discharge under section 57 or 58A but before the expiry of the period of 5 years from the date of sequestration, the trustee or the Accountant in Bankruptcy becomes aware of any newly identified estate with a value of not less than £1000 (or such other sum as may be prescribed
>
> (3) The Accountant in Bankruptcy may—(a) in the case where the trustee was discharged under section 57— (i) on the application of the trustee who was discharged, reappoint that person as trustee on the debtor's estate, or (ii) appoint the Accountant in Bankruptcy as trustee on the debtor's estate,
>
> (4) The Accountant in Bankruptcy may make an appointment or reappointment under subsection (3) only if, in the opinion of the Accountant in Bankruptcy, the value of the newly identified estate is likely to exceed the costs of— (a) the appointment or reappointment, and (b) the recovery, management, realisation and distribution of the newly identified estate.
>
> (5) Where the trustee was discharged under section 57 and applies for reappointment under subsection (3)(a)(i), the discharged trustee must provide to the Accountant in Bankruptcy the information mentioned in subsection (8)(a) to (c).
>
> (6) Where the trustee was discharged under section 57 and does not apply for reappointment under subsection (3)(a)(i), the discharged trustee must—
>
> (a) provide to the Accountant in Bankruptcy details of any newly identified estate that the discharged trustee becomes aware of, where that estate has a value which is not less than the value mentioned in subsection (1), and
>
> (b) if requested by the Accountant in Bankruptcy, provide to the Accountant in Bankruptcy the information mentioned in subsection (8)(b) and (c).
>
> (7) Where the Accountant in Bankruptcy was discharged under section 58A, the Accountant in Bankruptcy must record and consider….. (a) the estimated value of the newly identified estate, (b) the reason why the newly identified estate forms part of the debtor's estate, (c) the reason why the newly identified estate was not recovered, (d) the estimated outlays and remuneration of the trustee following an appointment or reappointment under subsection (3), and (e) the likely distribution under section 51 following an appointment or reappointment under subsection (3)
>
> (9) This section is without prejudice to any other right to take action following the discharge of the trustee."

Discussion

[26] Parties accept that discharge of a Trustee does not end a sequestration (*Accountant in Bankruptcy, Appellant*, quoting McBryde on *Bankruptcy* at para 8-75; McKenzie-Skene on *Bankruptcy* at para 18-04) and that it is competent for such a Trustee to apply for re-appointment where he has an interest. Where, as here, further assets have come to light he has an interest to do. Parties also accept that the terms of the Bankruptcy (Scotland) Act 1985 apply in this case. The power of the court to re-appoint a Trustee is found in section 63 of the 1985 Act.

[27] Mr Fairbridge was critical of the applicant for not having discovered sooner the existence of the PPI claims. Be that as it may the Sheriff Appeal Court has made clear in *Accountant in Bankruptcy, Appellant* that a discharged trustee does not have an obligation to go searching for such funds but where, as here, they fall in to his lap. Where that happens it would be a dereliction of duty for the holder of such a public office to wash his hands of these significant assets. As to the failure of the Trustee to identify the PPI claims as assets before his discharge it seems to me that the Trustee took reasonable steps to identify whether there might be such claims based upon the information which was provided in the debtor's application. The debtor says that he only latterly remembered the earlier bank loans which led to the awards and it is clear that he pursued these after his discharge although in fairness to the debtor he was candid in drawing this to the attention of the now former Trustee in 2016.

[28] Mr Fairbridge seemed to me to suggest that I should read the non-timelimited power of the court in terms of section 63 as if it had a time-limit similar to that provided in section 58 of the 1985 Act. Section 58B – D of the 1985 Act makes provision for the

Accountant in Bankruptcy administratively re-appointing a trustee (or him/herself) where further assets are discovered after discharge of a trustee but that procedure can only be implemented within 5 years of the date of sequestration. I do not, however, consider that the time limit applied to a purely administrative procedure should be read into a judicial one. There is no time-limit imposed in the statute or suggested in *Accountant in Bankruptcy, appellant* and if, as accepted by parties there is no end date to a sequestration there can be no such limit. I accept that a very lengthy delay in discovery of assets or in an application being made either by a creditor or the discharged trustee may be a factor to be taken into account in the exercise of the sheriff's discretion.

[29] Mr Fairbridge was critical of this application to the extent that it did not provide detail of each of the creditors and the proposed distribution of the assets. In doing so I was referred to the Sheriff Appeal Court's requirement in *Accountant in Bankruptcy, appellant* at para. 14 (where limited information about the composition of creditors had been provided) that it would be helpful to the court to be advised as a minimum of the identity of the creditors, so that the court can be satisfied that there is at least one entity who will benefit from the re-appointment process.

[30] The Bankruptcy Acts balance the interests of the debtor in obtaining a discharge so that he or she may return to business with those of the creditors in receiving at least a dividend on their debts. It is not clear to me that the question of re-appointment of the Trustee necessarily has any direct impact on the former whilst it clearly has a potential benefit to the latter. It does not appear to me to be the intention of the legislation to allow a discharged bankrupt to take advantage of undiscovered assets which are in fact and law part of the sequestrated estate. The only issue is whether it is appropriate for a trustee to be given authority to ingather and distribute such assets for the benefit of creditors. I accept

that in the Glasgow Sheriff Court case of *Pattullo, petitioner* Sheriff Deutsch had been provided with a detailed schedule setting out how it was intended that the £2,817 PPI funds available there would be distributed. In that case, however it was not clear that any creditor had a claim or would benefit and Sheriff Deutsch concluded that he should exercise his discretion and not re-appoint the discharged trustee, taking the view that there was no risk of the unfairness referred to by the Sheriff Appeal Court in *Accountant in Bankruptcy, appellant* (at para [9]).

[31] I accept Sheriff Deutsch's reasoning in *Pattullo petitioner*, that the purpose of re-appointment is not to benefit the professionals involved in the sequestration and that where there is discretion that discretion should not be exercised in favour of re-appointment if that is the only benefit. That is not, however, the case here. Even if the view is taken that the repayment of the underwritten Trustee's expenses is a questionable benefit to the Trustee rather than to the creditor, I am satisfied that there is sufficient information to show that even after the payment of the Trustee's costs for ingathering and distributing the PPI payment there seems to be a four figure sum left for distribution to creditors. It may be that the dividend to each creditor is modest but it does not seem to me that that should necessarily preclude re-appointment. It may be for all I'm aware that the banks and the major creditor do not persist in their claims leaving sufficient to pay one non-institutional creditor in full. That, however, is a matter for the creditors and their advisers.

[32] The learned Sheriff in Pattullo suggested that the way forward might be by way of a summary cause action of multiple-poinding. Value of the funds involved here takes the matter outwith the summary cause limits and an Ordinary Cause multiple-poinding seems an unnecessarily complex way to deal with a relatively straightforward matter. It would be a dereliction of duty for the Trustee not to apply for re-appointment having become aware of

these assets. I have some sympathy for the proposition that the Trustee should have made application in earlier course but the fact that he did not do so is only one factor which I have to consider in deciding whether or not to exercise my discretion. I do not consider that the explanation for the delay is so unreasonable as to persuade me against exercising my discretion. From the correspondence which I have seen there was a lengthy period of exchanges between the debtor and the Trustee who obviously sought legal advice on the appropriateness of making this application particularly in light of the original decision taken at this court in the Accountant in Bankruptcy appellant case which was known to be proceeding before the Sheriff Appeal Court. That decision was issued in January 2017 and it could be argued that the Trustee should simply have proceeded with an application shortly thereafter. As it was, discussions still appeared to have been ongoing with the debtor with the view to resolving issues and avoiding unnecessary litigation. Ultimately, when discussions were clearly not going to bear any significant fruit the application was lodged and the proceedings in this court have been dealt with timeously. Interestingly the debtor's initial position is summarised an email in which he writes "... I want you to be re-appointed as I can't proceed unless you are".

[33] Even if the applicant had not returned the cheques to the Bank he would not have been able to intromit with the funds. If I do not make this re-appointment, in the words of the Sheriff Appeal Court (in *Accountant in Bankruptcy, appellant*) a debtor who is stripped of all of his assets at the date of sequestration and also of all property that may come into his possession prior to discharge may obtain an unfair, unforeseen benefit. In the whole circumstances of the case it seems to me that the likely benefit to the creditors points in favour of my granting this application which I will do.

Expenses

[34] Parties were agreed that in the event that the applicant is re-appointed he would not seek any award of expenses against the debtor personally and the expenses of the application should simply be expenses in the sequestration in accordance with crave 4 of the application. It was agreed that in the event that the applicant was not re-appointed, the debtor would not seek an award of expenses against the applicant.

[35] Given my decision I will allow the applicant to lodge an account of expenses for taxation and order that these be expenses in the sequestration.