

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

[2019] SC ABE 21

ABE-SQ60-18

NOTE BY SHERIFF PHILIP MANN

in Appeal by

BLAIR CARNEGIE NIMMO  
AS FORMER TRUSTEE IN THE SEQUESTERED ESTATE OF MRS NAH

against

THE ACCOUNTANT IN BANKRUPTCY  
in which Mr ABH appeared as creditor

**Introduction**

[1] This is an appeal in terms of section 134(1) of the Bankruptcy (Scotland) Act 2016 by the former trustee on the sequestrated estate of a debtor against the determination of the Accountant in Bankruptcy (“AiB”) fixing the trustee’s remuneration for a certain accounting period. The sum determined by AiB was less than that claimed by the trustee.

[2] The debtor and her husband have divorced and the husband is a creditor in respect of sums due to him by the debtor in terms of the divorce decree.

[3] The creditor entered the appeal process and lodged answers arguing that due to fraudulent actions on the part of the trustee, including collusion between him and the debtor, his remuneration should be fixed by the court at nil. The debtor did not enter the process or separately appeal. The creditor had also at the same time, but separately, appealed AiB’s determination, in terms of section 134(1), on precisely the same grounds but his appeal had been dismissed on his own unopposed motion. At no time were the two appeals conjoined.

[4] Earlier in this process the three parties involved agreed to jointly remit the question of the trustee's remuneration to a reporter on the understanding that the reporter would not comment on the creditor's allegations against the trustee as set out in his answers. The content of the reporter's report was to be without prejudice to the creditor's submission that the trustee's remuneration should be fixed at nil but subject to the court's determination of the relevancy of the creditor's answers. The reporter duly reported to the court that in her opinion the trustee's remuneration should be fixed at a level which was between the amount originally claimed by the trustee and that determined by AiB.

[5] At a hearing to determine further procedure the creditor maintained his primary position that the trustee's remuneration should be fixed at nil on the grounds set out in his answers. His stated position was that if the court did not accept his primary position he would accept the reporter's recommendation. A debate was fixed for 21 February 2019 on the trustee's preliminary plea to the relevancy of the creditor's answers. Meanwhile at that same hearing it was agreed that AiB could withdraw from the appeal, having indicated his willingness to accept the reporter's recommendation.

### **The Debate**

[6] This case came before me for the first time when the debate called on 21 February 2018. The trustee was represented by Ms Weir. The creditor was represented by Mr Vallerino. I had had the opportunity of considering in advance the outline submissions lodged by both parties.

[7] At the outset of the debate I raised with parties what I saw to be a preliminary issue, namely that the creditor having appealed AiB's determination and that appeal having been dismissed it might be said that the creditor had no locus to argue, in this appeal, the position

set out in his answers which was the same position adopted by him in his own appeal.

*Prima facie*, it appeared to me that there were only two possible results in this appeal. The first was that the appeal could be upheld, in which case the trustee would be entitled to remuneration at the figure recommended by the reporter. The second was that the appeal could be refused, in which case AiB's determination would prevail. I allowed parties a short adjournment to consider this preliminary issue.

[8] After the adjournment Mr Vallerino maintained, under reference to his outline submissions, that this appeal opened up for the court a wide discretion, similar to that enjoyed by AiB at first instance, to review matters as a whole. The court, he said, had discretion to fix the remuneration at whatever level the court saw fit, including fixing it at nil. In considering the level of remuneration the court could consider the conduct of the trustee as a whole, including conduct which the creditor maintained was fraudulent.

[9] Ms Weir argued, under reference to her outline submissions, that the dismissal of the creditor's appeal put in his way a very significant obstacle which he could not overcome. His only opportunity to challenge AiB's determination on the basis that that determination ought to have been even lower level, or even nil, was to appeal. He had done that and his appeal had been dismissed. He could not now, in this appeal, maintain a position that had been dismissed. In any event, it was not open to the court to take account of allegations of the kind maintained by the creditor.

### **Discussion and Decision**

[10] Neither of the parties was able to cite any authority in which the precise issues arising in this appeal had been discussed or determined. I, myself, have been unable to find any such authority. I have therefore had to approach the matter without such assistance.

[11] It is important to bear in mind that what is under appeal by the trustee is AiB's determination fixing his remuneration at a level lower than that which he had claimed. The purpose of the appeal is, therefore, to decide whether or not that determination should stand or whether a different and higher figure should be allowed to the trustee by way of remuneration. In my opinion it is not open to the court to allow the trustee less than that determined by AiB or, for that matter, more than he had originally claimed. It would have been possible to fix a lower level of remuneration had the creditor's appeal been conjoined with this appeal but that is not what happened. It is the creditor's right, of course, to take part in this appeal but in the absence of an appeal at his own instance he is effectively restricted to aligning himself with one or other of the other parties.

[12] Even if I am wrong in the above it is my opinion that the court is only entitled to take account of actings of a kind such as those by the trustee which it considers to have been unreasonable or those on behalf of the trustee which, for example, it considers to have been undertaken by someone with a seniority and charge out rate which was too high having regard to the work undertaken. In effect, to meet the creditor's point, the court has exercised the same discretion as the AiB through the reporter who adopted exactly the same approach as AiB to the determination of the trustee's remuneration.

[13] It is not open to the court in these proceedings to make a determination that the trustee has been guilty of behaviour which is fraudulent. That would be a very startling proposition. It is a very clear indication that parliament did not countenance such a possibility that it provided by section 134(3) of the Act that the sheriff's determination in this kind of appeal is final. It strikes at the very concept of justice and fairness that anyone could be found to be fraudulent without recourse to an appeal from the sheriff. The repercussions of a finding of fraud against such person could be catastrophic for that person. Had

parliament intended that such a result be possible it would surely have legislated for that in the clearest of terms.

[14] Bearing in mind the above considerations and given that these are summary application proceedings in which I have a very wide discretion as to procedure, I see no merit in deferring a decision on the appeal by holding an enquiry into the creditor's allegations. I am conscious that the creditor has no right of appeal from my decision in this appeal but I am satisfied that I have given him a proper and adequate opportunity to make his case through his outline submissions and the oral submissions on his behalf which I heard at debate.

[15] I have therefore sustained the trustee's preliminary plea to the relevancy of the creditor's answers and have allowed the appeal to the extent of substituting for the amount of remuneration determined by AiB the amount thereof recommended by the reporter. I may say that even if the creditor's appeal had been conjoined with this one rather than having been dismissed I would have taken the same view as to the relevancy of the creditor's answers to the extent (which, as it happens, was the whole extent) to which they sought that the trustee's remuneration should be reduced on account of fraud on his part.

[16] I am comforted by the fact that the allowance of this appeal does not prejudice the creditor. He has other remedies such as an action for damages on the grounds of fraud or breach of trust on the part of the trustee in proceedings under the ordinary cause rules in which the usual rights of appeal will be available to both parties.

[17] On the trustee's unopposed motion I have found the creditor liable in expenses.