SHERIFFDOM OF NORTH STRATHCLYDE AT GREENOCK

Court Reference No B117-16

JUDGMENT

of

SHERIFF DEREK J. HAMILTON

in causa

Promontoria (Henrico) Limited, a company incorporated under the laws of the Republic of Ireland with registered number 554419 and having their registered office at 1 Grant's Row, Lower Mount Street, Dublin 2, Ireland

Pursuer

against

The Firm of Portico Holdings (Scotland), a partnership having a place of business at 13 Slaemuir Avenue, Port Glasgow PA14 6LW

First Defender

Linda Arthur residing at 13 Slaemuir Avenue, Port Glasgow, PA14 6LW as partner and trustee for The Firm of Portico Holdings (Scotland) and as an individual

Second Defender

Alt: Ms Ower, Counsel, instructed by HBJ Gately, Solicitors, Edinburgh

Act: Mr Thomson, Solicitor, Glasgow

Note:

1. This is a Summary Application, in which the Pursuer seeks a declarator that it is entitled to enter into possession of various properties, all as detailed in Crave 1 of the Application, and to exercise in relation to those properties all powers competent to a heritable creditor, including the power of sale.

2. The Second Defender, Linda Arthur, was a partner and trustee of the First Defender, the firm of Portico Holdings (Scotland). The Second Defender, along with her husband (now deceased), had granted a number of securities as partners and trustees of the firm of Portico Holdings (Scotland) in favour of Clydesdale Bank plc ("the Bank"). The Second Defender had also granted two securities in favour of the Bank in her own right.

3. The securities granted by the Defenders were in respect of a number of properties held by the First or Second Defender and were all in favour of the Bank. All of the securities were registered in the Land Register of Scotland over a period 1999 to 2009. All of the securities were then assigned by the Bank to the Pursuer in one Assignation dated 1st and 2nd June 2015, and registered in the Land Register of Scotland on 16 June 2015.

4. Parties had intimated preliminary pleas, and those preliminary pleas called before me on 1st August 2017 for debate. The Defenders' preliminary plea was on a competency point, and was to the effect that the Pursuer had no title to sue, and that the application should be dismissed. The Defenders' position was that the Assignation dated 1st and 2nd June 2015, and registered in the Land Register of Scotland on 16 June 2015, and relied upon by the Pursuer, did not conform to the statutory requirements for an assignation of a standard security as set out by Section 14 of the Conveyancing and Feudal Reform (Scotland) Act 1970, in that the Assignation failed to meet the requirements of Form A of Schedule 4 to the Act.

5. The Pursuer's preliminary pleas attacked the relevancy and specification of the Defenders' averments. The Pursuer's position was that other than the competency point taken by the Defenders, the Defender had not pled a relevant defence to the action.

6. Mr Thomson, for the Defenders, accepted that he had not pled a substantive defence to the application and, indeed, he was not in a position to do so. He conceded that if his preliminary plea was unsuccessful, the Pursuer was entitled to move for decree on the basis that there was no relevant defence pled. He submitted that the court, however, would still require to be satisfied that it was reasonable to grant decree.

7. I was referred by parties to a number of authorities –

R & J Dempster Limited v The Motherwell Bridge and Engineering Company Limited, 1964 SC 308

Sanderson's Trustees v Ambion Scotland Limited 1994 SLT 645

Regina v Soneji and Another (2006) 1 AC 340

Liquidator of Letham Grange Development Co Ltd v Foxworth Investments Limited, 2011 SLT 1152

Newbold and Oths v Coal Authority (2014) WLR 1288

Westfoot Investments Ltd v European Property Holdings Inc 2015 SLT (Sh Ct) 201

Royal Bank of Scotland plc v Carlyle (2015) UKSC 13

The Central Tenders Board and Another (Appellants) v White (trading as White Construction Service) (Respondent) (Montserrat) (2015) UKPC 39

Royal Bank of Scotland plc v Johar Mirza (2017) SAC (Civ) 13

One Savings Bank plc v John Burns and Rhoda Skinner or Burns (2017) SC BAN 20

Note by Lord Bannatyne in Steven Mark Shear v Clipper Holdings II SARL 2017

Rae v Davidson 1954 SC 361

8. The Defenders' attack on the Pursuer' title to sue was based on the terms of section 14 of the 1970 Act, and Form A of, as supplemented by note 2 to, schedule 4 thereof.

9. Section 14 of the 1970 Act is in the following terms:

> *"(1) Any standard security duly registered or recorded may be transferred, in whole or in part, by the creditor by an assignation in conformity with Form A or B of Schedule 4 to this Act, and upon such an assignation being duly registered or recorded, the security, or as the case may be, part thereof, shall be vested in the assignee as effectually as if the security or the part had been granted in his favour".*

Form A is in the following terms:

> *"I, AB (designation), in consideration of £.. hereby assign to CD (designation) a standard security for £ .. (or a maximum sum of £.., to the extent of .. being the amount now due thereunder;* in other cases describe as indicated in Note 2 to this Schedule*) by EF in my favour (or in favour of GH) recorded in the Register for ..... on .....* (adding if necessary, *but only to the extent of £.. of principal); With interest from ..... [To be attested]".*

Note 2 is in the following terms:

> *"In an assignation, discharge or deed of restriction, (1) a standard security of an uncertain amount may be described by specifying shortly the nature of the debt or obligation (e.g. all sums due or to become due) for which the security was granted, adding in the case of an assignation,*

to the extent of £ .. being the amount now due thereunder *and [remainder of note being irrelevant for present purposes]".*

Submissions

10. Mr Thomson acknowledged that the foregoing provisions had to be read along with section 53(1) of the 1970 Act, which is in the following terms:

> *"It shall be sufficient compliance with any provisions of this Act which require any deed, notice, certificate or procedure to be in conformity with a Form or Note, or other requirement of this Act, that the deed, notice, certificate or procedure so conforms as closely as may be, and nothing in this Act shall preclude the inclusion of any additional matter which the person granting the deed or giving or serving the notice or giving the certificate or adopting the procedure may consider relevant".*

11. Mr Thomson referred to the recent decisions of Sheriff Mann in the case of *One Savings Bank plc v Burns* [2017] *SC BAN 20* and the note by Lord Bannatyne in *Shear v Clipper Holdings II SARL 2017*. Mr Thomson urged me to follow the reasoning and decision of Sheriff Mann. Mr Thomson submitted that if an assignation was not in the terms specified in Section 14 and Form A, then the assignation did not empower the assignee to enforce the standard security being assigned. Mr Thomson stated that the 1970 Act had been revised and repealed often since its original inception, and Section 14 had been revised as recently as 8 December 2014. By contrast, Form A had never been amended. He submitted that if Parliament had intended to introduce flexibility in the form of assignation permitted, it would have done so. Mr Thomson accepted that some flexibility was allowed by the Act, but that was restricted by the terms of Section 53

12. Section 53 did not preclude additional information being introduced into an assignation, but if there were missing essentials, the assignation would not have the desired effect.

13. Mr Thomson noted the judgment of Lord Bannatyne in *Shear v Clipper Holdings II* case. He submitted that to ignore the statutory requirement, however, was not interpreting the legislation – it was simply ignoring it. It was essential for a debtor to know what had been assigned and the value of what was assigned. It was impossible from the assignation in favour of the Pursuer for the Defenders to know how much they owed the new debtor, being the Pursuer. Mr Thomson sought to distinguish the case of *Sanderson's Trustees* on the basis that that assignation proceeded upon a tripartite agreement.

14. Miss Ower, Counsel for the Pursuer, urged me to follow the reasoning of Lord Bannatyne in *Shear v Clipper Holdings II*. The terms of the present assignation referred to the standard securities that were being assigned. The terms of those standard securities specifically stated that the bank may assign the securities to any other bank or person. Miss Ower initially stated that if the bank had qualified the *"all sums due"* provision in the security by specifying the present sum outstanding that would have had the effect of converting the security to a fixed sum security. That appears to be the effect that Lord Bannatyne considered in paragraph 10 of his note. Both Miss Ower and Mr Thomson considered the matter further and both were then of the view that specification of the current sum due would not convert the *"all sums security"* into a fixed sum security for the assignee. I was not addressed on this matter with reference to Lord Bannatyne's comments and I was not referred to any authority as to when an *"all sums security"* might, on assignation, be converted to a fixed sum security.

15. Miss Ower asked me to consider the seriousness of any breach of the statutory provision. She aligned herself with Lord Bannatyne's comments in *Shear v Clipper Holdings II*. As in the *Shear v Clipper Holdings II* case, the Defenders were relying on a purely technical issue. They were using a technicality to delay payment even further. The assignation had clearly identified the security subjects, the assignor, the assignee and the debtor. The

assignation was not simply in the standard terms of Form A, but had the additional words *"to the extent of all obligations and liabilities due or to become due by the relevant Chargor to the Buyer"*. It was therefore clear to the Defenders when intimation of the assignation was made on them that the assignee was entitled to recover all liabilities due or to become due. Miss Ower submitted that the assignation was in fact in accordance with Form A as read with Section 53, in that the assignation conformed *"as closely as may be"* to Form A.

16. . It was submitted that even if the assignation was held not to comply with the strict terms of Section 14 and Form A, any omission was not fatal. Reference was made to the case of *Regina v Soneji and Another (2006) 1 AC 340.* I was asked to consider the purpose of the legislation, and whether any breach of the legislation should render the document invalid for the purposes of enforcement. The omission of the exact sums due as at the date of the assignation caused no prejudice to the Defenders. They knew that they were obliged to pay all sums to the Bank and they knew on imitation of the assignation that they were then due to pay all sums to the Pursuer.

Decision

17. Section 14 of the 1970 Act provides that a standard security may be transferred by an assignation in conformity with Form A of Schedule 4 to the Act. It can also be assigned in terms of Form B, but that is not relevant for present purposes. Upon such an assignation being duly registered, the security shall then vest in the assignee as effectively as if the security or the part had been granted in his favour. Form A sets out the style of assignation. Section 53 of the Act allows some leeway and states that it shall be sufficient compliance with any of the provisions of the Act which require any deed, notice, etc, to be in conformity with the form or note, that the deed, notice, etc, so conforms *"as closely as may be"*.

18. Form A is a style of assignation of a fixed sum security. Form A has within its terms the following provisions designed to deal with securities that are not

for a fixed sum; *"in other cases, describe as indicated in Note 2 to this Schedule"*. Note 2 provides that in an assignation of a standard security for an uncertain amount, the standard security, *"may be described by specifying shortly the nature of the debt or obligation (e.g., all sums due or to become due) for which the security was granted, adding in the case of an assignation "to the extent of £.. being the amount now due thereunder"*.

19. In the present case, the assignation covered thirty-four standard securities. Clearly there were substantial borrowings. I was advised that funds had been made available to the Defenders to acquire properties, and the funds were known as a *"hunting fund"*. There had been an ongoing dispute for some years between the Defenders and the Bank as to the exact amount due to the Bank. The nature of the dispute was set out in the pleadings.

20. Notwithstanding the Defenders' pleadings, the Defenders have not disputed as being due to the Pursuer the sums specified in the calling up notices served on them by the Pursuer. I was advised the current amount outstanding is approximately £1.7 million, with a property valuation total of approximately £1.4 million. I asked Mr Thomson what the Defenders' position would have been if the securities had not been assigned and the Bank had served the calling up notices. Would the Defenders have challenged the amounts stated in the calling up notices? Mr Thomson said they would not have done so.

21. Ms Ower's primary argument was that the assignation was in correct form, as it conformed with the terms of Form A, or was as closely as may be to Form A.

22. I considered the situation of a lender in dispute with a borrower over sums due on various securities. If that lender, rather than continue with the dispute, simply wished to offload the securities by assigning them to a third party, what sums should be shown in the assignation if the sum due was not clear? Is a financial institution entitled to offload securities to a third party for consideration, and agree with the third party that the third party would be

entitled to recover whatever sums were eventually ascertained as being due? If such was the case, it might not be possible in such a situation to specify the exact amount due on each security, particularly where multiple securities had been granted to cover multiple and substantial borrowings. In such a case Form A would not seem to be appropriate without some form of wording added. The assignation would therefore have to be in terms *"as close as may be"* to Form A. Looking at the present assignation, it contained all the necessary information required in an assignation, and required by Form A, other than the words, *"to the extent of £.. being the amount now due thereunder"*, which words should be in place for an assignation of an *"all sums due or to become due"* security. The present assignation, however, contains the additional words, *"to the extent of all obligations and liabilities due or to become due by the relevant Chargor to the Buyer"*. Those words may well cover the situation of the lender transferring his interest in a security (for what it might be worth) to a third party. I, of course, do not know of the exact circumstances surrounding the drafting of the assignation, nor do I know of the intention of the parties to the assignation. I appears, however, that some attempt was made to go beyond describing each security simply as *"an all sums due or to become due security"*.

23. I do not accept the parties to the assignation have simply ignored the legislation or Form A as suggested by Mr Thomson. Clearly Form A has been used as a starting point. Where the securities being assigned are not for fixed sums, the securities should be described as indicated in Note 2 to the schedule. Note 2 states that the standard security may be described by specifying shortly the nature of the debt or obligation for which the security was granted, adding in the case of an assignation *"to the extent of £.... being the amount due thereunder."* The present securities are not fixed sum securities. The nature of the debt has been stated. Some attempt has been made to describe to what extent the security is being assigned. Rather than a fixed sum being stated, the parties have agreed that the security is being assigned

"to the extent of all obligations and liabilities due or to become due by the relevant Chargor to the buyer".

24. Mr Thomson submitted that as the assignation did not follow the style of Form A, it did not have the required effect of vesting the security in the Pursuer as effectually as if it had been granted in their favour. Note 2 does provide for some variance on the wording of Form A. If it was the case that to be fully effectual an assignation had to comply with Form A, as extended by Note 2, then there really would have been no need for section 53. Section 53 allows parties to depart from the rigid wording of Form A as extended by Note 2, and allows parties to enter into an assignation that conforms as closely as may be. What does *"as closely as may be"* actually mean? Section 53 is sufficiently imprecise that an assignation which follows the style of Form A, with adaptations to suit the individual characteristics of the securities and of the bargain between the parties to the assignation, may well be considered to be as *"close as may be"* to Form A.

25. In *Onesavings Bank plc*, Sheriff Mann took no issue with Lord Dunpark's approach in *Sanderson's Trustees* to the reading of the words in Section 53(1) as meaning *"as closely as may be appropriate to the circumstances of the case."* Sheriff Mann could find no circumstances in the case before him which made it inappropriate or unnecessary to include the words that were omitted. He accepted that it would have been a very easy matter to include an additional column in the schedule to the assignation to specify the amount outstanding in respect of each standard security as at the date of the assignation.

26. In the present case, I was told there had been an ongoing dispute as to the extent of the outstanding borrowings due by the Defender, and that the dispute had been running for a number of years. That is set out in the pleadings. I was advised that the large number of securities covered many loans for a cumulo substantial amount. It may not have been easy for the Bank to state the amount due under each security. I asked Mr Thomson how

he thought the sums due under each security should be represented in the assignation. Initially he suggested it might be by reference to the initial value of the securities or the properties. He accepted however that the Bank would be able to recover more than that under each security if each particular property value had increased. He suggested that perhaps the total sum due to the Bank over all of the borrowings should be noted against each and every security referred to in the assignation. There may be some difficulty with that where the total sums due are unclear or in dispute, and that effectively takes parties back to where they are, which is a document that seeks to transfer all of one party's loans to another party. I am satisfied that the adaptations to the Form A style that are present in this case, are in the circumstances of these loans wholly understandable and reasonable, and that the assignation to deal with these securities has been prepared in a style to cover the circumstances of the loans and securities, and that the style is as close as may be to Form A, in the circumstances of this case.

27. I am, therefore, satisfied that the assignation complies with the terms of the 1970 Act, and has the effect of vesting the securities in the Pursuer as effectually as if the securities had been granted in the Pursuer's favour.

28. I now turn to Ms Ower's second point, that even if the assignation did not meet the terms of Form A and was not found to be as closely as may be to Form A, I should still find that the assignation had the effect of vesting in the Pursuer the various securities specified therein as effectually as if the securities had been granted in the Pursuer's favour.

29. This second point was not argued before Sheriff Mann. It was however argued before Lord Bannatyne in *Shear v Clipper Holdings II*. Lord Bannatyne considered the various authorities, including *The Central Tenders Board and anr v White* where Lord Toulson said;

"21 Some statutory powers are accompanied by statutory procedural requirements. The courts used to categorise procedural requirements in the exercise

of a statutory jurisdiction as either mandatory or directory. A breach of the former would make the act invalid, but a breach of the latter would not. But over time the distinction was found in practice to be unsatisfactory. In London and Clydeside Estates Ltd v Aberdeen District Council [1980] 1 WLR 182, 189-192, Lord Hailsham of St Marylebone LC said, at p 190, that in many cases:

> *"though language like 'mandatory', 'directory', 'void', 'voidable', 'nullity' and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition."*

22 Over the ensuing 35 years the courts have adopted a more flexible approach, which involves evaluating the seriousness of the breach and the degree of any injustice and public inconvenience which may be caused by invaliding the act. It is also potentially relevant to consider any alternative remedies available to a person legitimately aggrieved by the conduct of the public body."

30. Lord Bannatyne noted that the courts in more recent times had adopted a more flexible attitude to cases where the strict mandatory requirements of legislation had not been complied with.

31. He then firstly considered the question of the seriousness of the breach, namely: the failure to put the words *"to the extent of £ .. being the amount now due thereunder"* into the assignation, and concluded that the omission could not be characterised as serious. He considered in what way was the Pursuer affected by these words not being present (the Pursuer was the party challenging the assignation). On the one hand he noted that what was being relied upon might properly be identified as a purely technical issue. Like the present case the debtor knew to whom the debt had been assigned, and did not dispute that money was owed to the assignee. In that case the amount

owed was not in dispute, whereas of course the amount owed in the present case does appear to be in dispute (although it was not challenged when the calling up notices were served and would not have been if they had been served by the Bank) or the amount owed to them. The Pursuer did not dispute the granting of the standard security. The Pursuer was doing nothing more than relying on a technicality to delay payment. On the other hand he noted that there would be considerable inconvenience and in his view injustice in having the parties to the assignation go through the process of a further assignation and then have to deal with the various other conveyancing issues which would arise therefrom.

32. Lord Bannatyne stated;

> *"Overall, I believe to take the approach urged upon me by the Pursuer would be to frustrate the purposes of the legislation as set out in the Act. Parliament must be assumed to have intended a sensible result and I believe that if failure to comply with this part of the note, led to invalidity, a sensible result would be wholly frustrated."*

33. Interestingly, Lord Bannatyne was addressed on the effect of specifying in an assignation the present sum outstanding, and if doing so would have the effect of converting an *"all sums due"* security to a fixed sum security, with the result that the vesting of the security in the assignee would not be as effectual as if the security had been granted in his favour. He concluded there was some merit in that view. As I said earlier, that was Miss Ower's initial view, but she and Mr Thomson having considered the matter further, they both were then of the view that specification of the current sum due would not convert the *"all sums security"* into a fixed sum security for the assignee. I was not addressed on this matter in any detail, but I note Lord Bannatyne's considered view after hearing submissions.

34. Mr Thomson submitted that the Defenders would be prejudiced if the assignation was to have full effect. He said that it would result in

repossession of over 34 properties. I am satisfied that consequence and any possible prejudice would however come about as a result of the granting of decree, and that the Defenders are not prejudiced by the act of omission n of any words in the assignation.

35. Had I not been satisfied that the assignation conformed to the statutory requirements, I would have been satisfied that any variation of the style or any omission would not have been fatal to enabling the securities to be vested in the Pursuer as effectually as if the securities had been granted in the Pursuer's favour. Clearly, the assignation informs the Defenders that what is being assigned are the various securities, and some attempt has been made within the assignation to specify what is due in terms of the securities. That is, the liabilities currently due or that may become due by the Defenders. The Defenders can be in no doubt as to what their obligations are to the Pursuer. Their obligations to the Pursuer are the same as they were to the Bank.

36. The Defenders have been in dispute with the bank as to the extent of the sums due by them to the Bank. They also complain about the Bank's procedures and of the Bank's actings. In that situation they would have been in no doubt that what eventually is ascertained to be due to the Bank would, as a result of the assignation, be due to the Pursuer. Interestingly, notwithstanding the dispute with the Bank as to the procedures adopted by the Bank, and as to the amount due to the Bank, the Defenders did not challenge the amount stated to be due in terms of the calling up notices. Mr Thomson confirmed that if the calling up notices had been served by the Bank, rather than by the Pursuer, the Defenders would still not have challenged the sums. I am satisfied that even if I had found that the assignation did not conform to the statutory form, there would have been no prejudice whatsoever to the Defenders by the assignation being drawn in its present form. The challenge being put forward by the Defenders is clearly only a technical challenge, and is one that is designed simply to delay repayment of the debt due by them.

37. Before granting decree I require to be satisfied that it is reasonable to do so. Miss Ower submitted that there was no doubt there were sums owing by the Defenders to the Pursuer. The sums contained within the calling up notices totalled £1,709,625.50. Interest was accruing. The value of the properties was approximately £1.4 million. There was a substantial shortfall. The Defenders borrowing facilities expired on 21 January 2011. There had been no payments made by the Defenders since 2011. The properties were part of a buy to let portfolio.

38. Mr Thomson simply intimated that the Defenders had been in dispute with the bank regarding the debt. The Pursuer had not been insisting on payments while that dispute was ongoing. Mr Thomson accepted the properties were part of a buy to let portfolio and that for some considerable time the Defenders had been receiving income from the portfolio, but not meeting their borrowing payments. The Defenders had not set aside any funds from that income to meet the ongoing debt. Notwithstanding the ongoing dispute with the Bank, the Defenders had not challenged the figures contained within the calling up notices. There was a considerable shortfall in the value of the securities to the level of debt. There was no offer of repayment, and the debt was continuing to accrue. In the circumstances I have no hesitation in finding that it is reasonable to grant decree of repossession.

39. Miss Owers moved me to sanction the employment of Junior Counsel. That was not opposed by Mr Thomson. Mr Thomson sought an uplift in his chargeable rate of 50%. He sought an uplift simply on the basis that if the cause was suitable for Junior Counsel on one side then it surely followed that he should receive a significant uplift. I do not consider that that is a good reason. I was not addressed by either party on any of the statutory criteria for sanction for counsel or for seeking an uplift in fees. I do, however, recognise that this was an application of significant value. It may have far reaching consequences for the Pursuer as assignees. There were two recently

competing decisions issued by the courts which had left parties with uncertainty. The question of sanction of employment of counsel is governed by Section 108 of the Courts Reform (Scotland) Act 2014. Having regard to the importance of the point at issue and of the value of the claim, I am satisfied it is reasonable in all the circumstances for junior counsel to be employed on behalf of the Pursuer, and I therefore sanction the employment of junior counsel. With regard to the Defenders' solicitor's motion for an uplift in fees; having considered the factors contained within the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993 as amended, to cover the responsibility undertaken by the Defenders' solicitor in the conduct of the case, I allow an uplift in the Defenders' solicitor's fees of 25%. That increase is to reflect the importance of the cause and the subject matter to the Defenders, and also the value of the cause.

Derek J. Hamilton

Sheriff of North Strathclyde at Greenock

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