

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

[2018] SC EDIN 6

EDI-B692-11

JUDGMENT OF SHERIFF T WELSH QC

Under the Debtors (Scotland) Act 1987

ME III Limited, Marlin House, 16-22 Grafton Road, Worthington, West Sussex, BN11 1QP

Applicant

Against

James and Laura Worthington both residing at 17 Alnwickhill Court, Edinburgh EH16 6YG

Arrestees

and

Paul Carlin c/o 46 Alnwickhill Court, Edinburgh, EH16 6XX

Respondent

**Applicant: Saddiq; Nolans Glasgow  
Alt: Party and Ralph Carlin**

Edinburgh, 15 January 2018

**The Issue**

[1] The respondent is the heritable proprietor of a 2 bedroomed end terrace property, with private garage and garden, at 17 Alnwickhill Court, Edinburgh. He lives and works in the opal mines somewhere in Australia. He moved there in 2011. Before he left he managed to run up a substantial credit card debt on an MBNA credit card. The debt was assigned by MBNA to Hillesden Securities Ltd for enforcement. On 11 November 2011 Hillesden took decree in absence against the respondent for £10,797.25 plus expenses. On 3 October 2012 the respondent wrote to Hillesden and asked them to write-off the debt. He said his

property at 17 Alnwickhill Court was burdened by a mortgage, in negative equity and he could not pay his credit card debt. Hillesden did not oblige. On 27 November 2014 a charge for payment was served on the respondent at 17 Alnwickhill Court. By this time the debt had risen to £13,933.28 with interest and penalty charges. Inquiries were made by Sheriff Officers to ascertain if the property produced a rental income. On 28 October 2015 a rent arrestment schedule was served on the arrestees who were staying at the property. By then the debt had risen to £15,618.92 including interest and penalty charges. Then, on 1 March 2016 the mounting debt was further assigned to the present applicant, for recovery. On 29 March 2017 the applicant inhibited the respondent from intromitting with the property at 17 Alnwickhill Court and caused further inquiries to be made, to ascertain if the property was still tenanted and producing a rental income. It transpired that the arrestees were still living there with their family, they say, rent free. The applicant, however, contends that the arrestees pay rent to the debtor. Further, the applicant now applies to the court to impose a financial penalty on the arrestees under s73H of the Debtors (Scotland) Act 1987 because, it is said, they failed to disclose to the creditor information relating to the nature and value of the sums attached as they are bound to do, within 3 weeks of the arrestment, in terms of s73G of the Act.

### **The Hearing**

[2] At the hearing Ms Saddiq appeared for the Applicant. Mr James Worthington represented the arrestees and Mr Ralph Carlin appeared for his son Paul Carlin. The arrestees were adamant they occupied the property rent free. This position was supported by Mr Ralph Carlin.

*James Worthington*

[3] Ms Saddiq called James Worthington. He is 40 years of age and works as a housing officer. He said he is presently estranged from his wife but had been living at the property for 2 and a half years. He got married 2 years ago. His wife left him 4 weeks ago. His wife is a nurse. Laura Worthington is a family friend of Ralph Carlin. The witness said he does not know Paul Carlin personally. He moved into the property about the time of his marriage and pays council tax and a landscaping charge for the garden. He and his wife have never paid rent. He had no idea if there was a mortgage over the property. He never signed any agreement. Laura did that. He has lived in the property rent free for 2 years. Strange as it may seem he insisted he lives there rent free. The property is his electoral registration address and he gets his voting form there. He has worked with Dunedin Canmore, letting agents, for 10 years. The witness said Sheriff Officers have come to the door looking for Paul Carlin. It was put to him that in October 2015 his wife had admitted rent was paid to Ralph Carlin and she said this to the Sheriff Officers who called at the premises. He said his wife probably said that to get rid of the Sheriff Officers. He said his wife probably panicked. It was put to him that a schedule of arrestment was served on him and his wife on 28 October 2015. He said he had no time for this case. He chose to ignore the forms served. He did nothing about them. He did not seek legal advice. He said he phoned Nolans in Glasgow several times but got nowhere. A defence production which bears to be a tenancy agreement between Laura Worthington and Paul Carlin was put to the witness. He said he knew nothing about it.

*Mark Fishman*

[4] Mark Fishman (40), Sheriff Officer, gave evidence. He said he had worked with Gordon & Noble Messengers-at-Arms and Sheriff Officers for 27 years. He explained that once an arrestment is served the arrestee is now obliged to contact the creditor to confirm that the arrestment is successful. He said it was not uncommon to arrest one month's rent. He spoke to P4 which is a copy print out from Zoopla.co.uk showing the property at 17 Alnwickhill Court advertised for rent on 26 March 2013 for £895 per month. He indicated he visited the property on several occasions to ascertain if Paul Carlin resided there. After inquiry the witness concluded he did not live there. He spoke to a certificate of service in respect of a charge for payment dated 27 November 2014. He said he had spoken to Ralph Carlin, the debtor's father, who denied Paul Carlin owned the property. On 27 November 2014 he called again at the house to make inquiries. There was no one at home. A neighbour told him Paul Carlin was on holiday and his father collected his mail. He said on 28 October 2015 he called again at the property. Laura Worthington answered the door. He asked who owned the property. She said that both she and her husband rented the property from Paul Carlin for £805 per month. She said Paul Carlin lives in Australia. She said she has no contact with him directly and deals only with his father Ralph Carlin. The witness served a rent arrestment schedule with debt advice and information package on Laura Worthington personally and separately on James Worthington by leaving his copy with his wife. She said she had paid the rent that morning. She did not say she was living there with her family rent free. The witness also gave Laura Worthington advice about this matter by phone when she called the office later. The witness said he served a schedule of inhibition and debt advice and information package on the debtor on 29 March 2017 by leaving it in the hands of the Sheriff Clerk. On the same day he again visited the property and spoke to Laura

Worthington who confirmed she and her husband rented from Paul Carlin, but she only deals with his father, Ralph Carlin.

*Ralph Carlin*

[5] Ralph Carlin (62) gave evidence. He is semi-retired. He said Paul Carlin is his eldest son who owns the property at 17 Alnwickhill Court. He believed the purchase was made in 2000. His son lived there for a few years and then went to live in Australia. He works in the opal mines in Australia. He came back in 2015 but has not been back since. The witness said he has no idea if the property is mortgaged. It was let out at one time for 6 months. It was rented at £825. He met the tenants once. They left after a year. The witness said Laura Worthington is a family friend. She married James in November 2015. Paul Carlin was home for the wedding. He told the witness to let Laura and her family stay in the house as a gift. The witness said Paul Carlin was doing well financially, at that time. He did not need the money. He was earning between 4 and 5 thousand dollars a month. The arrangement was that Laura could stay in the house rent free provided she paid the council tax. The witness said his son has properties he rents out, in Pilrig Heights and Robert Burns Drive, Edinburgh. The witness said his son left because he was in a financial mess. He had many debts. The credit card debt was originally £8000. Now it is over £15,000. The witness said he tried to clear the debt. He offered the creditors £5000 in settlement but this was not accepted. He said his son is now in a better financial position in Australia. The witness spoke to a hand-written document, dated 15 August 2015, which purports to be a hand written contract between Paul Carlin and Laura Worthington (Kilgallin) stating she can live rent free in the property providing she pays the council tax and utility bills due.

## **Submissions**

[6] Ms Saddiq invited me to accept the evidence of Mark Fishman that the arrestees were renting the property from the debtor for £805 per month in October 2015. I was invited to conclude that the arrestment served on 28 October 2015 was effective and that the arrestees were then under a statutory obligation to disclose the nature and value of the sums arrested which they failed to do. Ms Saddiq said James Worthington gave evidence that he had deliberately ignored the documents served on him. Accordingly, I was invited to impose a financial penalty in the sum of £15,618.92 which is the sum due by the debtor to the creditor or alternatively the lower sum of £805 which was the rent paid. Mr Worthington invited me to dismiss the case because the debt had nothing to do with him.

## **Decision**

[7] Part 10 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 inserted a new Part 3A into the Debtors (Scotland) Act 1987 which now regulates the procedure to be followed where a creditor chooses to enforce a court decree against a debtor by arrestment of funds in the hands of a third party. Section 73G of the Act imposes a legal obligation on arrestees to disclose to an arresting creditor the existence of and the value of assets attached by an arrestment. Where nothing is arrested, there is no need for the arrestee to provide a "nil" return. The disclosure has to be submitted in the prescribed form within 3 weeks of the date on which the schedule of arrestment is served on the arrestee. A copy of the disclosure must be sent to the debtor and to any person known to the arrestee who owns or claims to own (in common or wholly) the attached property, or to whom attached funds are, or are claimed to be, due (in common or wholly). Section 73H regulates failure to disclose information. Subsection (1) provides that, where an arrestee fails to make a disclosure, the

sheriff may, on the application of the creditor, order the arrestee to pay the creditor the lesser of the sum due by the debtor to the creditor (on 28 October 2015 that was £15,618.92) or the amount which represents the minimum protected balance in bank accounts which are subject to an arrestment (on 28 October 2015 that sum was £460.06 in terms of section 73F(4) of the Act).

[8] Before I could impose a penalty in the present case I would have to be satisfied that rent was being paid by the arrestees to the debtor *via* Ralph Carlin and that funds were arrested in the hands of the arrestees on 28 October 2015. In that regard I prefer the evidence of Mark Fishman that Laura Worthington admitted that she and her husband were paying rent to the debtor. I reject the suggestion that the debtor allowed the arrestees to reside in his property rent free as inherently unlikely, especially given the debts he owed according to his father's evidence. I think it more likely the property was in fact rented out and that the arrestees were obliged to pay rent. I disbelieved both James Worthington and Ralph Carlin and considered they were lying in this regard both from the way they came over as they gave their evidence and because of the improbability of their story which I consider made up to avoid any financial liability attaching to James and Laura Worthington, arising from Paul Carlin's failure to pay his credit card debt. However, while I do consider the Worthingtons were renting the property I am not persuaded the applicant has established that when the arrestment was served on 28 October 2015 they were then under an obligation to pay that month's rent. The law is stated in *Riley v Ellis* 1910 SC 934 at 941:

"The only general rule that I can deduce is that arrestment is only possible where there is a present liability to account. By present, I mean at the date of the arrestment. I deduce this from a consideration of the things which admittedly are, and the things which admittedly are not liable to arrestment..... a pure future debt is not arrestable, because there is no present obligation either to pay or to account."

Mark Fishman stated Laura Worthington said the rent had been paid that morning. If that is so the obligation to account for the October rent had been satisfied and accordingly nothing was caught by the arrestment. As Ms Saddiq acknowledged the creditor would have to arrest again to catch the November rent before it was paid for the arrestment to be effective. I did consider whether Laura Worthington may have been lying about paying the rent that morning but she did not give evidence and I did not have an opportunity to assess her as a witness, accordingly, on balance I could not exclude the real possibility that she told Mark Fishman the truth and therefore the present obligation to pay the October rent had been satisfied and there was accordingly nothing to arrest. For these reasons I consider the applicant has failed to establish the arrestees were under a duty to disclose information and liable in the circumstances of this case to financial penalty.