



SHERIFF APPEAL COURT

**[2017] SAC (Civ) 28
PAI-SQ187-09**

Sheriff Principal M W Lewis
Sheriff P J Braid
Sheriff A MacFadyen

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M W LEWIS

in appeal by

GURBAX PUREWALL

Applicant and Appellant

against

the decision of the sheriff at Paisley dated 17 June 2016 in respect of an application under section 49 of the Bankruptcy (Scotland) Act 1985

**Applicant and Appellant: Balvinder Purewall, lay representative
Respondent: Manson, Bannatyne Kirkwood France & Co**

4 September 2017

Background

[1] Mrs Gurbax Purewall (“Mrs Purewall”) was sequestered on 09 November 2009. The circumstances leading to her sequestration flow from the death of her late husband, Jaipal Singh Purewall (“Jaipal Purewall”), and the subsequent breakdown in a business relationship with members of their extended family.

[2] Mr and Mrs Purewall have three daughters: Balvinder Purewall (“Ms Balvinder”), Ravinder Purewall or Gill, and Kamaljit Purewall (“Ms Kam”). The daughters have been

supportive of their mother's efforts to retain and operate the family business, providing much needed finance as well as emotional and physical support. The demise of the business was not of their making.

[3] By interlocutor of 18 January 2010 Mrs Maureen Elizabeth Leslie was appointed as trustee on the sequestrated estate of Mrs Purewall. The date of sequestration was 9 November 2009. The primary function of the trustee is to recover, manage and realise Mrs Purewall's estate and to distribute the funds so realised among the creditors (section 3(1)(a) and (b) of the Bankruptcy (Scotland) Act 1985 ("the 1985 Act"). Such estate as was identified was eventually ingathered but the process of distribution has been far from straightforward and astonishingly is still not complete. The approach of the trustee to adjudicating on the claims, particularly those of some of the family members, has led to a proliferation of applications and appeals to the sheriff in Paisley under the 1985 Act.

The Appeal to the Sheriff

[4] The most recent appeal to the sheriff was under section 49 of the 1985 Act. This section makes provision for the trustee in sequestration to adjudicate on claims by creditors to be entitled to vote at creditors' meetings and to rank for a dividend out of the estate of the debtor. Subsection (6) provides that:

"(6) ... any creditor may, if dissatisfied with the acceptance or rejection of any claim (or, in relation to such acceptance or rejection, with a decision in respect of any matter requiring to be specified under subsection (5)(a) or (b) above) appeal therefrom to the sheriff and the permanent trustee shall record the sheriff's decision in the sederunt book."

Ms Kam maintains that she submitted claims to the trustee in her own right and as executrix on the estate of her late father. Her claim, as executrix, for the sum of £288,563 due in

respect of a loan made by the executry to Mrs Purewall, was rejected by the trustee as time barred. Ms Kam appealed that decision to the sheriff.

[5] The sheriff concluded that the claim, having been sent to the trustee on 19 March 2015, had been submitted outwith the statutory time limits as set out in section 48 of the 1985 Act (paragraph [48] of his note). Section 48 provides:

- “(1) Subject to subsection (2) below and subsections (8) and (9) of section 52 of this Act, a creditor in order to obtain an adjudication as to his entitlement –
- (a) to vote at a meeting of creditors other than the statutory meeting; or
 - (b) to a dividend out of the debtor’s estate in respect of any accounting period, shall submit a claim in accordance with this section to the... trustee respectively –
 - (i) at or before the meeting; or
 - (ii) not later than 8 weeks before the end of the accounting period.”

This was not, however, the reason for refusing the appeal. His decision was quite simply that the claim had prescribed.

[6] The sheriff decided that the claim related to an obligation to which section 6 of the Prescription and Limitation (Scotland) Act 1973 (“the 1973 Act”) applies. He discounted the application of Schedule 3 (imprescriptible rights or obligations), Schedule 1, paragraph 2(d) (obligations under a contract of partnership), and section 7 (20 year prescriptive period) and gave the reasons for his decision about all of that in paragraphs [64]-[67] of his Note.

Having determined that the five year prescriptive period applied to the obligation, he then considered, without deciding which of them was correct, various scenarios to identify alternative dates from which prescription could be said to operate:

- The date of death of Jaipal Purewall (11 March 2002);

- the date upon which the debtor took over the running of the business as a sole trader (01 December 2003);
- as the executry was to be paid the share of the late Jaipal Purewall in six equal instalments, the date of the last payment due on March 2005;
- the date of sequestration (09 November 2009), being the date upon which the executry loan fell due.

In each example, he concluded that the claim had, or would have, prescribed (paragraphs [73]-[77] of his note) because in each case, more than five years had elapsed by the time of the claim submitted on 19 March 2015. Ms Kam has appealed that decision to this court.

The Current Appeal

[7] Ms Balvinder presented the appeal as lay representative for Kamaljit Purewall. She invited us to allow the appeal and to remit the matter back to the sheriff. She adopted her Note of Argument and in the opening sentences revealed what she perceives to be the issue at the heart of this appeal – that the sheriff erred in law in refusing the appellant’s appeal against the respondent’s rejection of the claim for £288,563.00 plus contractual interest made by the appeal *qua* executrix of the late Jaipal Purewall against the sequestrated estate of Gurbax Purewall.

[8] In support of her position, Ms Balvinder submitted that the sheriff was wrong to say that the prescriptive period was limited to five years – rather the claim was imprescriptible. That bald proposition led to an examination of the nature of the obligation. The sheriff recorded in paragraph [4] of his Note that “it was agreed by the parties that the claim before the court was restricted to a claim only by Kamaljit Purewall as executrix of the late Jaipal Singh Purewall ..., the claim being for the loan account of £288,563 plus contractual interest”.

(This came to be known during the hearing as the loan account claim). Ms Balvinder initially contended that the sheriff was wrong to so classify the claim. She vacillated between describing the claim as (1) a loan to Mrs Purewall made by her and her sisters of money due to them by the executry which is repayable on, among other things, the bankruptcy of Mrs Purewall (Agreement dated 01 September 2003 - Appendix p258) and (2) a sum due to the estate of her late father representing his share of the partnership business at date of death/dissolution of the partnership. By the end of the hearing, we were no clearer as to her position.

[9] The date on which prescription began to run also caused confusion but as the hearing progressed, clarity descended. Ms Balvinder had lodged a "LIST OF DATES" (No 9 of appeal process). She undertook, at our invitation, a detailed analysis of the time line, cross-referencing the dates with many documents in the Appendix. It took some time to elicit the information and material but it was a useful and informative exercise. We set out that time line in the following paragraphs and include, when appropriate, our views on some of the material. We are grateful to Counsel for the respondent for his co-operation in agreeing as much as he could regarding the family dynamic, the early part of the time line, as well as the background circumstances which led to this unhappy situation.

The Time Line

[10] By virtue of a partnership agreement registered on 14 January 1991 Jaipal Purewall, his wife and four members of their extended family (Surinder Kaur Sanghera, Belhar Singh Sanghera, Kirpal Haur Purewall and Hardev Purewall) carried on business as the Himalaya Tandoori with effect from 1 December 1990. (Appendix p278-288).

[11] Jaipal Purewall died on 11 March 2002. The partnership was dissolved but by virtue of Clause Eighth of the agreement a new partnership was immediately formed by the five surviving partners. That partnership continued to carry on the business until 30 November 2003 at which time the partnership was dissolved at the behest of Surinder Kaur Sanghera, Belhar Singh Sanghera, Kirpal Haur Purewall and Hardev Purewall.

[12] Mrs Purewall took over ownership of the restaurant with effect from on or about 1 December 2003. She operated the restaurant as a sole trader. A down-turn in business combined with a series of disputes with the four former partners resulting in litigation in the Court of Session led to her sequestration.

[13] Jaipal Purewall left a will in which he appointed his wife and his daughter, Kamaljit, as executors and he left his estate including his interest in the Himalaya Tandoori to his three daughters equally (Appendix p269-270). By agreement dated 1 September 2003 (Appendix 258) the daughters agreed to permit Mrs Purewall to utilise their share of their late father's estate. We were told that this was to facilitate the continuance of the business. Confirmation was granted on 15 September 2004 (Appendix p276). The Inventory is heavily redacted but reveals that the value of his share in the Himalaya Tandoori was £244,739.27 (Appendix p271-275). Jaipal Purewall's interest in the family home passed to his wife by virtue of a survivorship destination.

[14] On 1 March 2009 Balvinder, Ravinder and Kamaljit entered into a loan agreement with their mother to make a loan to her of £404,000 to facilitate the running of the business (Appendix p230). That family arrangement did not stave off the financial downfall of Mrs Purewall. She was sequestered on 9 November 2009.

[15] By circular letter date 24 March 2010 the trustee invited claims from all known creditors (Appendix p221-226). She did not invite claims from the daughters.

[16] Disappointed at not being included in the circulation, on 5 November 2010 Ms Kam wrote to the trustee setting out her understanding of the extent of the heritable properties owned by the partnership and by her late father and intimating a claim “as an executor” (Appendix p227-228). On 8 November, the three daughters wrote to the trustee intimating claims in respect of the loan of £404,000 made to their mother and unpaid wages (Appendix p229).

[17] On 17 November 2010 (Appendix p233-238) the trustee wrote to each of the daughters in identical terms regarding the letters of 8 November. These letters were scrutinised at length during the appeal hearing and in particular the following passage:

“I do not disagree that the estate of the late Jaipal Purewall has an interest in the sequestration of the estate of Gurbax Purewall, but this interest relates specifically to ranking as an ordinary creditor in the sequestration of Gurbax Purewall. With this in mind, I would invite you to submit your claim in the prescribed form (copy enclosed) to me at your earliest convenience, along with appropriate supporting documentation.”

[18] On 1 December 2010 a claim form 4 was submitted by the daughters to the trustee (Appendix p239-240) in respect of the loan and unpaid wages. The trustee adjudicated the claims, and on 14 February 2012 rejected the claim for unpaid wages and agreed only in part the claim in respect of the loan. This led to an appeal by the daughters to the sheriff under section 49 of the 1985 Act. Their appeal in so far as relating to the loan agreement was eventually successful, after proof. The sheriff’s decision was issued on 20 March 2015 (Appendix p74-131).

[19] On 6 September 2012 Ms Balvinder intimated a claim form 4 to the trustee on behalf of herself and her sisters “as beneficiaries” in the estate of their late father (Appendix p256-257). She attempted to explain to us the terminology used as in error and that in reality this was a claim by the executry. Her claim was not accepted by the trustee.

[20] In the course of the proceedings mentioned in paragraph [18] above, the case went to debate before Sheriff Livingstone on matters of relevancy. Ms Kam attempted to come into the action in her capacity as executrix seeking to introduce a claim based on the share due to the executry of the value of Jaipal Purewall's interest in the partnership. Concessions were made by the solicitor then representing the family members that the claim in that form and on that basis had prescribed but he sought to persuade the sheriff that the claim by the executry was in fact based on an agreement of loan between the executors and Mrs Purewall in terms of which the executors had agreed to lend their share in the business to Mrs Purewall. The sheriff concluded that Ms Kam could not bring herself into the action in a different capacity by way of adjustment; that to allow her in at all in that capacity would be tantamount to allowing an appeal under section 49 late; and no claim had been submitted to the trustee by Ms Kam in her capacity as executrix in respect of a loan to the executry. The sheriff's decision was issued on 22 August 2013 (Appendix p203-213).

[21] On 31 October 2013 Alan Munro, the solicitor representing the daughters, sent an email to David Adams, the solicitor representing the trustee, submitting *inter alia* a "supplementary form 4". In that email he wrote "I remain of the view that the executry of the late Mr Purewall still has a valid claim in the sequestration of Gurbax Purewall, albeit that the original claim form submitted in that regard (*sic*) were not capable of being accepted by the trustee." Ms Kam is designed as "executrix" and her claim is for £288,563 plus interest, predicated on a "loan by the estate of the late Jaipal Purewall to Gurbax Purewall" evidenced by the loan agreement, will, confirmation and arbitrated accounts of the business (production 11 in the 6th inventory for pursuer). There was some discussion about whether the claim form had been signed and if so by whom. Ms Kam addressed us herself on this

matter advising that she had signed the form and took us to a document in the bundle which on the face of it is a claim form signed by Ms Kam and dated 31 October 2013.

[22] The response to Mr Munro is an email dated 13 December 2013. Counsel initially submitted that the email is a rejection of the supplementary form 4. Even a cursory reading of the email reveals its inadequacy in that respect. It contains what purports to be a copy of the text of an earlier email (undated), which was not produced to this court. That text commences – “At this point in time we have not received formal intimation of their revised estate claim. If it were to be received the trustee would reject it as it is completely outwith the statutory period...”. We asked Counsel to supply us with a copy of the earlier email and he was not in a position to do so – he could not even tell us when the earlier email had been sent. He did not manage to quell our disquiet about the provenance far less the existence of the earlier email.

[23] The trustee and her advisors held fast to the position that the supplementary claim form had not been submitted, leading Ms Kam to submit a copy of the supplementary form 4 on 5 August 2014 (See faxed form 4 lodged with the Appendix to the respondent’s note of argument). For reasons which have yet to be properly explained, the trustee did not adjudicate on this form. Ms Kam lodged a further copy of the supplementary claim form on 19 March 2015 (*ibid*). She advised us that each of these claim forms is identical in its terms (other than the date) to that which had been submitted on 31 October 2013.

[24] On 9 November 2015 the trustee rejected the executry claim and sent a letter in identical terms to each of the daughters (Appendix 259-262). The amended adjudication lists the daughters as “beneficiaries” and provides that the claim is “rejected due to being time barred.” (Appendix p263-264). Counsel accepted that the trustee did not state in terms whether she maintained that the claim had been lodged outwith the statutory accounting

period or whether it had prescribed and he did not have instructions on that issue. He could give no explanation for the designation of the daughters as “beneficiaries”.

Respondent’s Submission

[25] Rather than adopting the terms of his note of argument and inviting us to refuse the appeal, Counsel for the respondent (correctly in our view) adopted a more neutral and nuanced stance. Although generally supportive of the sheriff’s decision, he conceded that certain material factors had been omitted from the sheriff’s reasoning, each of which might have led to a different outcome. He recognised that as matters of fact were and remain in dispute regarding the nature of the obligation, the date of the claim and interruption of prescription, the most prudent approach in the interests of justice would be to recall the sheriff’s interlocutor and schedule a proof restricted to the foregoing issues.

Decision

[26] The sheriff has had many dealings with the Purewall family in their long running disputes with the trustee. He has determined the proliferation of applications and appeals with scrupulous fairness. Without doubt he has, over the years, accumulated a significant level of understanding of the family relationship, the operation of the business, the reasons for the sequestration, the extent of the estate of the bankrupt, the actings of the trustee in attempting to ingather the estate, in inviting claims and adjudicating upon them and in making distributions.

[27] The instant decision was taken after debate, in the context of confused pleadings, a plethora of documents and muddled submissions. Such was the level of uncertainty over

the date of the claim that the sheriff convened a subsequent brief hearing on 10 June 2016.

Regrettably that hearing did not provide sufficient clarity to satisfactorily resolve that issue.

[28] We do not criticise the sheriff in relation to the general conclusions which he reached on the matter of the prescription period and his application of the five year period to the various alternative scenarios identified by him because he had to proceed on the information presented to him. Indeed we agree with much of his decision but nonetheless are inevitably drawn to the conclusion that the sheriff's decision is susceptible to challenge through the sin of omission. We are entirely comfortable with the sheriff's conclusion that the five year prescriptive period as set out in section 6 of the 1973 Act is applicable. The obligation, regardless of whether it is repayment of a loan arising from the September agreement or of sums due to the estate of the late Jaipal Purewall in respect of his interest in the partnership as at the date of his death from the sequestrated estate of his wife, is one falling squarely within Schedule 1, paragraph 1(g). The exclusion in Schedule 1, paragraph 2 of the 1973 Act does not apply. Paragraph 2 lists obligations which are excluded from the 5 year period, and includes (d) "obligations under a contract of partnership or of agency, not being an obligation remaining, or becoming prestable on or after the termination of the relationship between the parties under contract". The partnership dissolved on 01 December 2003, and accordingly as the sheriff correctly concluded paragraph 2(d) has no application. Mrs Purewall, with effect from that date, was a sole trader. We could find no assistance in the note of argument for the appellant or in any of her paperwork to support her contention that the claim is imprescriptible.

[29] The date of the claim remains troublesome as does the matter of interruption of the prescriptive period. It seems to us that the manner of the presentation of the appeal to the sheriff, faced with an appellant in a state of confusion as to the nature of the obligation and

the date of the claim, led him to hypothesise about the foregoing and omit to consider the matter of interruption. Further, by focussing on the date of the most recent claim form, the sheriff may have overlooked that it was the appellant's position that an earlier claim form had been submitted. If correct, such a form may have had the effect of interrupting prescription on at least one or more of the various factual scenarios identified by the sheriff.

[30] Further, based on the submissions made to us and the concessions made by Counsel, we are driven to conclude that the correspondence of November 2010 was not given any consideration by the sheriff in the context of identifying one as being a claim and the other as being a relevant acknowledgment. Although Counsel suggested that the claim (as set out in the letter of 5 November 2010) was in incorrect form and completely lacking in detail, he accepted the general proposition that an obligation may exist even although the amount has yet to be determined (see for example *Purewall v Purewall* 2010 SLT 120, para 30, and the Lord Ordinary's opinion in that case). He also submitted that this particular issue was not before the sheriff and should not form part of our reasoning. With respect, in her pleadings (Articles 12 and 13 of Condescence) the appellant avers that a claim was submitted on 5 November 2010 by the executry. Her averments are met with an extraordinary passage – "The Respondent reserves her position as to the content of any correspondence pending a review of her file." We do not know whether and if so when the trustee reviewed her file. Furthermore the appellant raised these matters in her submissions to the sheriff and yet this correspondence does not feature in the sheriff's reasoning.

[31] What we do have are the trustee's letters of 17 November (Appendix p233-238) (see para 17 above). Counsel accepted that read in a particular context, the paragraph examined may contain an acknowledgement of claim in terms of section 10(1)(b) of the 1973 Act. He tempered that concession by reminding us that he had only recently been instructed and did

not know the circumstances in which the letter had been written nor what the trustee intended to convey in that paragraph.

[32] In paragraph [65] of his decision the sheriff records: “The loan account claim is an obligation to which section 6 of the 1973 Act applies. There had been no relevant acknowledgement.” The sheriff does not state which claim he is referring to, but on any view it cannot be the claim form of 31 October 2013, since the sheriff makes clear at paragraph [3] of his decision that the appeal was conducted on the basis of the trustee’s denial that that claim had been received. Further, on any view, the sheriff has, with respect, not considered whether the terms of the letters of 17 November 2010 might constitute a relevant acknowledgment.

[33] With some hesitation, it follows, in view of the omissions we have identified and the concessions made, that the case should be remitted back to the sheriff to hear evidence, if required, and consider the following:

“Did the trustee err in her adjudication of 9 November 2015 in determining that the claim had prescribed by (1) failing to take account of (a) the terms of the letter of 5 November 2010 and the trustee’s response of 10 November 2010, (b) the terms of the supplementary claim form 4 dated 31 October 2013, and (2) in failing to treat the claim form of 19 March 2015 as a resubmission of the supplementary claim form 4 dated 31 October 2013?”

[34] We were addressed on the matter of expenses and have decided in the interests of fairness to all of the parties that there should be no expenses due to or by either party.

[35] Accordingly we allow the appeal, recall the sheriff’s interlocutor and remit the case back to him to hear evidence, if so advised, and thereafter to proceed as accords.