

SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2020] SC GLA 31

GLW-L72-20

JUDGMENT OF SHERIFF JOHN N McCORMICK

in the cause

F F

Pursuer

against

A F M S Ltd

Defender

GLASGOW, 9 July 2020.

The sheriff, having considered the petition and the inventory of productions, dismisses the petition as incompetent; finds no expenses due to or by either party.

**NOTE:**

**Preamble**

[1] This undefended but incompetent petition would not ordinarily justify a note.

However it raises concerning wider issues and exemplifies the need for vigilance.

[2] I decided the case solely on the basis of competency. The action is undefended. The pursuer is represented by a solicitor who, it transpires, does not possess a practicing certificate. There has been no hearing. I have received his representations by e-mail via my

clerk. As such, I raise but reach no concluded view on other collateral (some might argue central) matters within this civil forum.

### **Background**

[3] The pursuer consulted a Mr M. On behalf of the pursuer Mr M signed and served a statutory demand for payment on A F M S (not A F M S Ltd) on 30 April 2020 claiming the sum of £10,572.57.

[4] On signing the statutory demand on behalf of the creditor Mr M designed himself as “solicitor”.

[5] On 8 June 2020 Mr M signed and lodged electronically an initial writ craving the liquidation of A F M S Ltd.

[6] On 9 June 2020 warrant was granted appointing a copy of the petition and the deliverance to be advertised on the Scottish Courts and Tribunals website in accordance with the Coronavirus (Scotland) Act 2020 and like copy to be served on A F M S Ltd along with the usual order for advertisement in the Edinburgh Gazette and the Metro Newspaper all of which was done.

[7] On 26 June 2020 the sheriff clerk was contacted asking for the appointment of an interim liquidator to A F M S Ltd as a matter of urgency. The petition and inventory of productions were then forwarded to me to consider.

[8] When reviewing the papers it became apparent that the statutory demand for payment had not been served on the defender company. The statutory demand had been served on A (with one “l” and a double “r”) F M S (a firm) not on the limited company. The terms of the Insolvency Act 1986, section 123(1)(a) had not been complied with.

[9] I became concerned that all was not as it appeared. Mr M's name was not on the published list of practicing solicitors.

[10] Mr M was asked if he was a solicitor or a commercial attorney or, if not, on what basis he had signed the initial writ.

[11] Mr M replied that he had been a practicing solicitor some 19 years ago but that his name remains on the roll of solicitors as a non-practicing member. He does not have a practicing certificate. He is, he wrote, a commercial attorney.

[12] Meantime the court had been provided with an up to date list of commercial attorneys in Scotland. There are five. Mr M's name does not appear on that list. Further specific enquiry was made as to whether Mr M is, or ever has been, a commercial attorney. The response was in the negative.

[13] In short, without a practicing certificate Mr M had (a) signed the flawed statutory demand as a solicitor; (b) appended his qualifications ("LLB. Dip LP, NP") to a letter dated 21 May 2020 to the defender and to e-mails to the court - a point to which I will return and (c) prepared, signed and presented a writ to the court. Thereafter, having obtained the court's authority, he (d) proceeded to serve and advertise notice of the petition in the Edinburgh Gazette and the Metro newspaper and (e) sought the appointment of an interim liquidator.

[14] On Wednesday 1 July 2020, Mr M emailed to advise that he was unaware that without a practicing certificate he was not entitled to sign an initial writ on behalf of a third party. In addition, he had misunderstood the term "commercial attorney". He tendered his apologies for his apparent misunderstandings.

[15] However, on Friday 3 July my clerk received a further e-mail from Mr M which read:

“Further to our conversation on Wednesday I can confirm that I contacted [a named solicitor]. He has advised me that I was correct in that the petition does not require to be signed by a practicing solicitor.”

[16] If indeed Mr M received such advice that would be an interesting argument to hear.

He may yet have that opportunity.

### **Statutory framework**

[17] I narrate the terms of Section 32 of the Solicitors (Scotland) Act 1980 in full for ease of reference:

#### **“Offence for unqualified persons to prepare certain documents.**

- (1) Subject to the provisions of this section [and regulations 6, 11, 12 and 13 of the European Communities (Lawyer’s Practice) (Scotland) Regulations 2000], any unqualified person (including a body corporate) who draws or prepares—
  - (a) any writ relating to heritable or moveable estate; or
  - (b) any writ relating to any action or proceedings in any court; or
  - (c) any papers on which to found or oppose an application for a grant of confirmation in favour of executors, shall be guilty of an offence.
  
- (2) Subsection (1) shall not apply—
  - (a) to an unqualified person if he proves that he drew or prepared the writ or papers in question without receiving, or without expecting to receive, either directly or indirectly, any fee, gain or reward (other than by way of remuneration paid under a contract of employment); or
  - (b) to an advocate; or
  - (c) to any public officer drawing or preparing writs in the course of his duty; or
  - (d) to any person employed merely to engross any writ or
  - (e) an incorporated practice; or
  - (ea) a licensed legal services provider; or
  - (f) to a member of a body which has made a successful application under section 25 of the 1990 Act but only to the extent to which the member is exercising rights acquired by virtue of section 27 of that Act.
  
- (2A) Subsection (1)(a) shall not apply to -
  - (a) a ‘conveyancing practitioner’ providing conveyancing services within the meaning of section 23 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

- (b) an approved lay representative within the meaning of section 5F of the Heritable Securities (Scotland) Act 1894 or section 24E of the Conveyancing and Feudal Reform (Scotland) Act 1970 (lay representation in proceedings by creditors for repossession of residential property) while acting in pursuance of the section in question.
- (2B) Subsection (1)(b) shall not apply to a person who is, by virtue of an act of sederunt made under section 32 (power of Court of Session to regulate procedure) of the Sheriff Courts (Scotland) Act 1971, permitted to represent —
- (a) a party to a summary cause;
  - (b) a debtor or hirer in proceedings for—
    - (i) a time order under section 129 of the Consumer Credit Act 1974 (time orders); or
    - (ii) variation or revocation, under section 130(6) of that Act (variation and revocation of time orders), of a time order made under section 129].
- (2C) Subsection (1)(c) shall not apply to an executry practitioner or a recognised financial institution providing executry services within the meaning of section 23 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.]
- (3) In this section ‘writ’ does not include—
- (a) a will or other testamentary writing;
  - (b) a document *in re mercatoria*, missive or mandate;
  - (c) a letter or power of attorney;
  - (d) a transfer of stock containing no trust or limitation thereof.
- (4) For the purposes of this section, ‘unqualified person’ includes a registered foreign lawyer.”

[18] For the sake of completeness, section 2(2) of the Solicitors (Scotland) Act 1980 permits the Council of the Law Society of Scotland to admit as a member of the Society any solicitor not having in force a practicing certificate subject to certain terms and conditions - the position here.

[19] However, Section 4(c) of the 1980 Act provides that no person shall be qualified to act as a solicitor unless he has in force a practicing certificate. In addition, in terms of Section 23 a person who practices as a solicitor or holds himself out as a solicitor shall be guilty of an offence unless he can prove that he acted without receiving or without expectation of any fee, gain or reward, directly or indirectly.

[20] Commercial attorneys derive their rights from the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. As Mr M concedes that he is not a commercial attorney, I need not deal with this further.

[21] Mr M lists his qualifications which include that he is a Notary Public (see para [13]). Since 2007 only a solicitor with a practicing certificate can act as a notary public (Legal Profession and Legal Aid (Scotland) Act 2007, Section 62).

### **Discussion**

[22] The statutory demand was not paid or disputed. Perhaps the recipient decided to ignore its terms as it was wrongly addressed. In that scenario a prudent debtor company, on becoming aware of the demand, might lodge a caveat in the event that the creditor were subsequently to present a winding-up petition founding on the flawed statutory demand (the situation here). However, no caveat was lodged.

[23] Furthermore, the defender did not lodge answers to the petition. It may be that its directors are content to have a liquidator appointed. It is not for me to speculate. At all odds the statutory demand for payment was not served correctly on the defender. What flows from that error is incompetent.

[24] Here Mr M signed the statutory demand on behalf of the creditor and appended the word "solicitor" after his name. I do not know what, if anything, the recipient made of that designation. However, it would not be unreasonable for a recipient to conclude that where a statutory demand is signed by a solicitor on behalf of a named creditor, that that act might imply that its author is a solicitor practicing as such (not merely on the roll of non-practicing members).

[25] This case raises public protection issues. I will not ignore that. The court and each party to a litigation is entitled to expect that a representative lodging a writ is qualified to do so within the terms of the 1980 Act. After vacillating on his status, Mr M claims that he is.

[26] A wrongfully convened defender may have remedies over and above an award of expenses against a pursuer in circumstances such as this. If there was negligence, that pursuer may seek indemnification from his or her representative. Problems might arise about whether, and to what extent, a representative, such as Mr M, is insured. More generally, whether an award of damages in favour of a party would truly compensate for the reputational issues arising from, for example, an advertised (but incompetent) petition for liquidation, is quite another matter.

[27] On the statutory demand Mr M wrote that he was a solicitor; on letters to the court he appended his qualifications; when advertising the petition he appended “agent for the petitioner” to each notice but, when applying for the appointment of an interim liquidator, he did not enclose an execution of service (merely the recorded delivery slip) quite possibly because he would have had to sign that as a solicitor practicing before the court. That said, he had signed the writ.

[28] Solicitors with practicing certificates spend time and expense on continuing professional development and, where events go awry, their regulatory professional body and insurers provide a route for the aggrieved. Standards are thereby maintained.

[29] The same may not be said about those trading on a misleading veneer of competence, status and public confidence which the selective use of the professional title “solicitor” engenders, all while choosing not to maintain a practicing certificate (with the accompanying regulation and public protection).

**Disposal**

[30] To conclude, I will dismiss the petition as incompetent. For whatever reason the writ was not defended. I will find no expenses due to or by either party. That should bring an end to the case to allow Mr F to pursue recovery of his debt. Regrettably, he has already lost almost 3 months or so in these straitened times.

[31] I will direct my clerk to send a copy of my interlocutor and this note to (a) Mr M; (b) the pursuer on behalf of whom Mr M is acting; (c) the defender company; (d) the proposed liquidator who had consented to act in the event that the petition were to be granted and (e) to the Registrar at the Law Society of Scotland as it has jurisdiction to consider the matters raised. Each recipient may have a discrete interest in this decision.

[32] Finally, I have also instructed my clerk to send a copy to the Lord Advocate for him to take whatever action, if any, he considers appropriate in the public interest.