OUTER HOUSE, COURT OF SESSION

[2022] CSOH 87

CA16/22

OPINION OF LORD BRAID

In the cause

ASERTIS LIMITED

Pursuer

against

CHERYL DUNN

Defender

Pursuer: Young; BTO Solicitors LLP
Defender: Whyte; Campbell & McCartney Solicitors

2 December 2022

Introduction

[1] In this commercial action, brought by the pursuer as assignee of HGEC Capital Limited (HGEC) and its administrators, the pursuer sues for the sum of £583,146.92, in repayment of what is said to have been a series of gratuitous alienations made to the defender by HGEC within the meaning and scope of section 242 of the Insolvency Act 1986. (Section 242 provides that where a company has entered administration, only the administrator may challenge a gratuitous alienation. However, the right to bring such a challenge may be assigned by virtue of section 246Z of the Act.)

[2] The purpose of section 242 is to avoid a company prejudicing its creditors by voluntarily alienating property without adequate consideration whilst it is insolvent: *Joint Liquidators of Grampian McLennan's Distribution Services Limited* v *Carnbroe Estates Ltd* 2020 SC (UKSC) 23, paragraphs 23-26, Lord Hodge. Under the section, it is for the pursuer to establish: (i) that an alienation has taken place by which "any part of the company's property [was] transferred or any claim or right of the company [was] discharged or renounced": subsection (2)(a); and (ii) that the alienation took place on a "relevant day", which for present purposes means any day not earlier than 2 years before the company entered administration: subsections (2)(b) and (3)(b). If those facts are established, the court is bound to grant redress unless the defender establishes one of a number of listed circumstances.

[3] In the present case, the circumstance relied upon by the defender is that in subsection (4)(b), namely, that the alienations were made to her for adequate consideration. The primary issue for resolution is whether the facts relied upon by the defender could ever amount to adequate consideration. There is a subsidiary issue as to whether the defender is entitled to put the pursuer to proof of the alienations which were made. Although not formally admitted, there is no dispute that any alienations which were made, were made on a relevant day (it could not be otherwise, since HGEC was in existence for less than 2 years before entering administration).

Background

[4] HGEC was incorporated on 13 March 2018. The nature of its business and activities is unclear but appears to have involved fraudulent activities along the lines of a Ponzi scheme whereby money was received from new investors which was not invested but was

used for other purposes (for the avoidance of doubt, the pursuer does not aver that the defender was in any way implicated in that fraudulent activity). HGEC entered administration on 20 February 2020, when joint administrators were appointed by the court. The administrators' enquiries are said to have revealed that funds received by the company were alienated to, among others, the defender for no apparent consideration.

[5] Following a procedural history set out more fully below at para [8], the case called before me for debate and a hearing on the pursuer's motion for summary decree. At the outset of the hearing, counsel for the defender tendered a minute of amendment which he submitted cured the admitted deficiencies of the skeletal defences. Counsel for the pursuer submitted that the minute of amendment did no such thing, and the hearing proceeded. It centred on whether, in the minute of amendment, the defender has relevantly averred that she gave consideration for the alienations in the form of an agreement with HGEC that she would introduce investors to that company in exchange for which she was entitled to receive commission of 25% of the sums introduced.

[6] The pursuer's primary motion is for decree *de plano* in terms of its third plea in law (added by amendment at the debate) on the basis that the defences (even as they would be after amendment) are irrelevant and contain implied admissions that the defender received the alienations. Alternatively, the pursuer moves for summary decree in terms of rule 21.2 of the Court of Session Rules, on the basis that the defender has no defence to the action. Both motions are opposed.

[7] I should mention at this stage that there is a parallel action against a company owned by the defender, Cheryl Dunn Holdings Ltd (CDHL), in which it is averred that alienations amounting to a further £280,123 were made to that company. That action was described by counsel as parasitic to this, in the sense that the issues raised in the two actions are identical,

and it was accepted by parties that the outcome should therefore be the same in both. Accordingly, other than the occasional fleeting reference to CDHL, I do not intend to refer to the action against it again nor to issue a separate opinion in that case.

Procedural history

[8] At this stage it is worth saying something of the procedural history of the action, since that helps to set the scene against which the minute of amendment was tendered, and is relevant in considering whether further time ought to be given to the defender to expand upon her minute of amendment. Before the action was raised, the pursuer's position was set out in detail to the defender: first, in a letter of 5 August 2020 (more than 2 years ago) from the joint administrators' solicitors to the defender; and then in a letter from the pursuer's solicitors to the defender's solicitors dated 15 October 2021. Neither the defender nor her agents replied to either of those letters, both of which invited her to provide an explanation for the payments. Consequently, the action was raised in February 2022, and service was accepted by the defender's solicitor on 4 March 2022. Skeletal defences were lodged on 14 April 2022. A joint statement of issues was agreed between the parties on or about 3 May 2022, these being, first, whether the aggregate amount of £594,896.92 was transferred to the defender and, second, whether the court should grant decree for restoration of the sums alienated under and in terms of section 242(4). A preliminary hearing took place on 4 May 2022, when a structured period of adjustment was allowed and a procedural hearing was fixed for 8 July 2022. The defender's solicitors withdrew from acting on 6 July, no adjustment having taken place. On 8 July the defender did not appear and a peremptory diet was fixed for 5 August 2022. On that date, the defender did appear and was ordered to lodge adjusted defences by 19 August, a further hearing being fixed for 26 August 2022.

Adjusted defences were not lodged. On 26 August, the defender appeared, albeit late. She said that she had re-instructed the solicitor who had previously withdrawn, who was in the process of carrying out further inquiries to enable the defences to be adjusted. The pursuer moved for decree by default, but I afforded the defender a further opportunity to adjust her defences (by 16 September 2022) and fixed yet another by order hearing for 21 September 2022. By 21 September, still no adjusted defences had been lodged and the re-instructed solicitor had again withdrawn. The defender appeared on her own behalf again and said that she had now spoken to a new solicitor and hoped to instruct counsel. Since the defender appeared to be doing her best to find a new solicitor, I continued the case to a further by order hearing on 30 September 2022. On that date, counsel did appear for the defender. It was at that hearing that I fixed a debate, for 15 November 2022. The defender's proposed minute of amendment was intimated to the pursuer (and to the court) on Friday 11 November 2022.

The pursuer's averments

[9] The pursuer's averments are admirably succinct. It avers that between 14 March 2018 and 25 October 2019, HGEC transferred monies from its bank account to the defender, or on the defender's behalf, in the aggregate amount of £594.896.92, all as set out in a table lodged as number 6/3 of process. The table itemises the date and amount of each payment said to have been made to the defender, and specifies whether the payment was directly to the defender or was for her benefit (for example, some payments clearly relate to the payment of school fees for the defender's son). [The table includes two payments which were made before HGEC was incorporated, totalling £11,750. Counsel for the pursuer explained that these had been left out of account in arriving at the sum sued for, as can be

seen to be the case as a matter of simple arithmetic, and that only the remaining 99 payments (albeit I count 100) were sought to be recovered. Whether 99 or 100, the defender is thus given fair notice of the payments which she is alleged to have received.] The alienations all took place on a relevant day for the purposes of section 242(2) and (3)(b) of the 1986 Act. So far as the pursuer is aware, HGEC was never solvent in the sense of its assets exceeding its liabilities. It received no, or no adequate consideration, for any of the alienations. The defender had provided no explanation for the alienations.

[10] It is on the basis of these averments that the pursuer seeks repayment of the said sum of £583,896.

The defences

[11] In the defences lodged on 14 April 2022, the defender admits the date of administration of HGEC, but precious little else. Her response to the pursuer's averments is largely that they are not known and not admitted. In other words, her formal position in the defences is that she does not know whether or when any payments were made to her, despite the fact that the alleged total is over half a million pounds.

[12] In relation to those defences, the pursuer submits that since the fact of payment to her is a matter within the defender's knowledge, her "not known and not admitted" responses should be taken as implied admissions: *Ellis* v *Fraser* (1840) 3D 264, Lord Gillies at 271. I did not understand counsel for the defender to take issue with this, nor could he: the payment of sums to the defender or for her benefit is plainly a matter within her knowledge. I therefore accept the pursuer's submission that the defences must be taken to impliedly admit receipt of the alienations, which in the absence of a relevant defence would entitle the pursuer to decree *de plano*. However, the thrust of the submission by counsel for

the defender was that a relevant defence is to be found in the minute of amendment, to which I now turn.

The defender's minute of amendment

[13] In her defences as they would be after amendment, the defender avers, at answer 5, that she was never a director or employee of HGEC but that she was an independent contractor to it. In answer 8, she avers that she entered into two "Introducer Agreements" with "HGE Capital Ltd/JV", the first dated 11 November 2017 (that is, prior to the company's incorporation, hence the relevance of that agreement is unclear), and the second dated 16 March 2018. Pausing there, in terms of that Second Introducer Agreement, the defender and CDHL were to "introduce clients (funds)" (*sic*) to "HGE Capital Ltd[1]/JV" ("the services"). Clause 10 of the Second Introducer Agreement provided that the introducer (defined as the defender and CDHL):

> "will charge [HGEC] for the Services as follows…[the defender or CDHL] shall be paid 25% of all investment passed to or on behalf of HGE Capital Ltd/JV".

Clause 11 provided that invoices submitted by the defender and by CDHL to HGEC were due within 30 days of receipt.

[14] The minute of amendment then continues as follows:

> "8.4 Payments made to the defender…were made principally under the Second Introducer Agreement…
>
> 8.5 Throughout the lifetime of the Second Introducer Agreement, the defender made a number of introductions which led to investments being made to or on behalf of [HGEC] by various investors…[Six persons are then named]… These investments were considerable being in the hundreds of thousands and in some cases millions of pounds. [Another named person] also invested in [HGEC] or in the joint venture on its behalf.
> …

[1] In fact, the company is called HGEC Capital Ltd, but nothing is said to turn on that discrepancy.

> 8.7 The defender introduced investments worth considerable sums to [HGEC] and was entitled to be paid significant amounts in consideration of her work to encourage investment in [HGEC].
>
> [There then follow, in 8.8 to 8.15 averments of specific investments said to have been made by the named persons introduced by the defender.]
>
> 8.16 The defender believes that she introduced investments of in excess of £6 million to [HGEC]. Under the terms of the Second Introducer Agreement, the defender would have been entitled to significant commission on those investments. The defender's entitlement to commission would have been in excess of £1,500,000. That sum is in excess of the alienations. [HGEC] has paid to the defender… less than her total entitlement to commission.
>
> 8.17 In addition to the Second Introducer Agreement, the defender also entered into an agreement with Mr Campbell[2] under which she was to be paid a salary for a part of the time she was engaged in finding investments for [HGEC]… The Salary Agreement provided that the defender would be paid a salary of £10,000 per month for a number of months. The defender believe payments for around 12 months were due to her under the Salary Agreement.
>
> 8.18 [HGEC] received considerable investments into it and into the joint venture of which it was said to be a part. Those investments were introduced by the defender. The defender was not aware of any misuse of funds invested in [HGEC] at the relevant times when those investments were made. The alienations were payments of commission for the services performed by the defender. The commissions under the Second Introducer Agreement were a recognition of the value of the investments in [HGEC]. [HGEC] received consideration for those alienations."

In answers 8.19 and 8.20 the defender takes issue with eight of the 99 (or 100) payments allegedly made to her; she does not deny that they were made, but states that they "lack attribution".

Submissions

Pursuer

[15] Counsel for the pursuer advanced four main criticisms of the minute of amendment. First, it adopted an incoherent and inconsistent position in relation to whether or not the

[2] The principal behind HGEC

defender had received the alienations. At the beginning of answer 8 the defender maintained her "not known and not admitted" averment but in 8.18 she now averred that the alienations "were" payments of commission. Second, there was an absence of any attempt to link the alleged consideration with the specific alienations. By way of example, at 8.15(a) she averred that £1 million was transferred by a named individual to an account in Texas. That would (on her averments) have entitled her to payment of commission of £250,000 but there was no offer to prove that any of the alienations related to that entitlement. Third, in relation to many key averments, the defender was simply offering to prove what she believed, which was strictly irrelevant: *Brown* v *Redpath Brown & Company Limited* 1963 SLT 219, LJC Thomson at 222. Since she was not seeking to draw an inference from certain facts known to her, that formulation was inappropriate and irrelevant (and perhaps, in the words of LJC Thomson, an attempt to salve the conscience of the pleader). Fourth, the minute of amendment was unsatisfactorily vague and lacking in explanation of many key points. For example, averments were made of investments made before the company was incorporated. Insufficient explanation was given as to how payments into a Texas bank account benefitted the company. Whereas the defender averred that in excess of £6 million had been introduced by her, the averments of specific investments totalled only £4.3 million, with no explanation as to the other £1.7 million.

[16] In relation to the core issue of whether the defender had relevantly averred that she had given any, let alone adequate, consideration for the payments, counsel submitted, under reference to *MacFadyen's Trustee* v *MacFadyen* 1994 SC 416 that it was insufficient for the defender to aver simply that she was due money under a separate contract with the company, which was broadly equivalent to, or exceeded, the amount she was given. There

had to be a clear link between the alienations and the consideration, which was lacking in the defender's averments.

Defender

[17] Counsel for the defender referred to what he described as the defender's positive defence, and her negative defence. The former was her assertion that she and HGEC had entered into an agreement whereby she would be paid commission, which was (or at least it could not be said at this stage that it was not) adequate consideration. It was evident that matters had been conducted on an informal basis. A proof before answer should be fixed. The question of whether the consideration had been adequate depended on the circumstances and was apt for inquiry. Matters such as the irregularity of the payments and whether or not the commission was paid as part of a running account were all best determined in the course of a proof. *MacFadyen* fell to be distinguished on its facts, since in that case there was no existing commercial relationship as there was here. The negative defence was that the pursuer had produced inadequate vouching that all of the alienations had been received by her. In short, the case was not suitable for summary decree. The court could not be satisfied that the defender was bound to fail, which was the test: even if it could be said that the defender was unlikely to succeed at proof, that was not a proper basis upon which summary decree could be granted: *Henderson* v *3052775 Nova Scotia Ltd* 2006 SC (HL) 85, para [19]. The court could have regard to the minute of amendment in considering whether the defender had a defence to the action: *Robinson* v *Thomson* 1987 SLT 120.

Decision

[18] While the hearing proceeded at times on an assumption that the amendments in the defender's minute of amendment already formed part of the defences, it must be borne in mind that the logically anterior question is whether I should allow the minute to be received at all, which is a matter for the exercise of my discretion. In exercising that discretion I am entitled to take into account not only the extent to which the minute advances a relevant defence, but the whole history of the action bearing in mind the considerable latitude already extended to the defender, and the further delay which would be caused if the minute were received and had to be answered and (no doubt) expanded upon by adjustment (as it would have to be, standing the justified criticisms made of it by counsel for the pursuer). I accept the submission of counsel for the pursuer that in the context of a commercial action in which the defender has had more than 2 years to provide an explanation for the alienations, and to substantiate any defence that adequate consideration was given for the alienations, the minute of amendment should be treated as her definitive and final statement of what her position is, rather than as something which might be improved upon over time.

[19] Turning to consider the merits of the proposed defence, and putting the pursuer's other criticisms of the minute of amendment to one side for the moment, the core issue is whether the circumstances as averred by the defender could ever amount to consideration. If so, the question of adequacy would then arise, which I accept would be a matter for further enquiry. But if the circumstances relied upon by the defender could never amount to consideration, then inquiry into the adequacy of consideration would be superfluous, and the only remaining issue would be whether the pursuer ought to be put to proof of the alienations which it avers were made.

[20] As was said in *MacFadyen* at 421 E to F, "consideration" must be given its ordinary meaning as something which is given or surrendered *in return for* something else (my emphasis). While it is true that an alienation in fulfilment of a prior obligation will be one for consideration, it is clear that, for that to be the case, the parties must have intended at the time of the alienation that it should fulfil the prior obligation. As the court went on to say in *MacFadyen*, at 421F:

> "If something is given without any return being demanded or expected or obtained and at the time of giving is not intended to be regarded as a consideration of some past, present or future return…that which is given cannot later be converted into a consideration just because at the later date the giver and receiver chose so to describe it. A consideration appears to us to acquire its character as a consideration not later than the time when the giving or surrendering takes place."

While the facts of *MacFadyen* were different - in that here, unlike there, the consideration is said to have a patrimonial value, and there was a prior commercial relationship between the parties - the principle holds good: parties cannot retrospectively choose to hold that a particular fact or circumstance - here, said to be the fulfilment of an obligation to pay commission - amounted to the giving of consideration if that was not their intention at the time. As counsel for the pursuer put it, the defender, on whom the onus of establishing consideration lies, has to be able to aver and prove a link between the alienations and the obligation to pay commission.

[21] With that in mind, even on a generous reading, the minute of amendment falls some way short of averring relevant consideration. There is admittedly an averment in the middle of answer 8.18 that the alienations were payment of commission but that has to be viewed in the context of what else is pled, and for that matter, not pled. The defender makes no attempt to link any particular alienation, or alienations, with any commission to which she was contractually entitled. The specific investments which she avers - for

example, £300,000 by one entity; £1,000,000 by another; two payments of £25,000 by a third; £200,000 by a fourth - are, in the main, round sums which would have given rise under the SIA to commission payments of £75,000, £250,000, £12,500 and £50,000 respectively, yet nowhere in the list of payments do we find payments of any of those amounts. That the alienations were not, at the time they were made, intended to be payments of commission is confirmed by averments elsewhere in the minute: at 8.7, that the defender was entitled to be paid significant amounts in consideration of her work to encourage investment; at 8.16, that she "would have been" entitled to significant commission, and that commission "would have been" in excess of £1.5 million. The difference between "was" and "would have been" might seem small, but it is significant, as is the fact that the defender does not aver that she ever raised any invoices in respect of commission. Read as a whole, the proposed defence in the minute of amendment amounts to no more than an assertion that the defender would have been due more by way of commission than the sum paid to her, but nowhere does she offer to prove that the alienations were, at the time, intended to be payments of commission.

[22] Counsel for the defender submitted that at proof the defender might be able to establish that she received payments as part of a running account, or that she was receiving payments on an instalment basis. The flaw in that submission is, as counsel for the pursuer pointed out, that the defender does not plead that case. She does not aver that there was any agreement with HGEC to that effect. (This is not a mere technical pleading point: an affidavit by one of the joint administrators, lodged by the petitioner in support of its motion for summary decree (see para [28]), suggests that the principal behind HGEC did not confirm that the payments to the defender were paid as commission). It is not appropriate

to allow the action to limp on to a proof in the hope, Mr Micawber like, that something will turn up which might amount to consideration.

[23] The minute of amendment also contains an averment that the defender "believes" that payments for around 12 months were due to her under a salary agreement. Leaving aside for the moment the reference to belief, that averment is in any event irrelevant to establish consideration, since the defender does not aver that the payments were (nor, even, that she believes that they were) payments of salary; nor does she aver and offer to prove which of the payments in the table of alienations were in respect of salary. It is, moreover, unclear how payment of salary would fit with the defender's assertion elsewhere that she was not an employee of HGEC.

[24] For these reasons, I uphold the submission of counsel for the pursuer that the minute of amendment does not relevantly aver that consideration was given by the defender in return for the payments which were made to her, or for her benefit. In substance, it does no more than to aver facts and circumstances from which a liability to make payment of commission might have arisen at some point; but does not aver that it did arise or that the payments made were in fulfilment or reduction of such liability.

[25] That is largely determinative of the issue before me, since, even if the minute of amendment were to be allowed, what counsel for the defender described as her positive defence would be bound to fail. However, the other criticisms made of the minute of amendment by counsel for the pursuer are also well-founded, and should not be ignored. The amended defences are confusing and contradictory. It is unclear why the averment that receipt of the alienations is not known and not admitted remains. As noted above, that is an implied admission that they were received. Elsewhere, the defender avers that the alienations were commission. Elsewhere again, she avers that certain of the alienations lack

attribution, without admitting or denying that they were made. The amended defences also contain inappropriate and irrelevant assertions of belief, without any supporting averments of facts and circumstances from which such belief might legitimately be inferred: see *Brown* v *Redpath Brown*, above. Additionally, the amended defences contain averments which have no clear purpose. For example, what is the significance of the reference to the First Introducer Agreement, entered into before HGEC was incorporated. Similarly, what is the significance of investments made before the date of incorporation? Nowhere is this explained.

[26] I do not doubt that given more time, the defender might be able to address some of these criticisms. However, for the reasons given above, I do not consider that she is entitled to have more time, and in any event, the fundamental deficiency in her pleadings, even as they would be after amendment, remains that she has not relevantly averred that consideration was given. Accordingly I propose to refuse to allow the minute of amendment to be received.

[27] That leads on to a consideration of the defender's so-called negative defence, and whether the pursuer should be put to proof of the alienations. As I have pointed out, the defences contain an implied admission that all of the alienations were received. The pursuer has produced vouching that all of the alienations left one or other of HGEC's bank accounts. The majority of the payments in the pursuer's table plainly refer to the defender. For those which do not, the defender has had ample opportunity to state what her position is, but she does not.

[28] For all of these reasons, I have concluded that the defences are irrelevant. I will sustain the pursuer's third plea in law and grant decree *de plano* for the sum sued for.

[29] It is therefore strictly unnecessary for me to consider the pursuer's motion for summary decree. However, had it been necessary to do so I would have granted it. In support of that motion, the pursuer has produced an affidavit from Kenneth Craig, one of the joint administrators, along with supporting documentation. Mr Craig described the nature and extent of the administrators' inquiries into the alienations which were made. A Mr Cook, who professed to be HGEC's financial controller, had provided the administrators with details of HGEC's bank accounts and bank statements, and details, in a spreadsheet, of the individuals to whom payments were made by HGEC. Those individuals included the defender. The administrators had cross-referenced the schedule of payments to the bank statements. The vast majority of entries in the spreadsheet corresponded to entries of equivalent value on the same date and with a similar narrative. Other payments to the defender were identified from the bank accounts. A similar spreadsheet prepared in respect of another individual had been accepted by him as accurate. It therefore appeared to the administrators that the information provided by Mr Cook was accurate. The administrators had noted that there was a pattern of significant sums being deposited with HGEC followed by immediate distribution of those sums to, among others, the defender and CDHL. For example, before 7 December 2018, the company's Clydesdale Bank account had little or no funds. On 7 December the sum of £190,000 was deposited by someone who had subsequently told the administrators that he had been induced to invest in HGEC (by someone other than the defender). Immediately after receipt of that sum, £97000 was paid to CDHL. The remainder of the "investment" was paid out to other individuals over the next three days, so that no part of the sum received was in fact invested. This was a repeating pattern.

[30] Following their inquiries, the administrators believed that the payments made to the defender were those set out in the table relied upon by the pursuer.

[31] Although the defender has queried the attribution of a small number of the payments, she has not made a positive averment that those payments were not made to her.

[32] In all the circumstances, I would also have concluded, had it been necessary to do so, that the test for granting summary decree was met, and that the defender had no defence to the pursuer's claim, being bound to fail at proof.

Disposal

[33] I have sustained the pursuer's third plea in law and granted decree *de plano* against the defender for payment of the sum sued for. I have done likewise in the action against CDHL.