SHERIFF APPEAL COURT

[2025] SAC (Civ) 6
EDI-A125-21

Sheriff Principal N A Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in the appeal in the cause

CHARLES THOMPSON McKINLAY

Pursuer and First Respondent

against

AVELLIERIE LIMITED

First Defender and Second Respondent

and

KENNETH SCOTT

Second Defender and Appellant

Second Defender and Appellant: Garioch, solicitor advocate; Gilson Gray LLP
Pursuer and First Respondent: Olson, advocate; Chambers Legal Limited
First Defender and Second Respondent: no appearance

10 March 2025

[1] In April 2017 Croftwalk Limited ("Croftwalk") advanced a loan of £20,000 to the second respondent ("Avellierie"). The relevant deed of loan, namely Minute of Agreement dated 17 April 2017 included reference, amongst other terms, to a personal guarantee by the appellant, who was a director of Avellierie, and who was also a signatory. The sum was

repayable by 16 April 2018. The appellant also signed a separate letter dated 17 April 2017 (the "Personal Guarantee") which confirmed that he offered a personal guarantee in the event that Croftwalk did not make timeous payment.

[2] Croftwalk made a further loan of £33,000 to Avellierie in July 2017. The relevant document, namely Minute of Agreement dated 21 June 2017 again included, amongst other terms, a similar reference to a personal guarantee by the appellant ("Mr Scott"), who was a signatory. The loan was repayable on 21 June 2018. On this occasion, Mr Scott did not provide any further document or guarantee.

[3] In due course, Avellierie failed to make payment to Croftwalk. Croftwalk purported to assign the rights against Avellierie and Mr Scott to the pursuer and first respondent ("Mr McKinlay"), who was a director of Croftwalk, and he raised the present action. Avellierie has not defended the action, decree has passed against it, and recovery has not proved effective. The action therefore depends on the existence and effective transfer of any personal obligation of Mr Scott in respect of Avellierie's debts to Croftwalk.

[4] There was a preliminary proof in which the court, by judgment dated 10 November 2023, resolved a dispute whether the Minutes of Agreement contained effective personal guarantees ("The Lender shall have a Personal Guarantee…") by Mr Scott. It rejected that construction, and Mr Scott was found to have no cautionary liability to Croftwalk under those Minutes of Agreement. The second loan, unsupported by any separate letter of guarantee, is not recoverable against Mr Scott. That judgment was initially the subject of a cross-appeal, now abandoned, in the present proceedings.

[5] This appeal relates to the second diet of proof, which related to the issue of assignation, specifically to what had been assigned. The parties agreed that Avellierie's debt under the Minute of Agreement dated 17 April 2017 had been effectively assigned by

Croftwalk to Mr McKinlay. It was disputed, however, that the Personal Guarantee had also been assigned.

[6] In terms of Deed of Assignation dated 12 December 2020 it was provided:

> "We, Croftwalk Limited…hereby assign our whole right, title and interest in and to the claim of debt arising under the Deed of Loan dated 17 April 2017 between us (as lender) and Avellierie Limited… (as borrower) and Kenneth Scott (as guarantor), to Charles Thompson McKinlay…"

[7] Notice of that assignation was given in letters dated 18 January 2021 by Mr McKinlay's agent to both Avellierie and Mr Scott, stating:

> "TAKE NOTICE that by an Assignation dated 12 December 2020 Croftwalk Limited…assigned its whole right title and interest to the claim and debt under the Deed of Loan dated 17 April 2017 between them and Avellierie Limited…in favour of Charles Thompson McKinlay…"

[8] It was accepted by both parties that the assignation was effective to transfer Avellierie's right to repayment under the Minute of Agreement dated 17 April 2017. The latter document did not, however, create any personal right against Mr Scott. Accordingly, unless the assignation was effective to transfer both the rights under the Minute of Agreement and the rights under Personal Guarantee, there was no right of recovery against Mr Scott. Following further proof, the court held that the assignation did have such effect, that the rights under both documents were transferred, and that there was accordingly personal liability by Mr Scott for the indebtedness of Croftwalk to Avellierie. Mr Scott appealed.

Submissions for the appellant

[9] For Mr Scott, it was submitted that the sheriff did not apply the correct principles of construction to the Deed of Assignation. The principles of construction required a plain reading. It did not refer to the 2017 letter of guarantee. It was unambiguous and not subject

to identifying common sense or commercial purpose. The two documents, Minute of Agreement and Personal Guarantee, were quite distinct. Any cause of action was limited to the Minute of Agreement. The sheriff's construction required rewriting the contract, which was impermissible. She had used the benefit of hindsight. She had taken into account subjective intention, which in any event favoured non-assignation.

[10] The sheriff had further found assignation had been effective by operation of law. She had reached a wrong conclusion by misapplying *Miller* v *Muirhead* 1894 21 R 658. The principle of assignation of everything necessary to make the assignation effectual had no application here. The assignation was already effectual. The principle could not be justified by non-payment, as non-payment was the only reason there was anything to assign. It could not be right that every assignation of debt carried with it the assignation of an associated personal security.

[11] The sheriff had also wrongly allowed evidence on the financial standing of Avellierie in December 2020, when the only averments related to 2017. She had wrongly taken into account financial standing in 2020 as background to construction. Decree of absolvitor was appropriate.

Submission for the first respondent

[12] For Mr McKinlay, the only remaining respondent, it was submitted that an assignation of debt will impliedly assign all rights of the cedent required to make the assignation effectual. Reference was made to *Miller* v *Muirhead* (above). The sheriff had not erred. The wording of the Deed of Assignation provides a description of the Minute of Agreement. The sheriff's construction of the assignation accorded with legal principle. The objective meaning of a document involved ascertaining what a reasonable person, with

all the reasonably available background knowledge, would have understood it to mean. The Personal Guarantee was a collateral undertaking, and had no purpose outside that undertaking.

[13] The sheriff was correct to find that the Personal Guarantee had been assigned. It was incidental to the loan, and was necessary to give business efficacy to the assignation itself. In relation to pleadings, it was a reasonable inference that Avellierie was unable to pay from 2017 onwards.

Decision

[14] The question of whether an assignation of a claim of debt should carry with it an associated security has been recognised as not satisfactorily resolved under Scots law (see Scottish Law Commission Discussion Paper No 151 Chapter 5). It is asserted that security rights are accessory to the claims that they secure, and that in principle when a secured claim is assigned, the security should follow the claim (Scottish Law Commission: Report on Moveable Transactions, Volume 1 at paragraph 13.26 and following). The Moveable Transactions (Scotland) Act 2023 deals at section 16 with accessory security rights, but is not yet in force. It may be that disputes such as the present may shortly no longer arise. That does not assist with the present case, and does not resolve the question of how the law presently stands.

[15] The issue is one of construction of the Deed of Assignation. The relevant wording is:

> "We, Croftwalk Limited…hereby assign our whole right, title and interest in and to the claim of debt arising under the Deed of Loan dated 17 April 2017 between us (as lender) and Avellierie Limited… (as borrower) and Kenneth Scott (as guarantor), to Charles Thompson McKinlay…"

[16] The most recent authoritative treatment of the construction of contracts is *Lagan Construction Group* v *Scot Roads Partnership Project* 2024 SC 12, and *Paterson* v *Angelline (Scotland) Ltd* 2022 SC 240). In *Lagan*, the Lord President (Carloway) stated:

> "Parties' intention is most obviously gleaned from the language which they have chosen to use. The court should not normally search for drafting infelicities in order to justify a departure from the natural meaning of that language. It should identify what the parties agreed, not what it thinks common sense may otherwise have dictated. Contracts are made by what people say, not what they think in their inmost minds."

[17] The appellant's position is that the wording of the assignation is clear, and that there is no requirement or licence to depart from the plain words. In my view, that is correct. The appellant, however, has not placed sufficient reliance on the operative part of the assignation.

[18] It is true that the subject of the Deed of Assignation is the 2017 Minute of Agreement, and that the 2017 letter of guarantee is nowhere mentioned. That, however, does not resolve the question of what was assigned. The assignation is not restricted to the Minute of Agreement. That is merely the documentary vehicle for recording certain rights and duties. The subject of the assignation is not the document, but the rights. The possessor of the rights is Croftwalk, the intended recipient of the rights is Mr McKinlay, and the subject of transfer is described as: "our whole right, title and interest in and to the claim of debt arising under the Deed of Loan…"

[19] It is therefore an unduly restrictive reading to limit the transferred rights to those found within the four corners of the Minute of Agreement. The drafting is wide and inclusive in its terms. The subject matter is the "claim of debt", not just a debt. When it comes to "right, title and interest", both the "right" and "title" to the claim of debt may be referable to the Minute of Agreement. The "interest", however, is wider. Croftwalk has an interest in the claim of debt, in the form of a Personal Guarantee against Mr Scott. That

interest is quite independent of the Minute of Agreement, and the drafting expressly includes it as part of the bundle of rights which were transferred to Mr McKinlay. To approach matters from the opposite direction, it would be impossible to say Croftwalk had no interest in the claim of debt. It had the Personal Guarantee.

[20] The alternative is that the rights under the Personal Guarantee remain untransferred, and were retained by Croftwalk. Those rights would immediately, however, lose all value upon transfer of the principal debt, because there would be no debt to secure. The effect would be that Croftwalk's right and interest, if not their title, would have been extinguished at the moment of assignation. Croftwalk could not lawfully raise an action for payment under the Personal Guarantee, because it would retain no right to claim the principal debt. Anything other would leave the debtor with potential liability to both creditors. On the appellant's analysis, Croftwalk's right and interest disappear notwithstanding that they are not assigned. The result is incoherent as a matter of law and offends against commercial common sense. A valuable right would lose its value without reward or gain to either party to the assignation.

[21] On that analysis, it is unnecessary to comment on the objections to evidence about financial standing in 2020, as the evidence does not influence this analysis.

[22] On the remaining question of whether the assignation would otherwise have been assigned by operation of law, the law is less clear. There is a dearth of authority. In *Miller* v *Muirhead* (above), Lord Rutherford Clark stated:

> "If I assign a thing which is not mine, I assign all the rights I have to make it mine. If I assign a thing which I have bought, but which remains in the possession of the seller, I assign what is not my property, but I also assign the right to obtain delivery. The law implies that a cedent confers on his assignee everything which is necessary to make the assignation effectual."

[23] The case of *Muirhead* related to tenant's fixtures to the heritable property subject to a contractual right of removal at the end of the tenancy. During the lease the tenant assigned that contractual right to the landlord, as security for debt. The tenant company went into liquidation and the liquidator claimed that the purported assignation was an ineffective security over moveables. The court disagreed. The tenant's fixtures had by operation of law become the landlord's property. The tenant, however, held a contractual right to remove them, and thereby to transfer ownership back to himself. The goods were not his, but he had the right to make them his. The assignation of the contractual right was an effective renunciation, in favour of the landlord, of the contractual (but not property law) right of removal. The contractual right of removal had been assigned by operation of law, because it was part of "all the rights I have to make it mine" and it was necessary to make the assignation effectual.

[24] In the present case, Croftwalk assigned its rights to the debt owned by Avellierie and, with it, everything which was necessary to make the assignation effectual. On the respondent's argument, the Personal Guarantee was, by implication of law, necessary to make the assignation effectual. The question is whether the dictum in *Muirhead* applied in anything other than the particular facts of that case.

[25] I have concluded that *Muirhead* falls to be distinguished on the facts, and does not support the respondent's submission that the Personal Guarantee was assigned by implication of law. *Muirhead* relates to rights and property which are "not mine" - in that case moveables which had become affixed to heritage, or in the Second Division's example, undelivered goods which were in the possession of a third party. The dictum stops short of endorsing a much wider proposition that the principle can be applied to a right which remains with the cedent, or assignor, such as a right to demand payment from a third party.

Further, the phrase "If I assign a thing which is not mine" introduces some difficulty. The "thing" referred to is a corporeal moveable, not a right. The law of assignation has developed since 1894 and the modern law sits uncomfortably with such an analysis. For that reason I do not accept that *Muirhead* is in point. Croftwalk's right to payment of the debt was owned by Croftwalk and it could, and did, assign the debt. Croftwalk did not have any other mechanism, or indeed need, to "make it mine" either prior to or after assignation.

[26] For completeness, I do not accept the appellant's submission that there is a difference between what is necessary to make an assignation effectual, and what is required to make it valuable. Effectual transfer requires more than satisfaction of legal technicalities, and an assignation of a debt from an impecunious debtor would not be an effectual transfer.

Disposal

[27] The appeal is accordingly refused. Parties agreed that expenses should follow success. I will accordingly find the appellant liable to the first respondent in the expenses of the appeal process.