

SHERIFFDOM OF NORTH STRATHCLYDE AT KILMARNOCK

[2025] SC KIL 16

KIL-A91-24

JUDGMENT OF SHERIFF GEORGE JAMIESON

in the cause

NEW HOUSE PURCHASERS LIMITED

Pursuer

against

JAY MARGARET STEEL

Defender

Act: Hunter, Solicitor; Harper MacLeod, Glasgow
Alt: Fairbridge, Solicitor, Pollock, Fairbridge Schiavone, Glasgow

Kilmarnock 28 November 2024

The sheriff, having resumed consideration of the cause, Grants the pursuer's opposed motion number 7/1 of process for summary decree in respect of crave 1 of the initial writ, Refuses said motion in respect of crave 2 of the initial writ, Discharges the Diet of Debate fixed for 14 January 2025, of new Fixes a combined Hearing on Further Procedure and Expenses on 5 February 2025 at 10.00 am by way of webex.

Sheriff George Jamieson

Introduction

[1] The pursuer has two craves, one for payment (crave 1) and one for interdict (crave 2), which I shall discuss separately in this Judgment.

Crave 1 (Payment)

[2] The pursuer craves payment from the defender of the sum of £249,640, being a sum loaned by the pursuer to the defender on or around 8 September 2017 to enable the defender to purchase a property in Ayrshire. This loan was secured by means of a standard security over the property.

[3] The defender admits a loan was made to her and that it was secured by means of a standard security over the property. She avers, however, that the sum was advanced in accordance with a loan agreement between her and a director of the pursuer. She denies there was any loan between herself and the pursuer.

[4] It does not appear to be in doubt that, on 22 June 2022, the pursuer issued a written demand to the defender for repayment of the loan to the pursuer, nor that on 17 April 2024, the pursuer issued a calling up notice to the defender in respect of the standard security.

Motion for Summary Decree

[5] I heard parties on the pursuer's motion for summary decree on 22 October 2024.

[6] Both parties lodged written submissions in respect of the motion in advance of that hearing. I also heard supplementary oral submissions in respect of the motion at that hearing.

[7] Both parties referred to *Henderson v 3052775 Nova Scotia Limited* 2006 SC (HL) 85 as to the test for granting summary decree. However, that case was decided with reference to the Court of Session rule for summary decree. *Henderson* is therefore of limited value in determining the pursuer's motion in this case (see Farrington and others, *Should Scotland SLAPP Back?* 2024 JR 159 at p. 173).

[8] As observed by the Court of Session in *Maclay Murray and Spens v Andrew Orr* [2014] CSIH 107 at paragraph [3], the test to be applied in the sheriff court is now set out in OCR 1993 rule 17.2(2) (as substituted on 1 August 2012), which provides that a motion for summary decree may only be made on the grounds that:

- (a) an opposing party's case (or any part of it) has no real prospect of success; and
- (b) there exists no other compelling reason why summary decree should not be granted at that stage.

The Agreement Between the Defender and Delia Berkley

[9] This appears at 6/1 of process.

[10] In terms of this agreement dated 7 November 2017, the director agreed "through her company" (the pursuer), to lend £250,000 interest free to the defender to purchase the property, in exchange for the defender granting a standard security over the property in favour of the pursuer. The defender was bound to repay the loan "in such manner as may be agreed between the parties"; and any dispute or difference between the parties as to the interpretation, operation or construction of the agreement was to be "submitted for the decision of the Sheriff at Kilmarnock".

The Standard Security

[11] This appears at 5/1 of process.

[12] In this document dated 7 November 2017, the defender undertook to pay £250,000 to the pursuer and granted a standard security for the loan over the property, subject to the standard conditions specified in schedule 3 to the Conveyancing and Feudal Reform (Scotland) Act 1970.

Pursuer's Submissions

[13] There was no provision in the standard security as to when the loan fell to be repaid to the pursuer. It was therefore payable "on demand" (*Neilson v Stewart* 1991 SC (HL) 22 at p. 40; *Bell's Principles of the Law of Scotland* 10th ed. (section 201)).

[14] The agreement between the director and the defender was not binding on the pursuer, which was not a party to that agreement.

[15] The standard security was absolute in its terms: the defender undertook to pay £250,000 to the pursuer, without any qualification of any kind.

Defender's Submissions

[16] The loan was not repayable on demand; repayment was subject to the qualification in the agreement between the defender and the director that the loan would be repaid "in such manner" as agreed between those parties. Any dispute about that required to be submitted to the sheriff at Kilmarnock, which had not been done. The pursuer's action for payment was therefore premature.

Contract (Third Party Rights) (Scotland) 2017

[17] This Act replaces the common law rule of *jus quaesitum tertio* (section 11(1)) in relation to contracts constituted on or after 26 February 2018. As the agreement between the director and the defender and the standard security between the pursuer and the defender were both dated 7 November 2017, the 2017 Act does not apply in this case.

[18] Section 11(1) of the 2017 Act defines the *jus quaesitum tertio* ("JQT") as "the rule of law by which a person who is not a party to a contract may acquire a right to enforce or otherwise invoke the contract's terms".

Scottish Law Commission Report No. 245 on Third Party Rights

[19] The 2017 Act was passed following the publication of the above report.

[20] The SLC summarised the nature of the JQT at paragraph 2.4 of the Report as follows:

A JQT can only arise when two or more parties contract to confer a benefit on a third. Contracting parties can only confer rights upon a third party. Contracts cannot impose duties upon third parties without that party's consent... The essence of JQT is the third party's acquisition of a personal right under a single contract between two (or more) others.

Conveyancing and Feudal Reform (Scotland) Act 1970

[21] Section 10(1)(a) of the 1970 Act provides as follows:

The import of the clause relating to the personal obligation contained in Form A of Schedule 2 to this Act expressed in any standard security shall, unless specially qualified, be as follows:

(a) where the security is for a fixed amount advanced or payable at, or prior to, the delivery of the deed, the clause undertaking to make payment to the creditor shall import an acknowledgment of receipt by the debtor of the principal sum advanced or an acknowledgment by the debtor of liability to pay that sum and a personal obligation undertaken by the debtor to repay or pay to the creditor on demand in writing at any time after the date of delivery of the standard security the said sum.....

Analysis

[22] The personal obligation undertaken by the defender to the pursuer in the standard security was conform to Form A of schedule 2 to the 1970 Act and was not qualified in any

way. The defender was therefore obliged to repay the sum advanced to her by the pursuer “on demand”.

[23] This requirement was also conform to the general law of contract (*Nelson v Stewart* 1991 SC (HL) 22 at p. 40; *Bell’s Principles of the Law of Scotland* 10th ed. (paragraph 201)).

[24] The pursuer was not a party to the agreement between the director and the defender. That agreement conferred no benefit on the pursuer; it could not competently impose a duty on the pursuer to submit differences between the director and the defender about repayment of the loan to the sheriff. The agreement was therefore not binding on the pursuer. The standard security did not create any JQT in favour of the director by qualifying the terms of the standard security to include a condition the pursuer could only demand payment “in such manner” as agreed between the director and the defender.

[25] It follows that the defender’s defence to crave 1 has no real prospect of success.

[26] Further, I do not consider there is any compelling reason why summary decree should not be granted at this stage. The pursuer is a distinct legal person from that of its director; it is entitled to repayment of the loan to the defender on written demand, and such demand having been duly made (see 5/3, 5/4 and 5/5 of process), it is entitled to decree as first craved (the sum sued for being the actual amount advanced).

Crave 2 (Interdict)

[27] The pursuer seeks to interdict the defender from letting or otherwise transferring her proprietary interest or part thereof, without the consent of the pursuer, in respect of the property. Interim interdict to that effect was granted on 17 April 2024, on the basis the defender was proposing to rent the property through property agents in Ayr (see 5/6 of

process) without the pursuer's consent, contrary to standard condition 6 in schedule 3 to the 1970 Act.

[28] While the pursuer would be entitled to perpetual interdict based on a reasonable apprehension the defender sought to persist in this course of action, this, in my opinion, must be established at a proof. Breach of interdict would give rise to penal consequences for the defender and this amounts to a compelling reason not to grant summary decree in terms of crave 2 at this stage.

[29] Further, crave 2 seeks to prevent the defender from "otherwise transferring her proprietary interest or part thereof" in respect of the property. The terms of such an interdict are too wide. They prevent the defender selling the property, as well as letting it out.

Conclusion

[30] The pursuer has preliminary pleas relating to the relevancy and specification of the defender's pleadings (numbers 1 and 2) while the defender has a single preliminary plea directed to the relevancy and specification of the pursuer's pleadings (number 1). The parties' rule 22 notes focus only on crave 1 and say nothing about crave 2.

[31] Although parties were agreed that the expenses of the pursuer's motion for summary decree should follow success, the pursuer has succeeded only in obtaining summary decree in terms of crave 1.

[32] I shall therefore hear parties on further procedure and the expenses of the pursuer's motion for summary decree at the further hearing specified in my above interlocutor.

[33] This concludes my judgment in respect of that motion.

Postscript

[34] At a hearing on 5 February 2025, I granted decree for payment of £249,640 (the actual sum advanced rather than £250,000) by the defender to the pursuer in terms of crave 1 of the initial writ.

[35] I dismissed crave 2 for interdict on the pursuer's motion and I found the defender liable to the pursuer in the expenses of the action as taxed subject to a 20% reduction in taxed expenses to reflect the pursuer's lack of success in relation to crave 2 for interdict.