SHERIFF APPEAL COURT

[2024] SAC (Civ) 15
GLW-A265-22

Sheriff Principal A Y Anwar

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL A Y ANWAR

in the appeal in the cause

JOHN McIVOR (AP)

Pursuer and Appellant

against

THE ROYAL BANK OF SCOTLAND

Defender and Respondent

Pursuer and Appellant: Dailly, solicitor advocate; Dailly & Co Solicitors
Defender and Respondent: Smith, solicitor; Pinsent Masons LLP

16 April 2024

Introduction

[1] The issue in this appeal is a narrow and focussed one; did correspondence issued by the respondent to the appellant amount to a relevant acknowledgment for the purposes of section 10(1)(a) of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"), thereby interrupting the prescriptive period, or has the appellant's claim prescribed?

Background

[2] The respondent sold four payment protection insurance ("PPI") policies to the appellant between 1999 and 2003.

[3] The appellant became insolvent and entered into a trust deed in terms of the now repealed Bankruptcy (Scotland) Act 1985. The trust deed became a protected trust deed under paragraph 5 of schedule 5 to the 1985 Act on 21 July 2004. The respondent was a creditor under the protected trust deed and submitted claims to the trustee in relation to loan sums owed to it by the appellant. The amount of the appellant's estate ingathered by the trustee was insufficient to pay the creditors' claims in full. The respondent avers that its claim to the trustee was £38,453.96. It received a dividend of 8.47 pence in the pound, amounting to £3,011.96, leaving an unpaid balance of over £35,000. The trust deed terminated on 28 March 2008 with the appellant discharged from all his debts.

[4] The appellant avers that at no time either before or during the trust deed process, was he or the trustee aware that claims existed against the respondent for the mis-selling of PPI.

[5] In 2016, the appellant complained to the respondent that the PPI policies had been mis-sold to him. By letters dated 27 January 2016 and 14 July 2016, the respondent upheld those complaints and made offers to pay four sums ("the sums"), namely, £1,969.15, £6,245.00, £2,487.98 and £1,981.26 (being the sums first, second, third and fourth craved), to the appellant. Each offer letter stated as follows:

> "To accept our offer you will need to sign and return the declaration at the end of this letter. On receipt we will arrange for the payment to be made, subject to clearance of any arrears you may have with the Group."

[6] The appellant accepted the offers and completed the relevant declarations on 2 February 2016 and 19 July 2016. The respondent refused to pay the sums to the appellant,

claiming by letters dated 24 March 2016 and 1 April 2016 that the sums had been set-off in full against the loans advanced by the respondent to the appellant. The appellant disputed that position.

[7] The respondent litigated the question of whether it had a right to set-off discharged protected trust deed debts against PPI claims in a "test case". In 2019, the Inner House found against the respondent: *Royal Bank of Scotland Plc* v *Donnelly* [2019] SLT 1448. Further correspondence passed between the parties.

[8] These proceedings were served upon the respondent on 1 June 2022. The appellant maintains that a letter from the respondent dated 2 December 2019 and an email dated 6 December 2019 together constitute a relevant acknowledgement for the purposes of section 10(1)(a) of the 1973 Act, thereby interrupting the prescriptive period.

The correspondence

[9] It would appear that by 2016, the appellant engaged the services of a solicitor. It is helpful to set out the terms of the relevant correspondence passing between the respondent's legal counsel and the appellant's solicitor. The letter of 2 December 2019 from the respondent, in so far as relevant, is in the following terms: "Please be advised that we are considering our next steps in respect of the Inner House judgment and will confirm our position in due course."

[10] The solicitor for the appellant responded to this letter by email dated 5 December 2019; however, that response did not form part of the appendix to the appeal print. By agreement of the parties, and after enquiries from this court, that response was provided to this court. It was in the following terms:

"We write with reference to your letter of 2nd December 2019.

We note that you are considering your next steps in relation to the Inner House judgment in *RBS v Donnelly*. However, it remains our position that our clients *(sic)* prospects are strong, considering the Supreme Court judgment in *Dooneen Ltd (t/s McGuinness Associated) v Mond* [2018] UKSC 54, and our instructions are to proceed with court action to protect our clients *(sic)* position.

As advised, our client is prepared to enter negotiations with a view to settlement. It would appear to be in your interest to avoid further court proceedings on the question of set-off and the associated expenses. Our client has put forward a reasonable figure to you with a view to settlement being reached and we look forward to receiving your comments by 13th December 2019."

[11] The email of 6 December 2019 from the respondent's legal counsel, is in the following terms:

"Many thanks for your email but, as set out in my letter of 2 December, no action will be taken until such time as the bank has considered its options. I'm sure you'll appreciate why, in the circumstances, we would not look to negotiate individual cases. Should the bank decide to appeal the decision and you proceed to raise a court action, in all likelihood this would require to be sisted to await the outcome."

The 1973 Act

[12] The relevant provisions of the 1973 Act provide as follows:

"**6.— Extinction of obligations by prescriptive periods of five years.**

(1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years—

(a) without any relevant claim having been made in relation to the obligation, and

(b) without the subsistence of the obligation having been relevantly acknowledged,

then as from the expiration of that period the obligation shall be extinguished . . .

10.— Relevant acknowledgment for purposes of sections 6 and 7.

(1) The subsistence of an obligation shall be regarded for the purposes of sections 6, 7 and 8A of this Act as having been relevantly acknowledged if, and only if, either of the following conditions is satisfied, namely—

(a) that there has been such performance by or on behalf of the debtor towards implement of the obligation as clearly indicates that the obligation still subsists;

(b) that there has been made by or on behalf of the debtor to the creditor or his agent an unequivocal written admission clearly acknowledging that the obligation still subsists."

The sheriff's judgment

[13] The sheriff accepted that an obligation to make payment on the part of the respondent was created on 2 February 2016 and 19 July 2016. Those were the "appropriate dates" for the purposes of section 6(1) of the 1973 Act. However, he concluded that the December 2019 correspondence, looked at in the context of earlier passing correspondence, there had neither been performance towards implementation of the obligation nor an unequivocal written admission made to the appellant clearly acknowledging that the obligation still subsisted. In 2016, the respondent had advised the appellant that payment would not be made as it was exercising its right to set-off, in other words, it was asserting that it no longer had an obligation to make payment. The fact that the respondent was wrong in law in its assertion that it had a right of set-off was not relevant to the issue of whether the correspondence amounted to a relevant acknowledgment. The totality of the December 2019 correspondence indicated that the respondent was considering its options in light of the Inner House decision. The sheriff assoilzed the respondent from the craves of the writ.

Grounds of appeal

[14] The single ground of appeal advanced was that the sheriff had been wrong in law and fact to treat the respondent's position on its right to set-off as a denial of the existence of the underlying obligation to make payment. Properly construed, the correspondence constituted performance towards implementation of the obligation.

Submissions

[15] Both parties helpfully provided written Notes of Argument and adopted these in oral submissions.

Submissions for the appellant

[16] In considering whether a relevant acknowledgement exists, the court can look to at the whole context and earlier correspondence: *Richardson* v *Quercus Ltd* 1999 SC 278 and *Cawdor* v *Cawdor* 2007 SC 285. The sheriff had been wrong to conclude that the email of 6 December fell to be construed as a statement that the respondent no longer had an obligation to make payment. Viewed in context, the communications in December 2019 were a performance towards implementation of the obligation as clearly indicating the obligation still subsisted. It was in that context that the respondent referred to "negotiations". The respondent was acknowledging that sums may require to be paid to the appellant but was considering its options in light of the Inner House decision in *Donnelly*. At no point had the respondent denied it had an obligation to pay the appellant; the sheriff had erred in that regard. Set-off cannot be asserted without an underlying obligation to make payment. The email of 6 December indicated that the obligation to pay "still subsists" in terms of section 10(1) of the 1973 Act. The *Donnelly* judgment had been issued in November 2019. By December 2019, the respondent's position on set-off was irrelevant. None of the language used in the December correspondence refuted the obligation to pay the appellant. If there is any ambiguity in the correspondence, it should be resolved in favour of the appellant.

[17] Set-off as a contractual remedy cannot exist without an acknowledgement of the subsistence of a corresponding debt. A refusal to make payment is not to be equated with a refusal to acknowledge a contractual obligation subsists.

[18] The appellant invited the court to allow the appeal and remit the cause to the sheriff for further procedure.

Submissions for the respondent

[19] The sheriff did not err in law or in fact. The appellant had misunderstood the sheriff's decision. The sheriff concluded that the sums offered in the letters of 2016 had been applied by exercising a right of set-off and the respondent no longer had an obligation to make payment. At no time has the respondent denied the underlying obligation; the denial was in relation to an obligation to make payment to the appellant, the respondent having exercised its right to set-off the sums against the loan monies due.

[20] The test for what constitutes "performance" in terms of section 10(1)(a) of the 1973 Act, so as to interrupt prescription, is a fairly high one (Johnstone, *Prescription and Limitation of Actions,* (2nd ed) at paragraph 5.67, as approved in *Huntaven Properties Ltd* v *Hunter Construction (Aberdeen) Ltd* [2017] CSOH 57 at para [100]). Reading the correspondence in context, that test is not met. The correspondence does not clearly indicate that the obligation still subsists. The appellant suggested that the correspondence indicates that the issue of the PPI claims remains live and in contention. Even if that is the case, it does not meet the test in section 10(1). The contention between the parties is precisely whether there is any subsisting obligation. The question is not whether the respondent expressly denied any obligation in the correspondence, but rather whether the correspondence is capable of amounting to performance towards an obligation which clearly

indicates that the obligation still subsists. The correspondence referred to the need to sist any court proceedings which might be raised. By its very nature, that indicated that any proceedings would be defended.

Decision

[21] It is a matter of agreement that the obligation to pay the appellant subsisted for a continuous period of over 5 years from 2016 without any relevant claim having been made by the appellant. The appellant contends, however, that the subsistence of the obligation was relevantly acknowledged by the respondent in terms of section 6(1)(b) of the 1973 Act. The subsistence of an obligation is regarded as having been relevantly acknowledged only if one of two conditions is satisfied: (i) either there has been such performance by or on behalf of the debtor towards implement of the obligation as clearly indicates that the obligation still subsists; or (ii) there has been made, by or on behalf of the debtor to the creditor or his agent, an unequivocal written admission clearly acknowledging that the obligation still subsists (section 10(1)(a) and (b) of the 1973 Act).

[22] In the present case, the appellant contends that the terms of the correspondence in December 2019 from the respondent, considered in context, satisfy both conditions of section 10(1).

[23] Performance towards implement of an obligation must be such as "clearly indicates that the obligation still subsists". I respectfully agree with Lord Docherty's observation in *Huntaven Properties Ltd* v *Hunter Construction (Aberdeen) Ltd* [2017] CSOH 57 at para [100] (referring to Johnstone, *Prescription and Limitation of Actions,* (2nd ed) at paragraph 5.67), that the test for performance must be a fairly high one. Similarly, the language used in section 10(1)(b) suggests that the test for an unequivocal written admission clearly

acknowledging that the obligation still subsists is also a high one (Johnstone, paragraph 5.79). The use of the word "clearly" in both sections 10(1)(a) and (b) supports that interpretation.

[24] The appellant relied upon observations made by Lord Johnston in *Richardson* v *Quercus Ltd* (at page 290) that a broad and liberal construction should be put upon both the phraseology of the statute and any inferences or conclusions to be drawn from evidence bearing upon either of the two conditions of section 10(1). Lord Johnston noted:

> "While there are obviously certain strictures that apply in respect of sec 10 (1)(b), with regard, for example, to the requirement of writing and use of the word 'unequivocal' , when it comes to the phrase 'performance … towards implement of the obligation' in sec 10(1)(a) there is a myriad of facts and circumstances that could amount to compliance with that particular term. I would go as far as to suggest that even if the evidence was to some extent equivocal, any ambiguity should be resolved in favour of the creditor, especially where, as here, the debtor chooses to lead no evidence on this particular aspect of the case, leaving it open to the court to take inferences most favourable to the creditor . . "

[25] Lord Johnston's observations were obiter and were not commented upon by either Lord Prosser or Lord Abernethy. The observations are somewhat difficult to reconcile with the express language of section 10(1). Lord Prosser cautioned against adopting alternative terminology in preference to the language of the section. The legislation requires both performance in terms of section 10(1)(a) and an unequivocal written acknowledgment in terms of section 10(1)(b) to *clearly* indicate that an obligation still persists, not that it should "reasonably entitle" the creditor to believe that the existence of the obligation is being recognised by the debtor. Lord Johnston's observations require to be considered in light of his concern that the debtor in *Richardson* chose not to lead any evidence, rather than as importing tests of reasonableness or subjective belief into the conditions set out in section 10(1) of the Act.

[26] There are a multitude of facts, events and circumstances which might constitute performance towards implement of an obligation. Performance can consist of a positive act such as payment or part payment of a debt, or the carrying out of remedial works, or, as provided for in section 10(4) of the Act, it can consist of refraining from doing something or permitting or suffering something to be done or maintained. The task for the court is to examine the surrounding circumstances and to consider the terms of any correspondence in that context (per Lord Prosser in *Richardson* at page 287 and *Cawdor* v *Cawdor* per Lord President (Hamilton) at para [26]). A similar exercise is required when considering section 10(1)(b).

[27] Turning then to consider the correspondence in context, in January and July 2016, the respondent wrote to the appellant upholding his complaints in relation to the mis-selling of PPI and made offers to pay the sums. In each of these letters, the respondent stated that payment would be "subject to clearance of any arrears you may have with the Group". Before engaging solicitors, the appellant wrote to the respondent on 9 March 2016. In this letter, the appellant challenged the respondent's decision to "withhold" the sums on the basis that he "owed" the respondent money. It is clear that the appellant understood the respondent's position. By letters dated 24 March 2016 and 1 April 2016, the respondent advised the appellant that it had set-off the sums due to the appellant against monies owed by him, by crediting arrears on his loan accounts. On 19 July 2016, solicitors acting for the appellant wrote to the respondent challenging its right to set-off. They wrote again on 27 February 2017 noting that they had been "forced to progress this matter" in the absence of a response, referring to the Sheriff Appeal Court decision in *Donnelly* v *Royal Bank of Scotland* [2017] SAC (Civ) 1. The appellant's solicitor was also in correspondence with the Financial Ombudsman Service regarding the respondent's position. On 28 May 2019, the

appellant's solicitors wrote to the respondent referencing the Supreme Court decision in *Dooneen Ltd (t/a McGinness Associates)* v *Mond* [2018] UKSC 54 issued 6 months earlier which had found "that a discharged debtor was entitled to retain PPI compensation."

On 26 November 2019, the appellant's solicitor wrote again noting:

> "We have had time to consider the Inner House judgement of 21st November 2019 in RBS v Alison Donnelly [2019] CSIH 56. We note that on the basis of this judgment, and the Courts rejection of your set-off defence, it is now entirely unreasonable for you to continue to delay in making payment of the PPI awards to our client. . . .Please advise whether your client has any proposal for making payment."

[28] On 2 December 2019, the respondent wrote "Please be advised that we are considering our next steps in respect of the Inner House judgement and will confirm our position in due course." On 5 December by email, the appellant's solicitor wrote

> "it remains our position that our clients (sic) prospects are strong, considering the Supreme Court judgment in *Dooneen Ltd (t/a McGinness Associates) v Mond* [2018] UKSC 54 and our instructions are to proceed with court action to protect our clients (sic) position . . . our client is prepared to enter negotiations with a view to settlement."

That email was marked "without prejudice to our client's rights and pleas in law and cannot be relied upon in any future proceedings, except at our client's sole instance"; however, Mr Dailly on behalf of the appellant agreed that the email could be placed before the court and that the court could have regard to it.

[29] Finally, on 6 December 2019, the respondent responded to this email noting

> "no action will be taken until such time as the bank has considered its options… Should the bank decide to appeal the decision and you proceed to raise a court action, in all likelihood this would require to be sisted to await the outcome."

[30] It is in my judgment clear that this correspondence does not meet either condition set out in section 10(1)(a) or (b) of the Act. The respondent sought to exercise a right of set-off. Parties disagreed whether it was legitimate to do so. While during submissions, there was much discussion of whether the exercise of a right of set-off involves an acknowledgment

of a subsisting underlying obligation, I agree with the sheriff; that discussion was misconceived. The respondent had made its position clear. It is equally clear that that position was understood by both the appellant and those representing him. The respondent maintained that it had set-off the obligation to pay the appellant against the arrears due by the appellant. In doing so, the respondent was asserting that the obligation no longer subsisted; it had been satisfied. Whether it was wrong in law to so assert, is irrelevant. As at December 2019, the respondent was considering its options. Those options, as submitted by the respondent, might have included appealing the Inner House decision in *Donnelly* or seeking to reduce the actings of the appellant's trustee so as to re-open the trust proceedings and allow the respondent to re-assert its right of set-off in the insolvency proceedings. I note that the latter option, which was one foreshadowed in the opinion of Lord Reed in *Dooneen Ltd (t/a McGinness Associates)* v *Mond* [2018] UKSC 54 at para [23], was the course of action taken in *Baillie* v *Young* (1837) 16 S 294, and importantly, it was referred to by Lord Glennie in *Donnelly* (see para [50]), a decision with which the appellant's solicitor was familiar and had taken its time to consider.

[31] Moreover, the parties exchanged correspondence in which the appellant referred to the possibility of raising court proceedings to seek payment of the sums due on account of the respondent's refusal or delay to pay. The respondent had indicated that it would defend any such proceedings and seek to have them sisted. An exchange of that nature does not readily, less so clearly, permit an inference that there has been an indication or an acknowledgment that an obligation to pay still subsists. Mr Dailly candidly accepted (and was correct do so) that it would have been prudent for court proceedings to have been raised prior to the expiry of the prescriptive period; however, the appellant's solicitors had lost touch with their client.

[32] For these reasons, I will refuse the appeal and adhere to the sheriff's interlocutor of 18 May 2023. As the appellant is in receipt of legal aid, the respondent did not seek an award of expenses.