SHERIFF APPEAL COURT

[2023] SAC (Civ) 27
GLW-CA66-21

Sheriff Principal N A Ross
Appeal Sheriff H K Small
Appeal Sheriff D Hamilton

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in the appeal in the cause

BALBIR KAUR CHALL

Pursuer and Respondent

against

JASBIR SINGH CHALL

First Defender

THE CHALL PARTNERSHIP

Second Defender

HARDEEP SINGH CHALL

Third Defender and Appellant

HARDEEP SINGH CHALL, BURINDER KAUR SANDHU and

SUMAN KAUR RAI, as representatives of the deceased JAGWINDER SINGH CHALL

Fourth Defenders

Third Defender and Appellant: J A Brown; Lindsays LLP
Pursuer and Respondent: G MacColl KC; Wright Johnston & Mackenzie LLP

1 August 2023

[1] The respondent seeks reduction of a partnership agreement, together with a further conveyance, on the grounds that her signature was procured under essential error induced by misrepresentation and, separately, undue influence. Following a preliminary proof on the circumstances of execution, the sheriff found those averments to be proved. He found that the two contracts were voidable and fell to be reduced. He found that *restitutio in integrum* was not precluded.

[2] The appellant appeals on the grounds that reduction is not a remedy available to the respondent, because *restitutio in integrum* is not possible. The sheriff had erred in considering that contracts could be unwound so as to place the appellant in the same pre-contract position. A voidable contract cannot be reduced unless *restitutio in integrum* is possible. The appellant accepts that there is an obligation to account for intromissions with partnership assets.

The facts

[3] A preliminary proof before answer was fixed on the issue of the status of two agreements, namely a purported partnership agreement dated 1 February 2013 (the "2013 Agreement"), which shows the appellant to be assumed as a partner with a 25% share, and a further deed (the "2014 Conveyance") which conveyed partnership heritable rights to the appellant. The sheriff made findings in fact which include the following:

[4] The Chall partnership was formed in 1998 by oral agreement. Upon constitution, it had six partners, namely Surinder Chall and his wife (the respondent); Jasbir Chall and his wife Parmjit Chall; and Jagwinder Chall and his wife Gurbaksh Chall. It operated as a

business and investment vehicle for the assets of three separate families. Of the original six partners, only two now survive. These are the respondent and Jasbir Chall.

[5] By 2013, only three of the original partners were alive. These were the respondent, Jasbir Chall and Jagwinder Chall. The partners had agreed that the partnership would not dissolve on the death of a partner provided their spouse survived. By 2013 the partnership was owned one-third by the respondent, one-third by Jasbir and one-third by Jagwinder. The appellant, Hardeep Chall, is Jagwinder's son.

[6] Jagwinder Chall, with the consent of the other partners, undertook the principal role in the management of the affairs of the partnership. The appellant later became involved in managing the operation of the partnership assets from 2000. Neither the respondent nor Jasbir Chall had any substantial involvement in the management of the partnership. They were accustomed to receiving from Jagwinder documentation of a routine administrative nature. They were accustomed to sign such documentation without question or explanation, as they placed absolute trust in Jagwinder to manage the ordinary affairs of the partnership. Such documents included tax and accounting documents.

[7] Between 2012 and 2013 the partnership had to re-finance its borrowing. The appellant was involved in obtaining further lending. The third-party lender required (i) sight of a formal partnership agreement identifying all the partners, and (ii) confirmation that the appellant was the managing partner of the partnership. Jagwinder and the appellant instructed a solicitor to draft the 2013 Agreement. The effect of the 2013 Agreement was to alter the constitution of the partnership by (i) making the appellant a partner within the partnership and being awarded a 25% share of the profit and (ii) making the appellant the managing partner. This meant that the remaining partners' shares were each reduced from one-third to one-quarter.

[8] The respondent only speaks Punjabi. She is unable to read English. Prior to signing the 2013 Agreement she was not advised by Jagwinder, the appellant, or the solicitor who drafted the agreement to obtain separate legal advice. She had no understanding of the true nature, meaning or import of the document she was being asked to sign. She was induced by omission to believe she was being asked to sign a routine document relating to the day-to-day administration of the partnership. She proceeded to sign the 2013 Agreement. No consideration or capital was paid to the respondent for the diminution of her share of the partnership. She did not consent to such diminution of her share or the assumption of the appellant as partner.

[9] Subsequently in 2014, it was required that the appellant be named as a co-trustee on the registered titles for the heritable properties owned by the partnership. Jagwinder and the appellant instructed the same solicitor to draft the 2014 Conveyance, which was a deed of assumption and conveyance. They asked the respondent to sign it. She again was not advised by Jagwinder, the appellant, or the solicitor to obtain separate legal advice. Again, she did not understand the true import of the document she was being asked to sign. The respondent signed the 2014 Conveyance. She did not intend to consent to convey any heritable rights to the appellant.

[10] The appellant and his father thereafter continued to manage the partnership affairs. Jagwinder died in 2020. The respondent had become concerned over the management of the partnership. She requested details of the intromissions of the partnership's assets, but these were not provided. She subsequently became aware of the true import of the 2013 Agreement and the 2014 Conveyance. The present action was raised. She seeks count, reckoning and payment requiring the partnership, Jasbir Chall, the appellant and the executors of Jagwinder's estate to produce the books and accounts of the partnership. She

also seeks reduction of the 2013 Agreement and the 2014 Conveyance on the basis of (i) essential error induced by misrepresentation and (ii) undue influence.

[11] The appellant, in opposing reduction, founded on the impossibility of *restitutio in integrum*, as he had undertaken onerous obligations to third-party lenders which were impossible to unwind.

[12] On the basis of the foregoing, the sheriff found that the 2013 Agreement and the 2014 Conveyance were invalid and fell to be reduced. The respondent had executed both deeds under (i) essential error induced by misrepresentation from Jagwinder and (ii) undue influence by Jagwinder. He also found the partnership to have been dissolved upon the death of Jagwinder in 2020, conform to the original 1998 oral agreement.

[13] The appellant contended before the sheriff that if the deeds were found to be invalid it would be necessary for *restitutio in integrum* to be viable before the 2013 Agreement and the 2014 Conveyance were reduced. He submitted that he had been held out by the partnership to third party lenders as a partner, and would remain liable to these creditors in the event of reduction. The respondent did not offer to relieve him of this onerous liability. While it was accepted that a right of relief would be available to him against the partners, that did not prevent him being primarily liable to the creditors. The only way restitution would be possible was if he were given an indemnity by the partners. They had not offered any indemnity.

[14] The sheriff found that *restitutio in integrum* was not precluded and that it did not need to be offered as a condition of reduction. In any event, *restitutio in integrum* was possible in this case. The appellant would be able to seek indemnification as a matter of law from the partnership upon reduction of the deeds. The sheriff also found that, as a consequence of reduction, the partnership was dissolved, which is not challenged.

Submissions

[15] Counsel for the appellant accepted that, following the sheriff's findings in fact, the 2013 Agreement and the 2014 Conveyance were potentially voidable. He submitted that before either document is reduced, *restitutio in integrum* must be viable. The only manner in which that would be possible is for (i) the partnership to provide him with an indemnity for any debts and loans made to the partnership since 2013; and (ii) an order to be issued requiring remuneration to the appellant for the work undertaken by him for the partnership since 2013. The latter was necessary as the appellant had not been paid for his services to the partnership.

[16] Counsel accepted that the issue of remuneration was not, in isolation, a bar to *restitutio in integrum*. There could be flexibility in the nature of a remedy for that (*Spence* v *Crawford* 1939 SC (HL) 52). It was different, however, if the party seeking to reduce a contract was unable to relieve a defender of contractual liability to third parties. A third party liability had to be relieved as a condition of reduction (*Hay* v *Rafferty* (1900) 2 F 302). The appellant had to be relieved of his obligation to account for any liability of the partnership, including the loans issued by the lender, before the deeds were reduced. That had not been offered by the respondent. The loan arrangements were very substantial liabilities which were immediately prestable.

[17] Senior counsel for the respondent submitted that the appellant's position was that, notwithstanding that Jagwinder and the appellant had wrongfully misrepresented, and induced the respondent into signing, the contracts, he should benefit from his wrongful acts. He was seeking to keep his 25% partnership share, having paid nothing for it, even though the respondent never intended he receive it. Counsel submitted that the respondent could not rely upon his own wrongful conduct as a bar to reduction (*Spence* v *Crawford* at pp

71-72). The appellant's submission on the ratio of *Hay* was incorrect. The comments in *Hay* on *restitutio in integrum* were *obiter* and not binding on this court. There was no rule of law which entitled the appellant to an indemnity against third party liability as a precondition to reduction. Further, the transactions in 2013 and 2014 had been gratuitous. *Restitutio in integrum* was not applicable to a gratuitous transaction.

Decision

[18] All parties accept that the appellant is liable to account for his intromissions with partnership property. It arises out of his management of the partnership affairs, with his late father Jagwinder, whose representatives are similarly obliged. An account has already been lodged, and the next stages of count, reckoning and payment will proceed before the sheriff. This preliminary dispute is about whether the appellant is a partner and owns a share of the partnership assets, or is only a manager.

[19] The sheriff's findings about the circumstances in which the 2013 Agreement and the 2014 Conveyance came to be executed are not challenged. The respondent's signatures on each of these documents were obtained both by misrepresentation and by undue influence. This dispute is only about whether reduction is a competent remedy.

[20] The appellant claims that reduction is not competent, on the basis that *restitutio in integrum* is, in the circumstances, both required and impossible. The impossibility arises from his personal financial exposure arising from financial obligations undertaken by him to third party lenders on behalf of the partnership. The latter will remain a present and future liability on the appellant even if the contracts are reduced. The sheriff erred in finding that *restitutio in integrum* was possible, and that it was properly effected by a future obligation to indemnify.

[21] The sheriff found that restitution was possible in this case, and that the two documents fell to be reduced. In our view, he reached a decision which was open to him on the facts, and the appeal should be refused.

The law

[22] Both parties founded on the cases of *Hay* v *Rafferty* (1900) 2 F 302 and *Spence* v *Crawford* 1939 SC (HL) 52. The general approach of the law was recently reaffirmed by the Supreme Court in *Joint Liquidators of Grampian MacLennan's Distribution Services Ltd* v *Carnbroe Estates Ltd* 2020 SC (UKSC) 23:

> "The general approach of the law is that…the court will only grant decree of reduction if it is able to place the defender substantially in the position it would have been in if the parties had not entered into the impugned contract…" [per L. Hodge at para [58]]

[23] Lord Hodge placed reliance on the following dictum in *Spence* v *Crawford*:

> "restoration is essential to the idea of restitution. To take the simplest case, if a plaintiff who has been defrauded seeks to have the contract annulled and his money or property restored to him, it would be inequitable if he did not also restore what he had got under the contract from the defendant. Though the defendant has been fraudulent, he must not be robbed nor must the plaintiff be unjustly enriched, as he would be if he both got back what he had parted with and kept what he had received in return. The purpose of the relief is not punishment, but compensation" (per L. Wright at p 77 of *Spence*).

The decision in *Hay* v *Rafferty*

[24] Counsel for the appellant relied on *Hay*, an Inner House decision. *Hay* was described briefly in *Spence* as a case which "was a clear one, and is of no assistance in the present case." In *Hay*, the pursuer sought the reduction of an assignation by him of his share in a Crown fishery lease, obtained by fraudulent misrepresentation. Such Crown leases involve the tenant undertaking obligations to the Crown, and the allegedly dishonest assignee had

obtained the Crown consent to the assignation and had undertaken such obligations. He opposed reduction on the basis that, following reduction, he would remain obligated to the Crown. The case was dismissed at debate as the averments of induced error, *pactum illicitum*, and accounting were irrelevant, and *restitutio in integrum* was not possible. On reclaiming, the Inner House upheld the dismissal on these grounds, and separately on the grounds that the pursuer did not offer *restitutio in integrum*. The pursuer could not procure the relief of the allegedly dishonest assignee from the Crown obligations or from copartnery obligations, and therefore restitution was impossible. In the present case, senior counsel for the respondent submitted that this latter discussion was *obiter*, but we note it was not so treated in *Spence*.

[25] The Lord President in *Hay* endorsed the reasoning of the Lord Ordinary, whose decision turned on (i) the assignor having received a sum of £800 from the assignee for payment of the composition to his creditors; (ii) that prior to challenge of the assignation, "the condition of matters was totally changed, and that by the act of the pursuer", so it was the assignor, not the assignee, who was responsible; (iii) that restitution would be impossible due primarily to contractual obligations assumed to co-partners, a situation engineered by the assignor's correspondence with the firm; (iv) that the interests of the co-partners, and of the Crown (none of whom had been convened as parties) might be affected. The Lord Ordinary concluded that, although the pursuer sought reduction, "his own act has put this out of his power." To add to the caution required of *Hay*, the Lord Ordinary described the case as "exceedingly confused", which he followed with "much difficulty", and found the averments to be totally irrelevant.

[26] Accordingly, we do not agree with the appellant's submission that *Hay* is directly in point with the present case. Counsel urged us to consider that impossibility of relief from

third-party obligations was the effective bar in *Hay*. We do not agree with that reading of the judgment. In our view, the critical factor was that the change of circumstances leading to impossibility of *restitutio in integrum* was brought about by the pursuer's own act, not that of the assignee. In the present case, the opposite is the case. The assignee, the appellant, is seeking to found on his own actions as creating a barrier to reduction. In those circumstances, *Hay* is a case which is both clear and of no assistance, as was observed in *Spence*. Where a party actively causes a change of circumstances before seeking reduction, the equities are quite different to where a party seeks to rely on his own subsequent acts to prevent reduction of a contract which he has wrongfully obtained. Lord Thankerton in *Spence* made clear he was considering matters from the point of view of the wronged party, not that of the wrongdoer:

> "The normal type of case in which the question has arisen is one where the pursuer is purchaser and seeks to recover the price on restoration of the subject purchased, and the question in issue is whether the pursuer by his treatment of the subject purchased, while in his possession, has so treated it that it is no longer identifiable in any reasonable sense."(at p 69).

[27] In our view, *Hay* does not regulate the position where the wrongdoer retains the property and purports to rely on his own intromissions. Accordingly, we do not accept that *Hay* prevents the remedy of reduction in this case, or supports the appellant's position. In considering *restitutio in integrum*, parties agreed that *Spence* was the relevant authority.

The decision in *Spence* v *Crawford*

[28] In *Spence*, the fraudulent purchaser of shares pleaded that his position had been altered in a manner which could not be undone. The transaction to be reduced was the purchase of shares in a company. Since the sale, the capital of the company had been increased. The defender had gained, by the purchase, a controlling interest in the company

which he would lose. He had suffered loss in selling securities in order to relieve the vendor of liabilities, including overdraft obligations and pledge of securities with a bank. The House of Lords held that *restitutio in integrum* was possible by repayment of the purchase price with interest, and a voluntary payment by the vendor towards the purchaser's losses.

[29] Lord Thankerton, with whose judgement the other judges concurred, affirmed that a contract obtained by fraud was voidable provided *restitutio in integrum* was possible. The condition of the relief was that the fraudulent purchaser was restored to his pre-contract position. He noted, however, that *restitutio in integrum* must not be applied too literally, and that a fraudulent purchaser could not found on his own dealings with the sale subjects in order to thwart restitution.

[30] He discussed possible remedies where reduction of contract was sought by purchasers, if the sale subjects had deteriorated due to the fault of the vendor. He described (at page 70) as "this important passage" a quote from *Erlanger's Case* (3 App Cas 1218 at p 1278 per Lord Blackburn) that:-

> "And I think the practice has always been for a Court of equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract."

[31] He confirmed these principles were part of Scots law. *Hay* was considered, as a case of a vendor seeking to reduce a contract, but found to be a clear case and of no assistance. As a broad principle, a fraudulent purchaser could not found on his own dealings to prevent reduction.

[32] He progressed (p 73) to discuss payments made and obligations undertaken by the fraudulent purchaser in implement of the contract. He noted that the main purpose of the contract was to bring to an end the vendor's interest in the company. The postponement of payment of the purchase price was an ancillary matter. The purchaser allowed the sale of

certain securities, and gave a guarantee to the bank, procured another guarantee from his mother, and assigned to the bank a loan due to him by the company. These had never been called up and could not affect the question of restitution. He also allowed the bank to sell his stock. That fact "might raise a difficult question", but was avoided because the vendor had offered to compensate for any loss of value in the sale. Accordingly:-

> "In my opinion, to use Lord Blackburn's phrase, the Court will be doing what is practically just by making it a condition of restitution that the respondent should be compensated as above suggested, and such payment…will, in my opinion, satisfy the doctrine of *restitutio in integrum*."

[33] Lord Wright underlined that the remedy is equitable and its application discretionary. Where the remedy is applied, it must be "moulded in accordance with the exigencies of the particular case". The court must attempt to do what is practically just, without its hands being tied by rigid rules. The essence was restoration, and the purpose of the relief is not punishment but compensation.

[34] Accordingly, in our view *Spence* is authority for the proposition that where *restitutio in integrum* is required as a condition of reduction of a contract, it does not require to reach a position identical to the *status quo ante*. The court must attempt to reach a restoration to the original pre-contract position. If that is impossible then it is sufficient if the court imposes upon the parties a settlement which represents a practically just resolution.

[35] That is sufficient to address parties' submissions. It does not, however, address the question of whether this is a case where *restitutio in integrum* is required before the contracts can be reduced.

Specific features of the present case

[36] It is clear from *Spence* that the availability of *restitutio in integrum* is highly fact-specific. We accordingly note a number of central features of this case.

[37] The first is that respondent's signature was obtained in circumstances which were gratuitous, not transactional. She did not believe she was ceding rights of ownership in return for payment or other benefit. She did not intend to give away anything at all. She did not expect to receive anything. She believed she was enabling the conduct of routine affairs of the partnership.

[38] The second is that this was not a bilateral personal contract, but one signed by three partners of the firm. While *Hay* tended to recognise that unwinding a multilateral partnership contract may impose increased practical difficulties that is not a point taken in the present case. The appellant does not found on inter-partnership difficulties, and there is no challenge to the sheriff's findings in fact. It can be disregarded for present purposes.

[39] The third is that this not a case based on fraud. While the general rule is that a contract induced by fraud is voidable, there is an exception for essential error, which would render it void (McBryde: The Law of Contract in Scotland, para 14-56). Undue influence does not involve an element of fraud (*ibid* para 16-33). Senior counsel for the respondent submitted that the respondent had the option to affirm the arrangement had she wished to.

[40] Fourth, as already noted, the appellant seeks to found on his own actings. The authorities tend to focus on the conduct of the party seeking reduction, not the opposing party.

[41] Fifth, in distinction to *Hay*, the sheriff found that there was a practical remedy to avoid any unfair enrichment on the part of the respondent. His findings in this respect are not challenged on the facts.

Whether *restitutio in integrum* is a required precondition

[42] The sheriff found that *restitutio in integrum* did not require to be offered as a condition of reduction. We agree with that finding.

[43] We accept the submission for the respondent that the respondent's signature was obtained in circumstances which were gratuitous, not transactional. She did not believe she was exchanging rights of ownership in return for payment or other benefit. She did not intend to give away anything, or to receive anything. She was, as a result of essential error induced by misrepresentation, or separately by undue influence, induced into believing she was enabling the conduct of routine affairs of the partnership, not gifting assets to the appellant.

[44] In such cases:-

> "Unlike other vices of consent which render a deed of obligation voidable, reduction of a gratuitous deed for essential error does not require *restitutio in integrum* since in a gratuitous obligation there is by definition no counter-prestation" (Stair Encyclopaedia Reissue 14, para 435).

[45] The error in the present case was in the essentials, in the sense of a substantial error without which the respondent would have declined to contract. Restoration of the parties does not require the respondent to restore or refund anything to the appellant. There is no question of unjust enrichment or robbery, as Lord Wright describes in *Spence*. The purpose of the relief is not punishment but compensation. There is nothing to compensate the appellant for, because his liabilities were not incurred as part of any voluntary transaction with the respondent. For that reason the appeal must fail.

Whether *restitutio in integrum* was precluded

[46] In any event, even if *restitutio in integrum* were required before reduction could be made, in our view the sheriff was correct to regard it as not being precluded in this case. The court found there to be a solution which was practically just, as required by *Spence*.

[47] The sheriff considered that the remaining partners in The Chall Partnership, namely the respondent, Jasbir Chall and the estate of the late Jagwinder Chall, could indemnify the appellant against any and all liabilities he entered into on behalf of the partnership.

[48] As discussed above, *Spence* requires the court to take a practical approach to restitution, and it is not a bar that restoration is not precisely possible. The House of Lords went on to discuss examples. For example, the rule itself is modified where compensation can be made for any deterioration of the property, so any deterioration is not a bar to rescission but only a ground for compensation (at page 70). Allowances can be made for depreciation and permanent improvement. The court can take account of profits and make allowances for deterioration. It can in equity give relief which is practically just. The principle is that it is more fair that the wrongdoer should be compelled to accept compensation than that they should retain the full profit of their wrongdoing. If substantially compensation can be made, rescission with compensation is *ex debito justitiae* (that is, a remedy which exists as of right). In *Spence*, the contract was reduced on condition of repayment of the purchase price, together with compensation for an increase in value in the interim, and execution of a transfer document to transfer them to the defender.

[49] In the present case, the sheriff noted (at para 51) that *restitutio in integrum* remains possible by the simple mechanism of the surviving partners indemnifying the appellant in the event that he incurs liability in respect of the partnership obligations. Counsel for the appellant agreed that to be correct, but pointed out that this was not an immediate remedy.

In our view, that objection is not a good one, because the remedy is only as conditional and prospective as the liability to make payment itself. We agree that indemnity does not require to be made a precondition to reduction. It remains as an equitable remedy should payment be demanded by third-party creditors. The liability would arise as a matter of law upon reduction of the contracts. In our view, the sheriff has applied the principles of *Spence*. The practical solution he has identified is not the subject of appeal, and is not disputed. The appellant's position is only that it does not amount to actual restitution. On the above principles, that is not required. The sheriff has identified a solution which is practically just.

[50] Accordingly, even if *restitutio in integrum* is not, in these particular circumstances, a necessary precondition to reduction, we would have found that the sheriff had identified an equitable, and practically just, means of achieving *restitutio in integrum*.

Disposal

[51] We will refuse the appeal. We note that the sheriff fixed a case management conference "to determine the mechanics of implementing the foregoing findings and the question of expenses", and which was superseded by the present appeal. The action will require to progress in respect of the accounting. We will remit to the sheriff to proceed as accords. Parties should attempt to agree the disposal of expenses of the appeal. If this does not prove successful within 14 days, a hearing will be assigned.