



SHERIFF APPEAL COURT

[2020] SAC (CIV) 5
EDI-SQ362-15

Sheriff Principal C D Turnbull
Appeal Sheriff A M Cubie
Appeal Sheriff N McFadyen CBE

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal by

THE ADVOCATE GENERAL FOR SCOTLAND

for and on behalf of the

COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellant

in the remit under section 17G of the Bankruptcy (Scotland) Act 1985

by

THE ACCOUNTANT IN BANKRUPTCY

Respondent

in the sequestration of VCY

Appellant: Roxburgh, advocate; Office of the Advocate General
Respondent: Ower, advocate; Harper Macleod

16 March 2020

Introduction

[1] This appeal arises from an application for recall of a sequestration under the provisions of the Bankruptcy (Scotland) Act 1985 ("the 1985 Act") in which a dispute arose

between the trustee in the sequestration, the Accountant in Bankruptcy ("AIB") and the petitioning creditor ("HMRC"). The issue in the appeal is the proper interpretation of the word "debts" in the context of section 17 of the 1985 Act and whether or not that term includes interest.

Facts

[2] The facts which underlie the appeal are set out at length in the sheriff's judgment¹, which is reported as *Accountant in Bankruptcy, Applicant* 2019 SLT (Sh Ct) 235. We do not propose to rehearse them at length. The salient matters are set out in the following three paragraphs of this opinion.

[3] VCY was sequestrated at Edinburgh Sheriff Court on 3 March 2016 on the petition of HMRC. The date of sequestration was 10 December 2015. The AIB was appointed as the trustee in the sequestration. Subsequent to two prior applications, each of which was refused, on 10 July 2018 VCY applied to the AIB under section 17A(1) for recall of the award of sequestration, that on the ground that he was able to pay his debts in full.

[4] VCY's application was intimated on HMRC in accordance with section 17A(3). In response to the application, HMRC's position was that statutory interest must be paid in order to secure a recall of sequestration. The AIB did not consider that HMRC were entitled to statutory interest. That position had previously been encapsulated by a letter which the AIB had sent to all trustees on 4 May 2018

[5] The sum due to HMRC as at the date of sequestration and the petition expenses were duly paid. Thereafter, the agent acting on behalf of the trustee submitted to the AIB a

¹ see [2019] SC EDIN 30 - <http://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019scedin30.pdf?sfvrsn=0>

statement in accordance with section 17B and confirmed that their position was that the petition debt had been paid. HMRC objected to the recall of the sequestration on the ground that the debtor had not paid and had no intention of paying the statutory interest on the debt that was due to HMRC under section 51(1)(g). The application for recall of the sequestration was then remitted to the sheriff by the AIB in terms of section 17F(2).

The Sheriff's decision

[6] Having heard submissions from the AIB and HMRC (VCY did not participate in the remit), the sheriff concluded that VCY's debts had been paid in full. The award of sequestration was subsequently recalled, in terms of section 17 (see section 17F(3)). The basis for the sheriff's decision is to be found between paragraphs [21] and [25] of his judgment. The sheriff points out that for the purposes of the 1985 Act "debt" is not a defined term. He did not consider that the definition of "ordinary debt" for the purpose of sections 73 and 51(1)(f) (which provides that an ordinary debt is a debt which is neither a secured debt nor a debt mentioned in any other paragraph in section 51(1)) was helpful in resolving the present issue. The effect of section 51 was that interest was only payable when all other debts had been paid. The Act was effectively silent as to how the court could be satisfied that, on an application for recall, the debts had been paid in full. The sheriff notes that there may be a number of ways in which the creditors are paid and it does not follow that section 51 must necessarily apply in the sense of the trustee making a formal distribution. The sheriff found the omission in section 17 of express provision for the inclusion of statutory interest to be of some significance. Other parts of the 1985 Act clearly did distinguish between debts and interest. It was only on distribution under section 51 and in particular circumstances that the creditor would receive statutory interest.

[7] As the sheriff correctly observes (see paragraph [21] of his judgment), the remedy under section 17 is a discretionary one. One of the grounds upon which the court may recall an award of sequestration is that the debtor has paid his debts in full (see section 17(1)(a)). No issue arises in this appeal as to the sheriff's exercise of the discretion which was open to him.

Statutory provisions

[8] Insofar as relevant, section 17 is in the following terms:

“17. — Recall of sequestration by sheriff

(1) The sheriff may recall an award of sequestration if he is satisfied that in all the circumstances of the case (including those arising after the date of the award of sequestration) it is appropriate to do so and, without prejudice to the foregoing generality, may recall the award if he is satisfied that —

- (a) the debtor has paid his debts in full;*
- (b) a majority in value of the creditors reside in a country other than Scotland and that it is more appropriate for the debtor's estate to be administered in that other country; or*
- (c) one or more other awards of sequestration of the estate or analogous remedies (as defined in section 10(7) of this Act) have been granted.*

(2) Where one or more other awards of sequestration of the debtor's estate have been granted, the sheriff may, after such intimation as he considers necessary, recall an award whether or not the one in respect of which the petition for recall was presented.

(2A) Where the sheriff intends to recall an award of sequestration on the ground that the debtor has paid the debtor's debts in full, the order recalling the award may not —

- (a) be made before the payment in full of the outlays and remuneration of the interim trustee and the trustee,*
- (b) be subject to any conditions which are to be fulfilled before the order takes effect.*

(3) On or before recalling an award of sequestration, the sheriff —

- (a) shall make provision for the payment of the outlays and remuneration of any interim trustee and the trustee by directing that such payment shall be made out of the debtor's estate or by requiring any person who was a party to the petition for sequestration or, as the case may be, the debtor application to pay the whole or any part of the said outlays and remuneration;*
- (b) without prejudice to subsection (7) below, may direct that payment of the expenses of a creditor who was a petitioner, or concurred in the*

debtor application, for sequestration shall be made out of the debtor's estate;

(c) may make any further order that he considers necessary or reasonable in all the circumstances of the case.

(4) Subject to subsection (5) below, the effect of the recall of an award of sequestration shall be, so far as practicable, to restore the debtor and any other person affected by the sequestration to the position he would have been in if the sequestration had not been awarded.

.... "

[9] In support of their argument, HMRC place considerable reliance upon the terms of

section 51 of the 1985 Act, which is in the following terms:

"51. — Order of priority in distribution.

(1) The funds of the debtor's estate shall be distributed by the trustee to meet the following debts in the order in which they are mentioned —

(a) the outlays and remuneration of the interim trustee in the administration of the debtor's estate;

(b) the outlays and remuneration of the trustee in the administration of the debtor's estate;

(c) where the debtor is a deceased debtor, deathbed and funeral expenses reasonably incurred and expenses reasonably incurred in administering the deceased's estate;

(d) the expenses reasonably incurred by a creditor who is a petitioner, or concurs in a debtor application, for sequestration;

(e) ordinary preferred debts (excluding any interest which has accrued thereon to the date of sequestration);

(ea) secondary preferred debts (excluding any interest which has accrued thereon to the date of sequestration);

(f) ordinary debts, that is to say a debt which is neither a secured debt nor a debt mentioned in any other paragraph of this subsection;

(g) interest at the rate specified in subsection (7) below on —

(i) the ordinary preferred debts;

(ia) the secondary preferred debts;

(ii) the ordinary debts,

between the date of sequestration and the date of payment of the debt;

(h) any postponed debt.

(2) In this Act —

(a) "preferred debt" means a debt listed in Part I of Schedule 3 to this Act,

(b) "ordinary preferred debt" means a debt within any of paragraphs 4 to 6B of Part I of Schedule 3 to this Act,

(c) "secondary preferred debt" means a debt within paragraph 6C or 6D of Part 1 of Schedule 3 to this Act, and

Part II of that Schedule shall have effect for the interpretation of Part I.

(3) In this Act "postponed debt" means —

- (a) a loan made to the debtor, in consideration of a share of the profits in his business, which is postponed under section 3 of the Partnership Act 1890 to the claims of other creditors;*
- (b) a loan made to the debtor by the debtor's spouse [or civil partner]7 ;*
- (c) a creditor's right to anything vesting in the [...]1 trustee by virtue of a successful challenge under section 34 of this Act or to the proceeds of sale of such a thing.*

[10] "Debt" is not a defined term in the 1985 Act. The only reference to be found in the interpretation section (section 73) is in relation to the term "ordinary debt", which is to be construed in accordance with section 51(1)(f).

[11] Before the sheriff, and again before this court, attention was also drawn to the terms of paragraph 1(1) of Schedule 1 to the 1985 Act, which provides:

"1. —

(1) Subject to the provisions of this Schedule, the amount in respect of which a creditor shall be entitled to claim shall be the accumulated sum of principal and any interest which is due on the debt as at the date of sequestration.

Submissions for the parties

[12] HMRC argued that the correct meaning of a statute is identified by a consideration of the words of the relevant provision or provisions in the context in which they are used.

When Parliament used the word "debts" in sections 17 it was referring to the categories of debts that are outlined in section 51. That is the proper meaning of the words used in their statutory context. This interpretation is consistent with the scheme of the 1985 Act and the purpose of sections 17 to 17F. Sequestration is a collective process in which the trustee in sequestration administers the estate for the benefit of all creditors. The purpose of recall of sequestration is to enable a sequestration to be brought to a conclusion where either it ought never to have been awarded or where its continuation serves no useful purpose. Against that background, a requirement that a debtor make payment of his debts in full must

properly be viewed as requiring creditors to receive payment in respect of all the debts for which they are entitled to rank in the sequestration. That includes the payment of interest on ordinary and preferential debts which is itself a debt in the sequestration in terms of section 51(1)(g).

[13] The AIB argued that the sheriff's interpretation was the correct one and it was in keeping with the express provision in section 17D(3) of the 1985 Act (which is in broadly the same terms as section 17(4)) that

“the effect of the recall of an award of sequestration is, so far as practicable, to restore the debtor and any other person affected by the sequestration to the position the debtor or, as the case may be, the other person would have been in if the sequestration had not been awarded”.

The sheriff's reasoning should be accepted and the appeal should be refused.

Discussion

[14] Where the same word is used throughout a statute there is a presumption that it has the same meaning unless the context requires otherwise. In *Madras Electrical Supply Corporation Ltd v Boarland* [1955] AC 667 at 685, Lord McDermott observed that,

“The presumption that the same word is used in the same sense throughout the same enactment acknowledges the virtues of an orderly and consistent use of language, but it must yield to the requirements of the context, and it is perhaps at its weakest when the word in question is of the kind that readily draws its precise import, its range of meaning, from its immediate setting or the nature of the subject with regard to which it is employed.”

In *Madras Electrical Supply Corporation Ltd* the House of Lords held that the word under consideration (“person”) required to be given a different connotation in the two provisions considered by the court, they being “so different in their subject-matter and purpose”.

[15] It is true that section 51 regards interest as a debt – that much is apparent from the wording of sub-section (1), however, paragraph 1(1) of Schedule 1 treats interest separately

from the various classes of debt. It is therefore necessary to consider the subject matter and purpose of both section 51 and paragraph 1(1) of Schedule 1.

[16] The purpose of section 51 is to set out the order in which the available funds of the debtor's estate are to be distributed by the trustee. It is not entirely clear what the sheriff means by a "solvent sequestration" (see paragraph [23] of his judgment), however, that is a matter which is of no moment for the purposes of this appeal, it being clear from the sheriff's careful analysis of the relevant provisions of the 1985 Act that interest is only payable where the preceding classes of debt specified in section 51(1) have been paid in full and funds remain available for distribution to creditors in respect of interest. It is, however, notable that section 51 envisages that each of the various classes of debt could be paid in full and yet there are no further funds available to permit the payment of interest.

[17] It follows that the provisions of section 51 are applicable to a situation that is quite different to that envisaged by section 17. Moreover, despite the umbrella term "debts" being used in section 51(1) it is self-evident from the terms of section 51 that the various classes of debt therein are distinct from interest payable thereon.

[18] The provisions of paragraph 1(1) of Schedule 1 are also applicable to a situation that is quite different to that envisaged by section 17, paragraph 1(1) stipulating the amount a creditor is entitled to claim and how that is calculated. As noted above, for the purposes of a claim in the sequestration, the debt comprises two separate elements - principal and interest, the latter being restricted to any interest which is due on the debt (which in this context means "principal") as at the date of sequestration.

[19] For completeness we note the provisions of section 51(1)(e) and (ea) in which, in the case of ordinary preferred debts and secondary preferred debts, interest which has accrued to the date of sequestration is excluded (i.e. the claim submitted requires to be disaggregated

and the interest element deducted from the claim prior to distribution). Perhaps curiously there is no such exclusion in relation to the payment of an ordinary debt under section 51(1)(f). If the appellant's interpretation of section 51 was correct, that it applied in relation to recall in the same way as distribution, there would have been no requirement for the addition of section 17(2A); section 51 makes clear provision for the payment of the outlays and remuneration of both interim trustee and trustee. The insertion of section 17(2A) (by section 26(3)(b) of the Bankruptcy and Debt Advice (Scotland) Act 2014) fortifies the view we have reached that section 51 has no application in the recall procedure.

[20] It is, in our opinion, clear that the word "debt" has a different meaning in section 51 as compared to that in paragraph 1(1) of Schedule 1; the two provisions being quite different in their subject matter and purpose (cf. *Madras Electrical Supply Corporation Ltd*). In the context of section 17, no logical basis has been advanced by the appellant, HMRC, upon which the meaning of the word in section 51 should be preferred to that in paragraph 1(1) of Schedule 1.

[21] In terms of section 17(4), the effect of the recall of an award of sequestration is, so far as practicable, to restore the debtor and any other person affected by the sequestration to the position he would have been in if the sequestration had not been awarded. In the present case, HMRC received payment of the sum due to them as at the date of sequestration, which included interest to that date (see sub paragraphs 4 and 11 of paragraph [2] of the sheriff's judgment). In this case, to have required the payment of interest from the date of sequestration (10 December 2015) to, say, 26 July 2018 (the date upon which HMRC received payment of the sum due to them as at the date of sequestration) would have placed HMRC in a significantly better position than that they would have been in if the sequestration had not been awarded.

[22] Recognising Parliament's stated intent in relation to the effect of the recall of an award of sequestration, in our opinion the proper construction of the word "debts" in section 17(1)(a) does not include any interest which had accrued thereon from the date of sequestration. It follows that, as found by the sheriff, VCY's debts have been paid in full. The appeal will, accordingly, be refused.

[23] The appellant, HMRC will be found liable to AIB in the expenses of and incidental to the appeal. The appeal will also be certified as suitable for the employment of junior counsel.