Scottish Court Opinions

STEWART McLEOD Pursuer against PRESTIGE FINANCE LIMITED Defenders

[2016] CSOH 69

OUTER HOUSE, COURT OF SESSION

Lord Tyre

Pursuer: Party

Defenders: Stalker; Blacklocks

20 May 2016

Lord Tyre

[1] The pursuer ('Mr McLeod') seeks reduction of a decree granted on 15 May 2014 at Kilmarnock Sheriff Court in favour of the defenders ('Prestige'), who are the heritable creditors in respect of a debt secured over Mr McLeod's residence in Stewarton, Kilmarnock ('the subjects'). In terms of the decree, Prestige were granted warrant to enter into possession of and sell the subjects; warrant was also granted to officers of court to summarily eject Mr McLeod from the subjects. The action came before me on Prestige's motion for debate of the relevancy of Mr McLeod's pleadings.

Background to the sheriff court action

[2] Prestige's sheriff court action for warrant to exercise its statutory remedies under the Conveyancing and Feudal Reform (Scotland) Act 1970 took the form of a summary application, in accordance with section 24(1D) of that Act as amended. Prestige's averments were to the following effect. The pursuer is the proprietor of the subjects. In 2007, he granted a standard security over the subjects in favour of Morgan Stanley Bank International Ltd. The standard security, which was registered in the Land Register on 18 April 2007, was assigned to Prestige by an assignation registered on 9 July 2009. Mr McLeod failed to repay monthly instalments of sums

borrowed as they fell due. Following an unsuccessful attempt by Prestige to serve a calling-up notice by recorded delivery post, it was deemed to be served on 14 May 2012 by being sent to the Extractor of the Court of Session in accordance with section 19(6) of the 1970 Act. Prestige complied with the pre-action debtor protection requirements imposed by the 1970 Act (as amended) upon creditors seeking possession of subjects used for residential purposes. Prestige further averred that in July 2012 Mr McLeod made a proposal to pay £100 per month towards arrears which was not acceptable to them.

[3] Mr McLeod's defences in the sheriff court action were skeletal and, in my view, having regard to matters that must have been within his knowledge, uncandid. The only averment by Prestige admitted by him was that he was the proprietor of the subjects.

[4] The procedural history of the sheriff court action, according to Prestige's averments in the present action which I do not understand to be disputed, was as follows. The case called on 13 March 2013 and was sisted to await the outcome of a payment arrangement proposed by Mr McLeod. The sist was recalled in September 2013 and the case was continued until 9 October 2013 after Mr McLeod made another payment proposal. He failed to attend the hearing on 9 October and decree was granted against him. He applied to recall the decree under section 24D of the 1970 Act, which application was granted on 20 November 2013. An evidential hearing was fixed for 15 May 2014 in order for the action to be determined on its merits.

The evidential hearing

[5] In advance of the evidential hearing, Prestige lodged copy (though not principal) documents including a copy of the calling-up notice bearing the Extractor's acknowledgment of receipt, documents vouching compliance with the debtor protection requirements of the 1970 Act, and a statement of Mr McLeod's account. On the morning of the hearing (according to Prestige's narrative which again I do not understand to be disputed), Prestige were represented by a Ms Hamilton of Optima Legal, Solicitors. The case called before Sheriff Murphy in the callover, at which time Ms Hamilton advised the court that the parties were ready to proceed. She indicated that she did not intend to call any witnesses; Mr McLeod intended to represent himself. Mr McLeod challenged the jurisdiction of the court. The parties were informed that other cases would be dealt with first.

[6] The case called again at 12 noon, this time before Sheriff Foran who had become available. Mr McLeod was permitted to be assisted by a lay supporter who would take notes. Mr McLeod again challenged the jurisdiction of the court and requested the transfer of the case to the Court of Session as what he described as a 'court of record'. Sheriff Foran refused this request. Mr McLeod then sought to lodge a document that he described as a counterclaim. This document, which was

produced in the present proceedings, contained three craves (i) stating Mr McLeod's objection to the jurisdiction of the sheriff court on the ground that 'the Sovereign Man bares [sic] the right and privilege to be heard in a court of Common Law'; (ii) asserting that Prestige had presented no evidence to the court or himself of 'Proof of Claim to a Valid Cause of Action'; and (iii) objecting that Prestige was hiding or unable to supply the 'Original Instrument of Indebtedness'. Sheriff Foran refused to allow the document to be lodged on the grounds that it did not contain any counterclaim and, in so far as it stated additional grounds of defence, had not previously been intimated. Mr McLeod continued to dispute the sheriff's jurisdiction, but she instructed parties to proceed with the hearing.

[7] Ms Hamilton stated that she did not intend to call any witnesses. Mr McLeod indicated that he would only give evidence if someone from Prestige did so. The sheriff invited Ms Hamilton to begin her submission, which she did. At this point Mr McLeod rose and began to leave the court. He advised the sheriff that he did not intend to take any further part in the proceedings as he did not recognise the jurisdiction of the sheriff or the court. He was warned that if he left decree was likely to be granted against him, but he nevertheless proceeded to depart with his supporter and another friend. Ms Hamilton presented her submission and the sheriff granted decree in the following terms (with identifying details removed):

'The Sheriff (1) Granted warrant to the Pursuers to enter into possession of the subjects known as [address] being the subjects more particularly described in the Standard Security recorded in the Land Register of Scotland under Title Number [AYR3860] on 18 April 2007 and to sell the Security Subjects; (2) Found and Declared that the Pursuers have a right to enter into possession of and to sell the said subjects and to receive and recover the rent of and for the said subjects or at least so much of the rent as shall satisfy and pay the Pursuers all sums of principal and interest due to them under the said Standard Security and to exercise in relation to the said subjects all other powers competent to a creditor in lawful possession of the Security Subjects by virtue of the Conveyancing and Feudal Reform (Scotland) Act 1970; (3) Granted warrant to Officers of Court to summarily eject the Defender and his family, dependants, tenants and sub-tenants, servants and employees with their goods, gear and whole belongings from the said subjects and to make the same void and redd to the end that the Pursuers might enter thereon and peaceably possess and enjoy the same; (4) Found the Defender liable to the Pursuers in expenses of the action as taxed.'

An extract of the decree was issued by the sheriff clerk to Optima Legal on 10 June 2014.

[8] I pause at this stage to express my concern regarding the evidential basis upon which this decree was sought by Prestige and granted by the sheriff. The form of procedure was a summary application, but that procedure contains no relaxation of the ordinary rules of evidence. As noted in Macphail, Sheriff Court Practice (3rd ed, 2006) at paragraph 26-26:

'The sheriff is directed to dispose of the matter at the hearing 'summarily'. The hearing is, however, a proceeding in a judicial process, in which it is necessary to observe the rules of evidence and any relevant principles of civil litigation, for example as to the recovery of documents, as well as the rules of natural justice.'

The hearing on 15 May 2014 was an evidential hearing. Yet the solicitor for Prestige presented her case without having lodged either a principal or certified copy of the document founded upon, namely the calling-up notice, and without a witness to speak to any of her averments. Where a party comes to court founding upon a document as the basis of the right which it seeks to vindicate, the 'best evidence' rule requires production of the principal document. There is no relaxation of that rule to be found in procedure for summary applications. It is, of course, open to the parties to agree that copies will be treated as equivalent to principals. In the present case, however, Mr McLeod had made clear that he objected to the case being heard without production of the principal 'Original Instrument of Indebtedness' - which I interpret as a reference to his credit agreement with Morgan Stanley - and without oral evidence being led on behalf of Prestige, so there could be no question of the court proceeding on the basis that parties were agreed that copy documents would suffice. In my opinion the sheriff erred in granting decree without sight of the principal or a certified copy of the calling-up notice bearing the Extractor's receipt, and without any evidence in oral or affidavit form in support of Prestige's averments, none of which was a matter of admission by Mr McLeod. Had Mr McLeod remained in court to insist upon this point it would, in my view, have been difficult for Prestige to resist. Despite his ill-advised departure, it ought to have been raised by the sheriff ex proprio motu. It could have constituted a strongly arguable ground of appeal to the sheriff principal. Matters, however, have proceeded otherwise.

Events subsequent to the evidential hearing

[9] On 11 June 2014, Mr McLeod lodged a motion seeking leave to appeal out of time to the sheriff principal against Sheriff Foran's interlocutor granting decree against him. In a Note dated 3 July 2014, the sheriff principal described Mr McLeod's motion as having no comprehensible grounds or basis of appeal, and stated inter alia as follows:

'The fourteenth day, by which a correctly framed note of appeal should have been lodged, was 29 May 2014 and since no appeal was in fact lodged by then an extract of the decree granted could have been issued on 30 May 2014 or at any time thereafter. I am informed by the sheriff clerk that an extract was issued only on 10 June 2014 but the important fact is that an extract has been issued and was regular in that its issue preceded the lodging of any comprehensible note of appeal in proper form and the lodging of the necessary motion for leave to appeal late.

The issue of an extract bars any right of appeal and prevents the granting of any motion for an appeal to be allowed to proceed late. That is a well-known principle of

Scottish procedural law. In such circumstances the only remedy available to a party who seeks to escape the consequences of a decree granted against him is to proceed by way of an action of reduction raised in the Court of Session in Edinburgh in order to reduce the decree if proper grounds exist for such a reduction.'

[10] No steps were taken by Prestige in 2014 to enforce the decree granted in their favour. According to Prestige's averments in the present action, this was because Mr McLeod informed them that he had put the subjects on the market and on that basis they agreed to postpone enforcement action. For his part, Mr McLeod avers:

'The pursuer was forced to put his property under duress on the market due to decree being sought by the defender and subsequently granted by Sheriff Foran. The pursuer believed that he had no option but to place his property on the market with a right to recourse due to threat of taking forced possession by Prestige Finance Limited. An offer was made on the property which subsequently fell through. No other interest was shown on the property.'

In the meantime Mr McLeod's arrears have continued to increase.

[11] In May 2015, Prestige intimated their intention to enforce the decree. On 19 May 2015, Mr McLeod sent Prestige what bore to be a cheque for £75,501.66 drawn on the 'WeRe Bank' with an address in Manchester. This entity has attracted expressions of concern by the Financial Conduct Authority and the Financial Ombudsman Service. It is not a regulated bank or a participant in the interbank clearing system. It has been described by a Canadian court as a fraud (Servus Credit Union Ltd v Parlee 2015 ABQB 700 (Can LII), para 61). Prestige declined to accept payment in the form of a WeRe cheque. No payment in any other form has been tendered. On 1 June 2015, a charge for removing at Prestige's instance was served on Mr McLeod by a sheriff officer. The present action was then raised. On 12 June 2015, the Lord Ordinary (Lord Doherty) interdicted Prestige ad interim from enforcing the sheriff's decree or selling or advertising the subjects for sale. The minute of proceedings records that the Lord Ordinary expressed very real doubt as to whether it could be said that there was an arguable case for reduction of the sheriff court decree but decided, with considerable hesitation, and making allowance for Mr McLeod's status as a litigant in person, that it would not be appropriate to conclude at that stage that there was no arguable case.

The basis of the present action

[12] The pleadings upon which Mr McLeod seeks reduction of the sheriff court decree are difficult to follow. They consist in large part of erroneous assertions of what Mr McLeod believes to be the law of Scotland. Some passages are

incomprehensible. The following strands of complaint may be identified, although it is not clear which of them are founded upon as grounds for reduction of the decree:

His consent to the assignation by Morgan Stanley to Prestige was not sought or obtained;

He had no knowledge of the calling-up notice;

His requests to Prestige for exhibition of original documents, including the 'original instrument of indebtedness' and the assignation, have been refused;

The sheriff had no jurisdiction to hear the case or, in any event, did not have jurisdiction to hear it in the absence of 'verified' documents and witnesses to their authenticity;

He is not in default and believes that Prestige's calculations are incorrect;

Prestige were not entitled to refuse to accept the WeRe cheque.

Argument for Prestige

[13] On behalf of Prestige it was submitted that Mr McLeod had failed relevantly to aver a basis on which the court should exercise its discretionary power to reduce the sheriff court decree, and that the action should therefore be dismissed. As defences had been lodged in the sheriff court action, the decree was a decree in foro. The principles applicable to reduction of a decree in foro were to be found in Adair v Colville & Sons 1926 SC (HL) 51, Viscount Dunedin at 55-56 and Bain v Hugh LS McConnell Ltd 1991 SLT 691 at 695, and were summarised by Lord Woolman in Campbell v Glasgow Housing Association 2011 Hous LR 7 at para 48 as follows:

(a) reduction is a question of judicial discretion;

(b) each case turns on its own individual facts and circumstances;

(c) the remedy is only applied in exceptional circumstances;

(d) the test is higher for decrees in foro;

(e) reduction should only be granted where it is necessary to ensure that substantial justice is done; and

(f) the existence of, or failure to use, an alternative remedy is not an absolute bar to reduction.

Mr McLeod's averments were an attempt to re-argue the merits of the sheriff court action, or to appeal against the sheriff's decree. No exceptional circumstances were specified. No coherent explanation was given for Mr McLeod's departure from the evidential hearing, nor for his failure to appeal timeously. There was no need for reduction in order to secure substantial justice. Mr McLeod's case in the sheriff court proceedings had been weak. As regards the amount of arrears, that was not a matter that arose in the summary application which was only for recovery of possession of the subjects. In any event Mr McLeod was personally barred from seeing reduction of the decree by his actings in (a) securing Prestige's agreement to suspension of enforcement of the decree; (b) tendering a cheque; and (c) delaying the raising of the current action. Prestige were prejudiced because arrears had increased.

Argument by Mr McLeod

[14] Mr McLeod provided a written response to Prestige's arguments and also addressed me at the hearing. He maintained his position that the sheriff had had no jurisdiction, and in any event could not conduct the hearing because Prestige had failed to provide affidavit evidence or original signed documentation to support their case. In the absence of such evidence any decree granted by the sheriff was void. She had further erred in 'turning an evidential hearing into a full blown trial'. Prestige had consistently refused to supply him with documents verified by someone with 'first-hand knowledge of the facts'. He had been under the impression that Morgan Stanley and Prestige were the same company and was unaware of the assignation. By changing his loan to interest-only, Prestige had rendered the contract void. No timeous appeal had been lodged because he had been unaware that decree had been granted. As regards Prestige's argument based on personal bar, Mr McLeod accepted that he had put the subjects on the market albeit as a last resort to prevent them being taken from him. When the sale fell through he had no option but to explore other ways to settle the debt alleged to be due by him to Prestige. The WeRe bank cheque was a negotiable instrument that had been wrongfully retained without presentment by Prestige, with the consequence that any alleged debt was now discharged. In his oral address to the court, Mr McLeod further submitted that because the interest on his loan had been capitalised by Prestige, it could no longer be said that there were any arrears.

Decision

[15] It is important to bear in mind the nature of the current proceedings. This is not an evidential hearing before the sheriff or an appeal to the sheriff principal; it is an

application to the Court of Session for reduction of a decree granted in foro by a sheriff. I have set out above the test that must be met by an applicant for reduction of a decree. It is a high one. Before exercising my discretion in favour of the applicant, I require to be persuaded that the circumstances of the present case are exceptional and that reduction is necessary to ensure that substantial justice is done. The case of Bain v Hugh LS McConnell Ltd affords a useful example of circumstances in which it was held that that test was met.

[16] I am not persuaded that Mr McLeod has averred circumstances which, if proved, satisfy the test. In my opinion, and leaving aside for the moment the issue of quality of evidence, the various arguments presented by Mr McLeod are without substance. It was unnecessary as a matter of law for either Morgan Stanley or Prestige to seek or obtain his consent to the assignation of his debt, and he had no legal entitlement to have the principal assignation exhibited to him. Nor was he entitled to demand sight of the principal loan agreement as a condition of settling any debt due by him to Prestige as assignee of the original lender. Whatever may have been the position regarding his awareness of the calling-up notice at the time when it was served on the Extractor in 2012, he clearly had knowledge of it by the time the sheriff court action had been raised and defended by him. The sheriff undoubtedly had jurisdiction to hear the action at the instance of Prestige; section 24(1D) of the 1970 Act expressly provides for an application by a creditor for warrant to exercise its statutory remedies to be made by summary application, which applications must be made in the sheriff court. Mr McLeod accordingly had no right to demand that the case be heard in the Court of Session. Prestige's application contained no conclusion seeking payment and any contention by Mr McLeod that the sum said to be due by him has been incorrectly calculated is irrelevant to Prestige's entitlement to seek warrant to enforce the calling-up notice.

[17] With regard to Prestige's contention that Mr McLeod is personally barred from seeking reduction by his conduct since receipt of the sheriff principal's Note dated 3 July 2014, I accept, under reference to the discussion in Reid & Blackie, Personal Bar (2006) at para 19-19 and the authorities there cited, that it may be appropriate in certain circumstances to address personal bar as a distinct issue in determining whether a party should be permitted to exercise a procedural right. In the circumstances of this case, however, I prefer to examine the events founded upon by Prestige in the context of exercise of the court's discretion as to whether to grant the equitable remedy of reduction. In my opinion the fact that Mr McLeod chose, for whatever reason, to react to his failure to have the sheriff court decree set aside on appeal by attempting to sell the subjects, rather than by immediately attempting to have the decree reduced, during which time his debt to Prestige increased, is a factor weighing against the exercise of the court's discretion in his favour, had I otherwise been inclined to do so. Nor do I regard his attempt to persuade Prestige to accept payment in the form of a WeRe cheque as in any way assisting him. In my view it has no bearing on the issue with which these proceedings are concerned, namely whether the interests of justice require the sheriff court decree to be reduced. Prestige were, in any event, entitled to refuse to accept payment otherwise than in legal tender: see eg Child Maintenance and Enforcement Commission v Wilson 2014 SLT 46 at paragraph 11.

[18] That leaves the matter of Prestige's failure to present evidence of the requisite quality at the evidential hearing before the sheriff. I regard this as an issue of substance and by no means a technicality. Whatever right Prestige may have had to refuse to provide Mr MacLeod with the original or 'verified' documents or affidavits that he demanded from them for his own use, neither they nor the sheriff were entitled to disregard the law of evidence when decree in terms of the summary application was sought and granted. I have carefully considered whether this of itself is sufficient to constitute exceptional circumstances in which reduction of the decree may be necessary in order to achieve substantial justice. I have concluded that it is not. Certain additional material and information has been made available to me that was not before the sheriff. Although once again Prestige did not see fit to lodge principal documents in the present action, when I raised the matter enquiries were made and I was informed, on the responsibility of counsel, that the calling-up notice returned to Prestige's agents stamped with the Extractor's receipt was in their possession at the time of the evidential hearing and remained in their possession at the date of the hearing before me. I was also provided with a copy of the Land Register title sheet, which does not appear to have been produced in the sheriff court action, disclosing the registration of (i) the standard security by Mr McLeod in favour of Morgan Stanley and (ii) the assignation in favour of Prestige. On the basis of this material, I am satisfied that Mr McLeod has failed in the present proceedings to raise for enquiry any real issue as to the validity of the documentary foundation of Prestige's action, or any possibility that there were irregularities in the procedure leading up to Prestige's application for warrants to exercise their statutory powers as a creditor who has served a calling-up notice on a debtor in arrears.

Disposal

[19] I conclude, for these reasons, that Mr McLeod has failed to state a relevant case in law for reduction of the decree granted in favour of Prestige. As the case is accordingly bound to fail, no enquiry into the facts is necessary. In formal terms, I shall sustain Prestige's first plea-in-law (a general plea to relevancy) and dismiss the action.