EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 35
A391/17

Lady Paton
Lord Brodie
Lord Glennie

OPINION OF THE COURT

delivered by LADY PATON

in the cause

(FIRST) THE FIRM OF BARRY AND SUSAN PEART; (SECOND) BARRY PEART; and (THIRD) SUSAN PEART

Pursuers and respondents

against

PROMONTORIA (HENRICO) LIMITED

Defender and reclaimer

Pursuers and respondents: Walker QC, G Reid; MBM Commercial LLP
Defenders and reclaimers: Crawford QC, Ower; Addleshaw Goddard LLP

22 May 2018

Bank seeking recall of interim interdict against sequestration

[1] In this reclaiming motion, a bank (Promontoria, as assignee of the Clydesdale Bank) seeks the recall of an interim interdict granted on 28 November 2017, interdicting the bank *ad interim* from (i) proceeding to apply for the pursuers' sequestration in terms of a petition presented to Edinburgh Sheriff Court on 21 November 2017, or (ii) otherwise applying for the pursuers' sequestration in reliance upon apparent insolvency constituted by charges for

payment served upon the pursuers on 3 November 2017.

[2] The sheriff court proceedings have been sisted since December 2017.

Bank loans

[3] The pursuers are a married couple. They own the Old Golf House, Newbattle, Midlothian, which was (until April 2011) their home. As set out in their pleadings and affidavits dated 24 January 2018, the pursuers made a decision in 2007 to move to a smaller property, known as the Powerhouse. Their plan was to purchase that property, refurbish it as their home, and re-establish a working hydro-electric scheme to provide income.

[4] The pursuers required loans for their project. They aver that, after a re-financing arrangement, they acquired two loan accounts with the Clydesdale Bank, namely (i) a homeowner's loan and (ii) a loan for the purchase of the Powerhouse. As the Old Golf House was averred to be valued at approximately £1.25 million, any borrowing was expected to be quickly reduced as and when it was sold.

[5] The documentation for the loans comprised *inter alia* a facility letter and a standard security over the Old Golf House and the Powerhouse. The documentation provided that the loans were repayable on demand. The pursuers were designed as a commercial firm ("the firm of Barry and Susan Peart").

[6] While refurbishing the Powerhouse, the pursuers lived in the Old Golf House, at the same time advertising it for sale. The pursuers aver that, by letter dated 10 February 2010, the bank stated that no offer should be declined without its consent. The pursuers' position is that the bank had, in effect, a veto in any decision whether to accept an offer. They aver that offers were refused on the bank's advice.

Meeting on 3 February 2011

[7] In condescendence 5 (see paragraph [18] below) the pursuers refer to a meeting on 3 February 2011 involving the pursuers and three representatives of the Clydesdale Bank. The situation was discussed, as further described in the pursuers' and one representative's affidavits (not available at the interim interdict hearing in November 2017).

[8] The pursuers' position is that, at the meeting, a bank representative (Mr Cunningham) in effect undertook that the bank would not call up the loans until the Old Golf House had been sold. Relevant passages in the pursuers' affidavits include paragraphs 47 to 50 of the third pursuer's affidavit, and paragraph 13 of the second pursuer's affidavit.

Mr Cunningham's affidavit gives a different picture. In paragraph 13 he explains that the bank's intention was to be supportive; he had reassured the pursuers; but he did not agree to put enforcement on hold indefinitely until the Old Golf House had been sold.

[9] On 4 February 2011 another of the bank's representatives (Mr Balson) sent the pursuers an email documenting what had been agreed at the meeting (number 21/7 of process). The email makes no reference to a variation of the loan documentation or to an undertaking not to demand repayment until the completion of the sale of the Old Golf House.

[10] On 6 April 2011, the pursuers moved from the Old Golf House to the Powerhouse.

The years following the February 2011 meeting

[11] The pursuers further aver in their pleadings, as amplified by their affidavits, that in July and August 2011, two offers for the Old Golf House were refused on the advice of the bank. They describe four years passing, with little contact from the bank. The Old Golf House remained unsold.

[12] In condescendence 6, the pursuers refer to a letter from the bank dated 9 March 2015

advising them that there would be no further lending, and that while the bank did not currently intend to call up the loans, it –

> " … [reserved] its right to demand immediate repayment of each lending facility in full and/or take whatever action [was] necessary in the future to protect its position in respect of sums due …"

The bank added that all sums due were repayable immediately on written demand for payment.

[13] In about June 2015 the bank assigned the pursuers' debt to Promontoria (Henrico) Limited, the current defender. Subsequently, the pursuers received intimation that the loans would be called up. By letter dated 2 March 2016, the pursuers made a complaint to the Financial Ombudsman concerning *inter alia* mis-selling by the Clydesdale Bank. On 18 April 2016 Promontoria served charges on the pursuers for payment of £3.4 million. The pursuers responded with a petition for suspension and interdict. Promontoria undertook not to take any further steps until the complaint had been dealt with.

Charges for payment in November 2017

[14] In mid-2017, the Financial Ombudsman rejected the pursuers' complaint. By letter dated 12 September 2017, agents for Promontoria sent the pursuers' then solicitors a certificate of debt dated 6 September 2017. By letter dated 31 October 2017, those agents intimated that fresh charges would be served on the pursuers. By letter dated 19 September 2017, the pursuers' agents pointed out that the pursuers were in negotiation with Promontoria's agent "Engage", and requested that no further enforcement action be taken meantime.

[15] On Friday 3 November 2017 Promontoria served charges for payment of £2.5 million on the pursuers.

The raising of the current summons seeking declarator and interdict

[16] The pursuers contacted their then solicitors who had acted for them in 2016-2017. The sequence of events, as set out in the pursuers' pleadings, affidavits, and productions, was as follows:

- Friday evening 3 November 2017: Each of the pursuers was served with a charge for payment.
- Monday 6 November 2017: The pursuers emailed their solicitors with a copy charge. The solicitors replied by email suggesting a meeting with counsel which would have to take place before the expiry of the days of charge on 17 November 2017.
- Wednesday 9 November 2017: The second pursuer emailed the solicitors requesting a meeting the following week. The solicitors replied by email, indicating their availability during Monday to Wednesday of that week.
- On Monday 13 November 2017, the second pursuer emailed the solicitors requesting a meeting with counsel on Wednesday 15 November 2017. There was apparently no response to that email.
- On Wednesday15 November 2017, the solicitors sent the pursuers their firm's invoice, and advised that one solicitor would be on annual leave until 21 November 2017, and his colleague (who might otherwise have dealt with the matter) was unavailable on 16 and 17 November 2017.
- The pursuers contacted another firm of solicitors (their current agents MBM Commercial LLP) who agreed to a meeting on the afternoon of 17 November 2017.
- 17 November 2017: The days of charge expired, with the result that in law, the

pursuers became apparently insolvent.

- 21 November 2017: Promontoria presented a petition in Edinburgh Sheriff Court, seeking the pursuers' sequestration.
- 23 November 2017: At a hearing in the sheriff court, Promontoria applied for warrant to cite the pursuers to the sequestration hearing scheduled for 21 December 2017. The pursuers' lawyer appeared and opposed the application. The application was granted by the sheriff.
- 24 November 2017: The pursuers' summons (seeking declarator and interdict) was signetted in the Court of Session. The pursuers enrolled a motion for interim interdict. As a result of a *caveat* lodged by the defender, a hearing was fixed for 28 November 2017.
- 28 November 2017: After hearing submissions from counsel for the pursuers and counsel for the defender, the Lord Ordinary pronounced the interim interdict referred to in paragraph [1] above.
- 12 December 2017: The defender enrolled a reclaiming motion. Urgent disposal was granted.
- 14 December 2017: The pursuers lodged a Note of Objection to the competency of the reclaiming motion.
- 21 December 2017: A hearing on the Note took place (Lady Dorrian, the Lord Justice Clerk; Lady Paton; and Lord Drummond Young). The objection to competency was repelled, as set out in the opinion of the court 2018 SLT 93.
- 9 February 2018: The reclaiming motion took place. In the course of submissions, the court was advised that there were no other known creditors of the pursuers, although there might be as yet undisclosed creditors. The court was also advised

that the Old Golf House was currently being advertised for sale, with

Messrs McEwan Fraser as selling agents.

Pursuers' summons for declarator and interdict

[17] The pursuers' summons contains the following conclusions:

"1. For declarator (i) that the Clydesdale Bank Plc unilaterally varied its contract with the pursuers by undertaking on 3 February 2011 that it would not seek repayment on demand of the sums advanced by it to the pursuers and that no such demand would be made until after the sale of the Old Golf House, Newbattle, Dalkeith by the second and third pursuers; and (ii) that the defender, as assignee of the Clydesdale Bank is bound by said variation of the contract.

2. *Alternatively* for declarator (i) that the Clydesdale Bank on 3 February 2011 waived its right to seek repayment on demand of the sums advanced by it to the pursuers, until after such time as the sales of the Old Golf House, Newbattle, Dalkeith by the second and third pursuers had been completed; and (ii) that the defender, as assignee of the Clydesdale Bank is subject to said waiver.

3. For interdict of the defender and all others acting under its instructions or under its authority from (i) proceeding to apply for the pursuers' sequestration in terms of the petition presented in the Sheriffdom of Lothian and Borders at Edinburgh on 21 November 2017; or (ii) otherwise petitioning or applying for the pursuers' sequestration in reliance upon apparent insolvency constituted by the charges for payment served upon each of the pursuers on 3 November 2017; and for interdict *ad interim*."

[18] In condescendence 5 and 8, the pursuers aver as follows:

"Cond 5. The late development of the Powerhouse and inability to achieve a sale of the Old Golf House caused significant concern to the pursuers. The pursuers were concerned about the extent of their borrowing from the Bank and consequent vulnerability of their financial situation. The pursuers were concerned that they could not accept offers for the Old Golf House without the Bank's approval. On 3 February 2011, the pursuers attended a meeting with Nigel Cunningham, Allan Ferguson and Cliff Balsom, all representing the Bank. Nigel Cunningham was the senior representative of the Bank present. The meeting took place at the Powerhouse and the Old Golf House. At the meeting parties discussed the delays to the completion of works at the Powerhouse. It

was agreed that the pursuers would endeavour to move into the Powerhouse by 28 February. The attempts made to sell the Old Golf House were also discussed. The pursuers were told that the Bank would attempt to be 'flexible' in order to facilitate a sale and in respect of the finance provided to the pursuers. It was indicated by Mr Cunningham that the Bank would consider measures such as a part-exchange of a purchaser's property, or providing a mortgage for any purchaser of the Old Golf House if necessary. The engagement of a marketing consultant, Patsy McLaren, was discussed. During the course of the meeting, the third pursuer expressed concern at the financial position that the pursuers were in and the difficulties experienced in selling the Old Golf House. In reply to the concerns expressed, Mr Cunningham stated that the Bank wanted the pursuers to 'be able to get on with your lives.' Mr Cunningham told the pursuers that the Bank would continue to provide support. He explained that interest was not being applied or accrued to the accounts, and that no charges were being applied. Mr Cunningham stated to the pursuers: 'I am not here to pull the rug out from under you. Whatever happens, you won't lose out with all that has happened.' The pursuers understood (and a reasonable party would, in the whole circumstances of the meeting and the parties' contractual relationship, have understood) this to be a unilateral variation on behalf of the Bank of the parties' contractual relationship to the effect that the Bank would not proceed to demand repayment of the two overdraft accounts until the matters discussed at the meeting (that is, firstly the move by the pursuers to the Powerhouse and secondly the sales of the Old Golf House) had been completed. Such a variation prevented the pursuers from 'losing out' in the situation in which they found themselves, when compared to the situation which the pursuers and the Bank had anticipated when the facilities were arranged in 2008 (that is, redevelopment and sale to be achieved in a short period of time). …

Cond 8. The statement made by Nigel Cunningham on behalf of the Bank on 3 February 2011 constituted a variation to the rights of the parties under the terms of the Facility Letter and Standard Security. The defender, as the Bank's assignee, is bound by said variation. The pursuer accordingly seeks and is entitled to declarator as first concluded for. *Esto* the statement did not constitute a variation of the contract, it constituted a waiver of the Bank's rights. The pursuers have relied (and continue to rely) on that waiver and, in particular, with respect to the structure of the financial affairs which allows them to defer repayment until after the sale of the Old Golf House. This is the declarator sought in the alternative."

The granting of interim interdict

[19] As noted above, on 28 November 2017 the Lord Ordinary (Lady Wise) granted interim interdict in terms of the third conclusion. Giving written reasons later in an opinion dated 20 December 2017, the Lord Ordinary identified three separate stages of analysis:

> "[17] … The first was that, having regard to the joint view expressed that it was no longer possible for the pursuers to seek to suspend the charge and so exceptional circumstances were required, that matter should be addressed first. On the face of the pleadings, the pursuers were badly let down by their previous agents in circumstances where they consider they had an argument for suspending the charge served in November 2017. I decided that the period during which exceptional circumstances had to be made out related particularly to the period from the service of the charge on 3 November 2017 onwards as it was during that period that suspension of the charges could have been sought. Considerations of the balance of convenience are much broader and are taken into account at the third stage of my analysis. It seemed to me that the circumstances averred in relation to the relevant period were exceptional. The pursuers had been entitled to rely on the previous agents who had been representing them for some time for advice and representation in relation to these new charges, which were in radically different terms from those served the previous year. Those solicitors appear to have taken no real cognizance of the extreme urgency of the situation and, on the account in the summons, left the pursuers without any individual to represent them during the critical period. The pursuers did not delay in seeking fresh legal representation and those now instructed took active steps to bring the matter into court as soon as reasonably practicable. Accordingly there was nothing dilatory about the way in which the pursuers approached matters following service of the charges on 3 November 2017 …"

[20] The Lord Ordinary then considered the authority of *Aitken* v *Aitken* 2005 Fam LR 59, and continued:

> " … For very different reasons than those put forward by the pursuer in *Aitken*, I considered that the pursuers in this case had made out exceptional circumstances that justified allowing a challenge to be made on equitable grounds. The combination of the failure of their previous agents to progress matters as instructed and the absence of any other remedy to halt the sequestration proceedings pending determination of the issues raised in this case were in my view exceptional enough and so formed a sufficient basis from this to move to the stage of considering whether to grant interim interdict applying the established tests for that …"

[21] The Lord Ordinary discussed the issues of a *prima facie* case and the balance of

convenience. She referred to *Royal Bank of Scotland plc* v *Carlyle* 2015 SC (UKSC) 93,

considered the issues of variation of a contract and waiver, and concluded:

> "[19] … In my view, standing the whole background as explained, there was sufficient in the averments to conclude that the pursuers have stated a reasonably arguable case. [20] … I took into account that while a reasonable *prima facie* case had been made out, it was not the strongest case standing the conflicting formal loan documentation. I regarded the delay in raising the issue of the undertaking of February 2011 as neutral on balance of convenience as it was on *prima facie* case, given that the precise circumstances in which the account of the February 2011 meeting was given to the current agents and any question of whether it had also been given to the previous agent had not yet been explored. Having considered these two matters, it seemed to me that in all other respects, the balance of convenience overwhelmingly favoured the pursuers. They are an older couple who would be left without any legal remedy and face almost certain sequestration should interim interdict not be granted. On the face of their pleadings they have been subjected to unsatisfactory representation by their former legal agents in terms of losing the ability to mount a challenge to the charge before the expiry of the relevant days. If they succeed in securing a declarator of an undertaking by the bank in the terms sought, the enforcement action taken by the defender, served on the basis of a right to demand immediate repayment, would be shown to have been ill founded. The defender on the other hand has proceedings in the sheriff court for sequestration which could be sisted pending the outcome of these proceedings. If the position they have now stated in relation to the principal sum and interest and the ability to demand immediate repayment turns out to be correct, they will suffer little prejudice. In all the circumstances, I decided to exercise my discretion in favour of granting the orders sought by the pursuers."

[22] The bank reclaimed.

The Bankruptcy (Scotland) Act 2016

[23] The Bankruptcy (Scotland) Act 2016 provides *inter alia:*

> "**16 Meaning of 'apparent insolvency'**
>
> The apparent insolvency of a debtor is constituted … whenever –
>
> (f) following the service on the debtor of a duly executed charge for payment of a debt, the days of charge expire without payment …
>
> **22 When sequestration is awarded**
>
> … (3) Where a petition for sequestration of the estate of a debtor is presented by –
>
> (a) a creditor …

the sheriff must grant warrant to cite the debtor to appear before the sheriff on such date as is specified in the warrant to show cause why sequestration should not be awarded …

… (5) The sheriff must forthwith award sequestration on [a petition by a creditor] on being satisfied –

> … (e) that .. the requirements of this Act relating to apparent insolvency have been fulfilled.

(6) But subsection (5) is subject to section 23 …

(7) In this Act, 'the date of sequestration' means – …

> (b) where the petition for sequestration is presented by a creditor … and sequestration is awarded, the date on which the sheriff granted warrant under subsection (3) …

23 Circumstances in which sequestration is not to be awarded in pursuance of section 22(5)

(1) Sequestration must not be awarded in pursuance of section 22(5) if –
- (a) cause is shown why sequestration cannot competently be awarded,
- (b) the debtor forthwith pays or satisfies, or produces written evidence of the payment or satisfaction of –
  - (i) the debt in respect of which the debtor became apparently insolvent, and
  - (ii) any other debt due by the debtor to the petitioner and to any creditor concurring in the petition.

(2) Where the sheriff is satisfied that the debtor will, within 42 days beginning with the day the debtor appears before the sheriff, pay or satisfy the debts mentioned in sub-paragraphs (i) and (ii) of subsection (1)(b), the sheriff may continue the petition for no more than 42 days.

(3) [Continuation in the event of a debt payment programme being applied for] …

30 Recall of sequestration by sheriff

(1) The sheriff may recall the award of sequestration if satisfied that in all the circumstances of the case (including those arising after the date of the award) it is appropriate to do so.

(2) In particular, the sheriff may recall the award if satisfied –
- (a) that the debtor has paid the debtor's debts in full,
- (b) that 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) that another award of sequestration of the estate, or of an analogous remedy, as defined in section 17(6), has (or other such awards have) been granted …"

Submissions for the defender and reclaimer

[24] Senior counsel for the defender submitted that the reclaiming motion should be granted and the interim interdict recalled.

Ground of appeal 1: the fundamental policy of bankruptcy law

[25] The Lord Ordinary had erred in failing to take into account the summary nature of sequestration. Five propositions were advanced:

(i) The fundamental policy was that once a person was "apparently insolvent", his property had to be managed in such a way as to protect the body of creditors.

(ii) The ensuing sequestration proceedings provided for in the Bankruptcy (Scotland) Act 2016 did not leave the court with a general equitable discretion to refuse or delay the proceedings once they had commenced. The proceedings "commenced" on the date when warrant to cite was granted (23 November 2017).

(iii) The court could only intervene in sequestration proceedings at common law if to do so was consistent with the underlying policy and with the 2016 Act.

(iv) Only those limited instances could properly be considered as "exceptional circumstances", affording the court a limited discretion at common law (and not a general equitable discretion).

(v) Because there was no room for the court to exercise a general equitable discretion, the reclaiming motion was not concerned with whether the Lord Ordinary had failed properly to exercise her discretion or whether the Inner House could interfere with the exercise of discretion.

[26] Senior counsel submitted that *esto* those propositions were held to be wrong, and the

court were to find that it had a general equitable discretion in sequestration proceedings such as to engage issues of *prima facie* case and balance of convenience, any such discretion had to be exercised in the context of the fundamental policy of sequestration. Accordingly the court would require to be satisfied that the basis of the case for intervention was sufficiently strong to justify the risk of possible prejudice to the underlying policy. The case for intervention would require to be cogent and convincing.

[27] Against that background, senior counsel submitted that the Lord Ordinary erred in paragraph [17] of her judgment. She misdirected herself in finding that she was entitled to exercise a general equitable discretion. She erred in considering only the interests of the pursuers, and not the interests of the body of creditors as a whole. Delay to sequestration proceedings ran counter to the underlying policy of bankruptcy. Bankruptcy proceedings were intended to be summary. Practical problems would arise, including the incurring of further debts which would not rank in the sequestration, payments made by the debtor, and general uncertainty for those dealing with the debtor in a state of apparent insolvency. Unless the debtor's estate was managed in terms of the 2016 Act, there was a risk that the debtor would continue to deal with his estate by, for example, taking on new debt, or dissipating assets, thus prejudicing creditors as a whole.

[28] It was acknowledged that counsel's submissions before the Lord Ordinary had focused upon "exceptional circumstances" in the context that there existed a general equitable discretion: but in fact there was no such discretion. The law was well-established: the courts could only intervene and stop a sequestration if to do so was consistent with the policy underlying the 2016 Act: proposition (iii) above. Reference was made to *Sutherland* v *Sutherland* (1843) 5 D 544; *Joel* v *Gill* (1859) 929 at page 937; *Scottish Milk Marketing Board* v *Wood* 1936 SC 604, at pages 610-611; *Liquidators of Grampian Maclennan's Distribution Services*

Ltd v *Carnbroe Estates Ltd* 2018 SLT 205, at paragraph [12] *et seq*.

[29] The authorities demonstrated that the law did not permit the court to interdict sequestration proceedings once apparent insolvency had been constituted and sequestration proceedings had been commenced. If that were to be permitted, the fundamental policy of bankruptcy law would be subverted. Once sequestration proceedings had commenced, it was too late to challenge the debt (*Sutherland* v *Sutherland cit sup*). It was permissible for the debtor to challenge the debt prior to the commencement of sequestration proceedings, as the pursuers had done in 2016. But once sequestration proceedings had commenced, it was too late.

[30] The 2016 Act permitted limited challenges to an award of sequestration, and, in certain specific circumstances, recall of sequestration. Reference was made to section 23(1) of the 2016 Act ("cause shown", or payment of the debt, preventing the award of sequestration) and section 30(1) (recall of an award of sequestration). Relevant authorities were cited.

[31] If this court took the view that *Aitken* v *Aitken* 2005 Fam LR 59 decided that the court had a general discretion to stop sequestration proceedings, it was submitted that Lord Hodge erred in so holding, as he was then interfering with a sequestration process which was not itself challenged (for example, by a writ seeking reduction of the charge for payment). But senior counsel submitted that Lord Hodge had not in fact so held: too much was being read into paragraph [5] of his judgment. There was no way of intervening unless to do so would be consistent with the policy of the 2016 Act (proposition (iii)). The 2016 Act did not offer the debtor the option of providing security for payment: but in the particular facts of the family law case of *Aitken*, the husband having consigned £36,000, the Lord Ordinary was able in the exceptional circumstances of that case to grant interim interdict without subverting the policy of the 2016 Act. The decision in *Aitken* was restricted to its particular facts, and was not

authority for a general equitable discretion to interdict bankruptcy proceedings.

Ground of appeal 2: no exceptional circumstances

[32] Senior counsel submitted that, *esto* the Lord Ordinary had taken the summary nature of sequestration into account, she erred in finding that exceptional circumstances existed such as to warrant the grant of interim interdict and delay the sequestration proceedings. Failure on the part of the pursuers' former solicitors did not qualify. It was not a ground which would prevent sequestration being awarded in terms of section 23, nor would it justify recall in terms of section 30.

[33] *Esto* failure on the part of solicitors was relevant, the Lord Ordinary had left out of account the following relevant factors:

1. The solicitors in question had acted for the pursuers in 2016, and had raised interdict proceedings in respect of an earlier charge, prior to sequestration proceedings being commenced.
2. Following upon the Financial Ombudsman's rejection of the pursuers' complaint in mid- 2017, the defender's solicitors wrote to the pursuers' solicitors advising that a charge would be served. The pursuers' solicitors, in their reply, did not mention any agreement that the debt would not be enforced until the Old Golf House had been sold.
3. The email correspondence in November 2017 suggested dilatoriness on the pursuers' part, rather than failure on the part of their solicitors.
4. The pursuers' current solicitors had lodged a *caveat* in Edinburgh Sheriff Court, and appeared at the sheriff court on 23 November 2017 to oppose the granting of the warrant to cite.

Those factors made it clear that the pursuers were well familiar with the stages of the process, and were well aware of the urgency of matters. The Lord Ordinary erred in concluding that exceptional circumstances had been made out.

Ground of appeal 3: a weak prima facie case

[34] If, contrary to the defender's position, the Lord Ordinary had a wide equitable discretion on the question of interim interdict in a sequestration, that discretion had to be exercised in the context of the policy underlying bankruptcy law. The court would have to be satisfied that the underlying basis of the case for interim interdict was sufficiently strong to justify any possible prejudice to the underlying policy caused by delay to the sequestration proceedings. Any attempt to interdict a sequestration process had to make out a cogent and convincing *prima facie* case (*Gillespie* v *Toondale Ltd* 2006 SC 304). A colourable case was insufficient.

[35] In the present case, the productions did not support the averments in condescendence 5 of the summons. Furthermore, any oral comments by Mr Cunningham, upon which the pursuers sought to rely, could not properly be construed as giving such an undertaking. The affidavits spoke of the defender's desire to help, to be flexible, and to rearrange finances if necessary. But there was then a leap to the pursuers' understanding that an undertaking had been given not to call up the debt until the Old Golf House had been sold. There was no factual basis for that assertion. In the context of bankruptcy law, no *prima facie* case had been made out.

Final submission for the defender

[36] On the basis of all or any of the three grounds of appeal, the reclaiming motion should be allowed and the interim interdict recalled.

Submissions for the pursuers

[37] Senior counsel submitted that there had been an exercise of the Lord Ordinary's discretion which should not lightly be interfered with (*Scottish Power Generation Ltd* v *British Energy Generation (UK) Ltd* 2002 SC 517, paragraph [18]).

[38] It was unnecessary for the pursuers to seek reduction of the charge: interim interdict (and ultimately permanent interdict) would prevent the charge from being used, and it would expire after four months. The pursuers would also have declarators in terms of the first two conclusions (a unilateral variation of the contract by the undertaking, or alternatively waiver of the right to seek repayment).

[39] There was no basis in the bankruptcy legislation for excluding common law remedies such as interdict (cf the approach in *Aitken* v *Aitken cit sup*). The defender's first proposition concerning the summary nature and underlying policy of bankruptcy law (in particular, speed and efficiency) was accepted: but that policy did not have the consequences contended for. The authorities referred to did not strip the court of its right to grant an interim interdict. The fundamental policy of bankruptcy law was entirely respected by the imposition of the "exceptional circumstances" test. The defender sought to put a gloss on the definition of the fundamental policy as being "for the protection of creditors". The correct approach was that the court had an equitable discretion which it could exercise only if exceptional circumstances existed.

[40] There was a parallel between the present case and the case of *Aitken*. In *Aitken*, the creditor was given judicial security in the form of consignation. In the present case, the defender held a heritable security, namely the standard security. Thus the present case was directly comparable to *Aitken*, and for that reason alone – because of the security for the debt

– was an example of "exceptional circumstances". A second reason for deeming the present case to be one of "exceptional circumstances" was the solicitors' failure.

[41] The sequestration proceedings in *Aitken* had been sisted and remained sisted until matters were resolved. Thus all the protections for creditors remained in place. Similarly in the present case, the sequestration proceedings had been sisted and could remain sisted until matters were resolved. All the protections would remain in place. In any event, the only creditor currently identified to date was the defender, and the defender held the standard security.

[42] In respect of the first ground of appeal, the Lord Ordinary was clearly aware of the summary nature of sequestration and the limited grounds for challenge. She properly set herself the task of assessing whether or not exceptional circumstances existed. She further addressed prejudice in a general sense in paragraph [20] of her judgment. Her conclusion was that the granting of interim interdict would cause the pursuers considerable prejudice and the defender little prejudice: such a conclusion could not be faulted.

[43] As for the second ground of appeal, it was for the Lord Ordinary to assess the question of exceptional circumstances. The Lord Ordinary was entitled, on the basis of the averments, information, and submissions before her, to reach the conclusion she did. Only if the appeal court could hold that the Lord Ordinary's conclusion was one which no reasonable Lord Ordinary could have reached could the appeal court interfere.

[44] In relation to the third ground of appeal (an inadequate *prima facie* case), there was no "higher test". All that was required was a good arguable case (*Schuh Limited* v *Shhh … Ltd* [2011] CSOH 123 at paragraph [13]). It was for the Lord Ordinary to assess the productions, as she had in paragraph [18] of her opinion. Even if (contrary to the pursuers' submission) the appeal court was entitled to open up and re-assess the Lord Ordinary's assessment, and

even if there were no written productions supporting the pursuers' position, the pursuers could point to inaction on the part of the bank for four years, which was in keeping with the unilateral undertaking said to have been given by the bank. The question of performance would be a matter for proof. What was said at the meeting could bind the bank (*Royal Bank of Scotland* v *Carlyle* 2015 SC (UKSC) 93, paragraphs 28 and 35). A proof was therefore required. The matter was highly fact-sensitive. The Lord Ordinary accepted that the pursuers' case was not a strong one, but she held that there was a sufficient *prima facie* case, and was entitled to do so. The pursuers in their averments pled a number of key facts, including:

- the bank's direct interest in the sale of the Old Golf House;
- the bank's virtual veto when offers were assessed (a rather unusual feature of the case);
- the assurances given at the meeting on 3 February 2011.

[45] Mr Cunningham's affidavit was based on his notes. He would be subject to cross-examination in a proof. The bank's actings over the four years following the February 2011 meeting would be the subject of scrutiny.

[46] The third pursuer's recollection of the meeting, as set out in her affidavit, was likely to be more accurate. The bank's involvement in the marketing of the Old Golf House, including providing a marketing consultant and paying for the pursuers' removal, gave rise to a particular context in which Mr Cunningham's statements fell to be construed. Such a highly fact-sensitive situation required to go to proof.

[47] In the result there were no good grounds for disturbing the Lord Ordinary's exercise of her discretion.

Discussion

The policy of bankruptcy law

[48] At the outset, we note that the defender's argument based on the policy of bankruptcy law was not one which was advanced before the Lord Ordinary.

[49] The policy of bankruptcy law is to ensure that the procedure following upon an award of sequestration is summary and expeditious, taking the management of the estate out of the debtor's hands and protecting the interests of the body of creditors. There is no appeal against an award of sequestration, and the court will in general not intervene to interrupt the proceedings or bring them to a halt. That much is clear from the decided cases; and nothing in the Bankruptcy (Scotland) Act 2016 (a consolidating Act) suggests any intention to depart from that policy. The summary procedure includes the vesting of the estate in the trustee in bankruptcy, the termination of the debtor's intromissions with the estate, challenges to acts which might constitute gratuitous alienations or unfair preferences, and ultimately the distribution of funds amongst creditors, all with a view to protecting the general body of creditors and ensuring a fair distribution of the estate (cf *Liquidators of Grampian Maclennan's Distribution Services Ltd* v *Carnbroe Estates Ltd* 2018 SLT 205 at paragraph [12] *et seq*).

[50] An award of sequestration activates the earlier date of the grant of warrant to cite (in this case, 23 November 2017) as being the "date of sequestration": section 22(3) and (7)(b) of the 2016 Act, the latter subsection containing the qualifying phrase "*and sequestration is awarded*". In other words, it is only if and when there is a subsequent award of sequestration that the date of the grant of warrant to cite becomes relevant and operative (*Report on the Consolidation of Bankruptcy Legislation in Scotland,* Scot Law Com No 232, May 2013, page 6). When an award of sequestration is made (which might have occurred in the present case on

21 December 2017, but for the interim interdict), the estate vests in the trustee as at the date of warrant to cite (23 November 2017); ranking is assessed using that date as the operative date; and challenges to gratuitous alienations and fraudulent preferences may be made, using that date as the operative date. But unless and until an award of sequestration is actually made, these consequences do not occur – and they may never occur if, for example, cause were to be shown why sequestration should not be awarded (section 22(3)), and no award of sequestration was made.

[51] Following upon an award of sequestration, the only statutory means available to a debtor seeking to halt the procedure is a petition for recall in terms of section 30 of the 2016 Act. It has, however, been recognised for some time that in certain circumstances the court may intervene to bring the sequestration to a halt. An action for reduction of the award of sequestration is competent: *Central Motor Engineering Co* v *Galbraith* 1918 SC 755, Lord Johnston at page 769; Lord Mackenzie at page 770; and Lord Skerrington at page 770; *Arthur* v *The SMT Sales and Service Company Ltd* 1999 SC 109 at page 115; see also *Wright* v *Tennent Caledonian Breweries Ltd* 1991 SLT 823, Lord Hope at pages 825-826. Whether such an action will succeed is another matter, but we are here concerned only with the question of competency. It is not possible to give an exhaustive definition of the circumstances in which such an action may be brought, but *dicta* in the cases make it clear that reduction is only competent where no other remedy is available (Lord Johnston in *Central Motor Engineering*); reduction is an exceptional remedy available only in "exceptional circumstances" (Lord Mackenzie in *Central Motor Engineering*); and interference by way of reduction is "a matter of particular delicacy" (*Arthur* v *The SMT Sales and Service Company Ltd* at page 115C).

[52] In the present case, the argument for the defender rests, to a large extent, upon the proposition that the 2016 Act lays down a complete and exhaustive code regulating

bankruptcy procedure, to the extent that there is no room for the exercise of any general equitable discretion by the court: the only route open to a debtor against whom apparent insolvency has been established, who thereafter seeks to resist sequestration on the ground that no debt was in fact due, is by showing cause why sequestration should not, or cannot competently, be awarded (section 22(3) and 23(1)(a) of the 2016 Act); and the only recourse for a debtor seeking to halt the procedure following upon an award of sequestration is by a petition for recall in terms of sections 29 and 30. This is a powerful argument, but it fails in our opinion adequately to take into account the fact that, as set out above, the court does have the power to intervene by way of reduction of the award of sequestration in circumstances not covered by the statute. That in itself is sufficient to demonstrate the fallacy in the "complete code" argument. But matters do not end there. If the complete code argument were correct, one would expect some clear provision in the statute for what was to happen in the event that the debt was disputed. The Act is silent on this issue. Sections 22 and 23 of the 2016 Act do not appear to allow a debtor who disputes his indebtedness to oppose the making of an award of sequestration on that basis; and section 30, which may allow for recall of the sequestration on the ground that there never was any indebtedness, comes too late to prevent an award of sequestration (and the potential damage caused thereby) where the debt is disputed. In such circumstances it has been left to the debtor to apply for suspension of the charge for payment intended to be relied upon by the creditor to establish apparent insolvency, and to seek interdict against further procedure based on that charge. Alternatively, in the (perhaps exceptional) case where the days of charge have expired and an application for suspension and interdict comes too late, apparent insolvency having been constituted (cf *Wright* v *Tennent Caledonian Breweries Ltd* 1991 SLT 823 at page 826D, *Aitken* v *Aitken* 2005 Fam LR 59 at paragraph [5]), the debtor may seek reduction

of the charge and all that flows from it. These examples are not necessarily exhaustive of the circumstances in which the court may be called upon to intervene; but it is sufficient to show that the provisions of the 2016 Act, comprehensive as they are in some areas, leave room for the court to play a part when circumstances require it to do so.

[53] Turning to the specific issue in this case, if, as the case law makes clear, it is competent to bring an action for reduction of an award of sequestration, it must follow that a claim for an interim remedy ancillary to such an action, such as interim suspension or interim interdict, is also competent, although no doubt such an interim remedy will only be granted in the same exceptional and limited circumstances. And if such proceedings (together with an application for an interim remedy) are competent in respect of an award of sequestration after it has been made, it must also be competent, in such limited circumstances, to seek a similar remedy after expiry of the days of charge but prior to any award of sequestration.

[54] This case is concerned only with an application for interdict and interim interdict to prevent the defender from proceeding to apply for the pursuers' sequestration in reliance upon the apparent insolvency constituted by the charges for payment served on the pursuers on 3 November 2017. The first question we have to decide, before turning to consider issues relating to the Lord Ordinary's exercise of her discretion, is whether such an application is competent. In our opinion, it is. We consider that not only may a debtor "show cause" why sequestration should not be granted (sections 22 and 23 of the 2016 Act), a route which is unlikely to avail the debtor in a case such as this, but the court retains a general equitable discretion at common law, in exceptional circumstances, to grant interdict in terms such as are sought in the present case. We have found nothing in the 2016 Act to support the defender's contention that the policy of bankruptcy law restricts or qualifies the

court's common law power to grant interdict and interim interdict prior to any award of sequestration. We would emphasise again that, in a case where the debtor has allowed the days of charge to expire without taking steps to challenge the debt or the charge upon which his apparent insolvency is established, it will only be in exceptional circumstances that the court will intervene. This is clear from the cases cited above dealing with reduction of an award of sequestration, and we see no basis for applying a less stringent test in a case such as this. That test of "exceptional circumstances" was applied by Lord Hodge in *Aitken* v *Aitken* 2005 Fam LR 59 at paragraph [5]. It has been adopted as the appropriate hurdle in other cases: see for example *Holden* v *Royal Bank of Scotland* [2011] CSOH 84 at paragraph [16], and *Polley* v *West Lothian Council* [2015] CSIH 19 at paragraph [32] (in both cases it was held that exceptional circumstances had not been made out). We do not attempt to define what the phrase may include. We accept, however, that the grant of interdict or an equivalent remedy at such a stage will be rare. It will only be in exceptional circumstances, and then only at the court's discretion, always bearing in mind the whole circumstances of the case and any interests which have to be protected, that interdict or interim interdict will be granted. Applications on the part of a debtor considered by the court to have come too late without adequate explanation or excuse, or to be purely dilatory in nature, or to reflect a wilful refusal to pay, will not succeed. But if the court were satisfied that exceptional circumstances had been made out, the court has, in our opinion, the full general equitable power normally available to it at common law to grant interdict and interim interdict, and, where necessary, other orders. Where interim orders are sought, this will, as in the case of all applications for interim orders, involve an assessment of the strength of the *prima facie* case and the balance of convenience.

[55] No award of sequestration has been made in the present case. On 17 November 2017, the days of charge expired and the pursuers became apparently insolvent. On 21 November 2017 the bank presented a petition for sequestration. On 23 November 2017 the sheriff granted warrant to cite the pursuers to a sequestration hearing, scheduled for 21 December 2017, at which they could, if so advised, "show cause" why sequestration should not be awarded. But as a result of the interim interdict granted by the Court of Session on 28 November 2017, the sheriff court proceedings have been sisted, without any award of sequestration. We therefore consider, contrary to the defender's proposition (v), that this reclaiming motion is indeed concerned with whether the Lord Ordinary erred in law in her consideration of whether to grant interim interdict, or failed properly to exercise her discretion, and whether the Inner House can properly interfere with any exercise of that discretion. In that context, while accepting that the Lord Ordinary had to be satisfied that there were exceptional circumstances, we do not accept that the test justifying this court's interference with any exercise of discretion on the part of the Lord Ordinary is affected by the fundamental policy underlying sequestration such that this court must take a more critical view than would normally be taken of such an exercise of discretion.

Exceptional circumstances

[56] In paragraph [17] of her opinion, the Lord Ordinary restricted her assessment of whether the circumstances qualified as "exceptional" to the period from the service of the charge for payment (3 November 2017) to the expiry of the days of charge (17 November 2017), the reasoning being that the pursuers should have made some sort of intervention prior to the expiry of the days of charge, and therefore are required to show exceptional circumstances during the days of charge. In our view, that approach cannot be criticised.

[57] We accept that failures, delays, or a *prima facie* inexplicable lack of response on the part of solicitors will not necessarily satisfy the test of exceptional circumstances. But in the present case, the Lord Ordinary notes the considerable previous involvement of the former agents, their success on behalf of the pursuers in previous proceedings, their familiarity with and knowledge of the pursuers' circumstances, and also what must be assumed to be their experience in and knowledge of sequestration law and therefore of the extreme urgency of the passing days of the charge, and yet their apparent abandonment of the pursuers at the worst possible moment. As the Lord Ordinary observed in paragraph [17] of her opinion:

> "The pursuers had been entitled to rely on the previous agents who had been representing them for some time for advice and representation in relation to these new charges, which were in radically different terms to those served the previous year.

[58] The Lord Ordinary also notes the pursuers' prompt and effective instruction of new agents, who took immediate steps on their behalf. Furthermore, as senior counsel for the pursuers pointed out, there was, in the background, the fact that the bank in the present case had security, namely the standard security (cf the security available in *Aitken* v *Aitken*). Having assessed the circumstances, the Lord Ordinary concluded that exceptional circumstances had been made out.

[59] In our opinion, the Lord Ordinary's approach, reasoning, and conclusion cannot be criticised. We consider that she was entitled to find that there were exceptional circumstances.

Prima facie case and balance of convenience

[60] When assessing the issues of a *prima facie* case and balance of convenience, the Lord Ordinary was entitled to take into account all the circumstances of the case, including:

- the controlling role adopted by the Clydesdale Bank in the marketing of the Old Golf House, including the bank's funding and organising of the pursuers' removal from the Old Golf House, refurbishment of that property, and the services of a marketing consultant, all as set out in the pursuers' pleadings and affidavits;
- the veto averred by the pursuers to have been exercised by the bank, preventing the acceptance of several offers to purchase the Old Golf House;
- the assurances averred to have been given by the bank representative Mr Cunningham at the meeting on 3 February 2011;
- the bank's lack of enforcement action and its limited contact with the pursuers for a period of about four years following the meeting in February 2011, as averred by the pursuers;
- the differing values which the bank appears to have placed on the debt owed (averred to be £3.4 million in 2016, but apparently £2.5 million in 2017), and, in addition, disputes over the accrual of interest and a sum of £234,000;
- the fact that the bank has the security of the standard security.

We would add that the Lord Ordinary was entitled to bear in mind the fact that there was no information about other creditors – any "body of creditors" – requiring protection.

[61] We agree with senior counsel for the pursuers that the circumstances of this case are highly fact-sensitive and would require the hearing of evidence. While the affidavits provide some additional detail, they are not, in our view, sufficient.

[62] In relation to the first conclusion for declarator of a unilateral variation of the contract by the bank, the pursuers are unable to produce any written evidence supporting the undertaking which they assert was given by the bank, but that is not necessarily determinative (cf *Royal Bank of Scotland* v *Carlyle* 2015 SC (UKSC) 93 paragraphs [28]

and [35]). The meaning and import of Mr Cunningham's assurances given at the meeting of 11 February 2011 require to be assessed in context – not only in the context of the meeting itself, but also in the context of the whole background, including "prior dealings … and any shared understandings" (*Carlyle,* paragraph [35]), and furthermore, in the context of the events following upon the meeting in February 2011.

[63] In relation to the second conclusion for declarator of waiver by the bank, that is again a fact-sensitive matter requiring the hearing of evidence. As Lord Keith observed in *Armia Ltd* v *Daejan Developments Ltd* 1979 SC (HL) 56; 1979 SLT 147 at page 165:

> "[Waiver] is a creature difficult to describe but easy to recognise when one sees it … The word 'waiver' connotes abandonment of a right … The abandonment may be express, or it may be inferred from the facts and circumstances of the case …"

Any contention that there could be no implied waiver standing the terms of clause 8 of the facility letter (noted in the Lord Ordinary's opinion at paragraph [6] as providing that any failure by the bank to exercise its right or remedy is not to constitute waiver), would be a question of fact and degree to be assessed by the court after hearing evidence. There might also, depending on the evidence, be a stateable case based on express waiver. Ultimately there is, in our view, sufficient in the pursuers' pleadings and the pursuers' affidavits to establish a *prima facie* case of waiver.

[64] In the result we consider that the Lord Ordinary was entitled to take the view that a *prima facie* case, although not the strongest, had been made out. The reasoning in relation to balance of convenience (paragraph [20] of the opinion) cannot be criticised. Again we are not persuaded that the Lord Ordinary erred in this context, or that there is any ground for challenging the exercise of the Lord Ordinary's discretion.

Decision

[65] We refuse the reclaiming motion and adhere to the Lord Ordinary's interlocutor of 28 November 2017. We continue any question of expenses.