



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 58

CA130/21

OPINION OF LORD ERICHT

In the cause

BV10 LIMITED

Pursuer

against

(FIRST) ALLANVALE LAND INVESTMENTS LIMITED; (SECOND) JAMES VINCENT KIRKWOOD; (THIRD) ALASDAIR McMASTER KIRKWOOD; (FOURTH) LINDSEY KIRKWOOD; (FIFTH) ALLANVALE LAND (AUCHINCRAIVE) LIMITED; (SIXTH) JAMES McMASTER KIRKWOOD

Defenders

Pursuer: MacColl QC; Morton Fraser LLP
Defenders: Murdoch (sol-adv); Murnin McCluskey

25 August 2022

Introduction

[1] This is one of two related cases which called before me for debate on the same day. The other case is *BV10 Limited v Allanvale Land (Linlithgow) Limited and James Vincent Kirkwood* [2022 CSOH 59] (the “Linlithgow Action”). The opinions in both of these cases should be read together. This is the lead opinion for both cases. The cases arise out of a series of corporate funding transactions, which included share transfers. BV10’s position is that BV10 obtained an equity interest under the transactions and the transfer of the shares

was an integral part of the consideration for the loan, so the share transfers should be implemented. This is opposed by the defenders on the basis that the share transfers were in security of loans. The loans referred to in this action have been repaid. The loan referred to in the Linlithgow action will, according to the defenders, be repaid once agreement is reached between the defenders and the administrators of BV9.

The series of transactions

Transactions in December 2019

[2] A facility agreement (the “2019 Facility Agreement”) was entered into on 20 December 2019 and 23 December 2019 among BV8 Limited and Allanvale Homes (Adamton) Limited (“Adamton”). BV8 Limited agreed to make a loan facility of £534,188.03 available to Adamton. The purpose of the loan facility was to enable Adamton to loan monies to the first defender (“Investments”) so that Investments could then repay certain other indebtedness.

[3] At the time of the 2019 Facility Agreement being entered into, the share capital of Investments was 500 ordinary shares of which 250 were owned by the James Vincent Kirkwood and the other 250 by Alasdair Kirkwood.

[4] The 2019 Facility Agreement included the following provisions:

“4. CONDITIONS PRECEDENT

General

4.1 [BV8] shall be under no obligation to make the Facility available until it has received the following and is satisfied with the same:

...

4.1.9 A signed stock transfer form by [James Vincent Kirkwood: this would seem to be an error for Alasdair Kirkwood as the

stock transfer form is from Alasdair and the Share Purchase Agreement has James and not Alasdair remaining as the joint venture partner] transferring 50% of the issued share capital of [Investments] to BV10 Limited;

4.1.10 A completed share certificate of [Investments] showing that 50% of the issued share capital of [Investments] is held by BV10 Limited;

4.1.11 A shareholders agreement between [James Vincent Kirkwood] and BV10 Limited in respect of [Investments].

13. SECURITY

13.1 The obligations of [Adamton] to [BV8] under this Agreement shall be secured by all existing Security held by [BV8] for the liabilities of the Adamton as follows:

13.1.1 the Floating Charge; and

13.2.2 each Guarantee.

13.2 For the avoidance of doubt [Adamton] acknowledges that all Security held and to be held by [BV8] shall unless the Security Document expressly states otherwise secure all the liabilities of [Adamton] to the Lender of whatsoever nature."

[5] The definitions clause in clause 1 included the following:

"Security' means a mortgage, charge, pledge, lien or other security interest securing any obligation of any person or any other agreement or arrangement having a similar effect.

'Security Documents' means the documents referred to in Clause 13."

[6] The stock transfer form, dated 23 December 2019 and granted by Alasdair Kirkwood, was delivered.

[7] The Shareholders Agreement was entered into on the same dates as the 2019 Facilities Agreement, that is 20 and 23 December 2019.

[8] The Shareholders Agreement proceeded on the basis that Investments was a joint venture company with 500 shares in issue, 250 held by James Vincent Kirkwood and 250 by BV10. Investments was defined as “JVC”.

[9] The recitals included following:

“WHEREAS:

...

The JVC shall carry on business in accordance with the terms and conditions of this agreement.

Mr [James Vincent] Kirkwood and BV10 shall exercise their rights in relation to the JVC in accordance with the terms and conditions of this agreement.”

The shareholders agreement went on to specify in detail the scope of business to be conducted by the JVC, and included protections for its shareholders. The business “shall be the development of residential and commercial property (cl2.1). There were restrictions on the transfer of shares to third parties (cl11) and deadlock provisions to allow one partner to buy out the other if they could not reach agreement (cl 10). Clause 20.1 provided:

“20 Entire Agreement

20.1 This agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous discussions, correspondence, negotiations, drafts, agreements, promises, assurances, warranties, representations, arrangements and understanding between them, whether written or oral, relating to its subject matter “

Transactions in March 2020

[10] A facility agreement (the “March 2020 Facility Agreement”) was entered into on 19 and 20 March between BV8 Limited and the fifth defender (“Auchincruive”). BV8 Limited agreed to make a loan facility of £2,101,382.74 available to Auchincruive. The purpose of the loan facility was to fund the acquisition by Auchincruive of land at Auchincruive Estate.

[11] At the time of the March 2020 Facility Agreement being entered into, the share capital of Auchincruive was 100 shares, all which were owned by James Vincent Kirkwood.

[12] The March 2020 Facility Agreement included the following provisions:

“4. CONDITIONS PRECEDENT

General

4.1. [BV8] shall be under no obligation to make the Facility available until it has received the following and is satisfied with the same:

4.1.19 A signed stock transfer form by [James Vincent Kirkwood] transferring 100% of the issued share capital of [Auchincruive] to [Investments];

4.1.20 A completed share certificate of [Auchincruive] showing that 100% of the issued share capital of [Auchincruive] is held by [Investments];

4.1.21 A signed stock transfer form by [James Vincent Kirkwood: again this would seem to be an error and should have been Alasdair] transferring 50% of the issued share capital of [Investments] to BV10 Limited;

4.1.22 A completed share certificate of [Investments] showing that 50% of the issued share capital of [Investments] is held by BV10 Limited;

[13] Clause 13 contained similar wording to that of clause 13 in the 2019 Agreement but in respect of security for the liabilities of Auchincruive to BV8.

[14] The stock transfer forms by James Vincent Kirkwood and Alasdair Kirkwood, both dated 19 March 2020, were delivered.

Transactions in December 2020

[15] A facility agreement (the “December 2020 Facility Agreement”) was entered into on 22 and 23 December 2020 between Allanvale Land (Linlithgow) Limited (“Linlithgow”) and BV9 Limited (“BV9”). BV9 Limited agreed to make a loan facility of £1,466,201.12

available to Linlithgow. The purpose of the loan facility was to fund the acquisition by Linlithgow of land at Linlithgow.

[16] At the time of the December 2020 Facility Agreement being entered into, the share capital of Linlithgow was 100 shares, all which were owned by James Vincent Kirkwood.

[17] The December Facility Agreement included the following provisions:

“4. CONDITIONS PRECEDENT

General

4.1. [BV9] shall be under no obligation to make the Facility available until it has received the following and is satisfied with the same:

4.1.21 A signed stock transfer form by [James Vincent Kirkwood] transferring 50% of the issued share capital of [Linlithgow] to BV10 Limited;

4.1.22 A completed share certificate of [Linlithgow] showing that 50% of the issued share capital of [Linlithgow] is held by BV10 Limited;

[18] Clause 13 contained similar wording to that of clause 13 in the 2019 Agreement but in respect of security for the liabilities of Linlithgow to BV9.

[19] The stock transfer form was delivered.

Orders sought in this action

[20] The orders sought by the pursuer BV10 in the current action were as follows:

“1 For an order under section 125 of the Companies Act 2006 ordaining [Investments] to rectify its register of members by:

- (a) entering the name of [BV10] as the holder of 250 ordinary shares of £1 each;
- (b) removing [Alasdair Kirkwood] from the register; and
- (c) removing [Lindsey Kirkwood] from the register.

...

- 4 For an order under section 125 of the Companies Act 2006 ordaining [Auchincruive] to rectify its register of members by:
- (a) entering the name of [Investments] as the holder of 100 ordinary shares of £1 each; and
 - (b) insofar as they are shown to be members of [Auchincruive] removing [James Vincent Kirkwood] *et separatim* [James McMaster Kirkwood] from the register."

The orders sought in the Linlithgow Action

[21] The orders sought by BV10 as pursuer in the Linlithgow Action were as follows:

- "1 For an order under section 125 of the Companies Act 2006 ordaining [Linlithgow] to rectify its register of members by:
- (a) entering the name of [BV10] as the holder of 50 ordinary shares of £1 each;
 - (b) reducing the number of shares held in the name of [James Vincnet Kirkwood] to 50 ordinary shares of £1 each"

Pleadings

[22] The defender pled in this action that the transfer of the shares to the pursuer was

"to be taken in order to provide security and reassurance for BV8 Limited about its loan, in that a party nominated by the lender would be in a position of influence in relation to the operation of the first defender, and that the agreement was to be for the duration of the loan. The pursuer made no requests for implement of the share transfer until after repayment of the loan to BV8 Limited".

Similar averments appear in the Linlithgow action in respect of BV9.

Submissions for the pursuer

[23] Counsel for the pursuer submitted that decree *de plano* should be granted. The defenders' averments were irrelevant. The defence pled (that the transfer of shares was in

security for the loan) did not reflect the terms of the facility agreements, which imposed restrictions on the period for which shares were to be owned by the pursuer, nor provided that the transfer was to be only a means of providing security for the loan under the facility agreement. There were no averments to indicate that a separate or collateral agreement was reached that the transfer was only to be in security or for a limited period of time.

Submissions for the defenders

[24] The solicitor- advocate for the defenders submitted that all parties had not been called: BV8 Limited ought to be the pursuer, and Adamton ought to be a defender in this action. Similarly BV9 and Linlithgow ought to have been pursuer and defender in the Linlithgow action. The pursuer had no title to sue as any title to sue rested with BV8 in this action and BV9 in the Linlithgow action. Further, he submitted that upon repayment of the loan, the contract was at an end, and the pursuer's case for transfer of the shares and rectification of the registers was irrelevant.

[25] The solicitor- advocate further submitted that, *esto* the cases were not dismissed on his pleas of all parties not called and no title to sue, the cases should proceed to proof before answer.

Analysis and decision

No title to sue/all parties not called

[26] In these actions, BV10 seeks registration of a share transfer in terms of a stock transfer forms. In the current action, the grantee of the Stock Transfer forms is the pursuer, or the pursuer's Joint Venture Company, and the grantors are defenders. In the Linlithgow Action, the grantee of the Stock Transfer forms is the pursuer, and the grantors are

defenders. The solicitor advocate submits that the correct pursuers are the lenders, ie respectively BV8 and BV9 (in administration), and that Adamton should be called as a defender in this action. In my opinion, that is incorrect. The pursuer in each action is suing on the stock transfer forms. Neither BV8, BV9 nor Adamton is a party to the stock transfer forms. At any proof, any oral or written evidence necessary from BV8 and BV9 or its administrators or Adamton could be led without them being called as a party. Accordingly, in both this action and the Linlithgow action I repel the defenders' pleas of no title to sue and all parties not called

Transfer of shares in security

[27] The difference between the parties is that the defenders maintain that the transfer of the shares was to be in security for the repayment of the loans and when the repayment has been made, the transfers are not to be implemented. The pursuer on the other hand maintains that this is not the case. The answer to the dispute between them must be found in a consideration of the contractual documents which they entered into.

[28] The contractual documents are entirely in accordance with the position of the pursuer. There is nothing in any of the three Facility Agreements which could lend any support to the defenders' position. It is nowhere stated any of the Facility Agreements that the share transfer are merely to be in security of the loan and are reversed, or not implemented, once the loan is repaid. Although the Facility Agreements all deal in detail with the security which is provided for the loan, there is no mention in any of them of shares being transferred in security. Indeed, the contractual documentation, far from setting out a short-term transfer arrangement until a loan was repaid, sets out a long-term arrangement whereby a Shareholders Agreement is entered into. The Shareholders Agreement provides

for a long term relationship between BV10 and James Vincent Kirkwood as shareholders whereby through the vehicle of Investments they engage in a joint venture to develop residential and commercial property. That joint venture is to be a long term one: it contains deadlock provisions and restrictions on share transfer. There is nothing in the Shareholders Agreement to bring it to an end once the loans are repaid. The defenders' position is in general incompatible with the terms of the Joint Venture Agreement, and also in particular incompatible with the entire agreement clause (20.1). Further, the defenders do not aver any oral or written collateral agreement such as a side letter providing that notwithstanding the terms of the documentation the share transfer was not to proceed, or should be reversed, when a loan was repaid. The defenders do not seek rectification of the contractual documentation as not giving effect to the intention of the parties. The documentation is clear on its terms and does not provide for re-transfer of the shares, or the un-winding of the joint venture, on repayment of the loans. In any event, in the Linlithgow action there is no averment that the loan has been repaid: the defenders in that action merely aver that there are discussions with the administrators. In all these circumstances, the pursuer is entitled to the orders for rectification of the registers sought in each action.

[29] As the answers disclose no defence to either action, in each action I shall uphold the pursuer's pleas-in-law and repel the defenders' pleas-in-law and grant decree *de plano*.