SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2022] SC GLW 13

SQ4-18

JUDGMENT OF SHERIFF ALAYNE E SWANSON

In

APPEALS UNDER SECTION 127(5) OF THE BANKRUPTCY (SCOTLAND) ACT 2016

In the sequestration of NAHID ALI 8 [address redacted] Glasgow G12 8EB

By

(1) SHAHEENA AKHTER (also known as Shaheena Ali) residing at 32 [address redacted] Glasgow G4 9DT
(2) KHALID MASOOD and KM INVESTMENTS CORP 3006 [address redacted] California CA95204 USA
(3) JAVED ALI and DR KISHWAR SULTANA residing together at 74 [address redacted] Glasgow G20 6AP

Act: Docherty (for appellants)
Alt: Lloyd (for Accountant in Bankruptcy)

Glasgow 27 April 2021

The Sheriff having resumed consideration of the cause refuses the appeal by Shaheena Akhter; refuses the appeal by Khalid Masood and KM Investment Corp; refuses the appeal by Javid Ali and Kishwar Sultana; makes no further order meantime.

Background

[1] The debtor Mr Ali was sequestrated on 5 March 2018. On 15 October 2020 the Trustee adjudicated upon creditor claims submitted to him in terms of sections 122 of the Bankruptcy (Scotland) Act 2016 ("the 2016 Act") for the purposes of obtaining an adjudication as to the creditors' entitlement to a dividend out of the debtor's estate. An

adjudication schedule was prepared and intimated to interested parties on 15 October 2020. (Productions 1a, 1b, 2a and 2b).

[2] The petitioning creditor and his wife objected to those adjudications and applied for a review of the Trustee's decisions by the Accountant in Bankruptcy ("AiB") in terms of section 127(1) of the 2016 Act. (Productions 3b to 3e) The petitioning creditor stated in his application that claims by creditors have been allowed when the claims were not genuine and have been made by family and friends of the debtor. He also suggested that the Trustee had not ingathered all of the debtor's estate and gave three examples relating to (i) shares in companies which owned valuable assets, (ii) heritable properties particularly title GLA 202272 and (iii) a property in Wilton Street Glasgow. In his decision letter dated 30 November 2020 the AIB notes that his review function in terms of the 2016 Act only relates to the adjudication decisions and the questions raised about other assets and transfers to family members were not relevant to the review of the adjudication decisions. For that reason they were not addressed.

[3] The AiB revoked the Trustee's decisions on 30 November 2020. In respect of the claim by Shaheena Akhter the AiB stated that although it was satisfied that the loan of £55,000 was made to the debtor there was insufficient evidence from which to determine the amount still due and that the total sum remained unpaid.

[4] In respect of the claim by Khalid Masood and KM Investment Corp the AiB stated that although it was satisfied that the claimants jointly lent the sum of £110,0000 plus interest to the debtor there was insufficient evidence from which to determine that the total sum remained unpaid. The AiB also considered that the Trustee's adjudication admitting each creditor's claim for £196,307.13 gives the two creditors an unfair preference over the

other creditors in the case; the adjudication should be on one combined claim for the one evidenced amount.

[5] In respect of the claim by Javed Ali and Kishwar Sultana the AiB stated that although it was satisfied that the claimants jointly lent the sum of £50,0000 to the debtor there was insufficient evidence from which to determine that the total sum remained unpaid. The AiB also considered that the Trustee's adjudication admitting each creditor's claim for £50,000 gives the two creditors an unfair preference over the other creditors in the case; the creditors should submit one joint claim in the sum of £50,000 or two individual claims each for the sum of £25,000. The AiB held the Trustee's decision on the two claims to be incompetent.

[6] These three appeals against the review decisions of the AiB come to the Sheriff in terms of section 127(5) of the 2016 Act. The appellants crave the court to overturn the AiB decisions. The errors made by the AiB identified by the appellants in their respective notes of appeal are as follows:

1. Acceptance of the objectors' application as having been presented on a stateable ground;
2. Revocation of the adjudication on grounds not relied upon by the objectors;
3. Incorrect use of powers under the Act by revoking the adjusications;
4. Incorrect reliance on section 123 in relation to further information; inversion of the burden in relation to creditor claims; reference to "usual practice" by creditors
5. Rejection of the Trustee's treatment of the joint nature of the debt

Submissions

[7] Written submissions were lodged by the three appellants and the AiB. Mr Foster who represented the petitioning creditor adopted the submissions of the AiB. He did not take an active part in the appeal hearings.

[8] For the appellants Mr Docherty submitted that in the first and second appeals the AiB was not entitled to reach the decisions that there was insufficient evidence that the loan remained outstanding because that was not a ground of appeal relied upon by the objectors. In addition the matters relied on by the AiB were matters of fact and that the AiB was not entitled to revoke the decisions on the basis of inserting its own judgment on matters of fact unless the AiB had concluded that the Trustee's decision on those matters of fact was fundamentally flawed. The decision contained no analysis of why the Trustee's decision was not one which was within the range of reasonable decisions he could have made.

[9] The matters of fact taken into account relate to the creditor's inability to produce evidence of non-payment and evidence of payment being sought. Reliance on the non-production of evidence inverted the burden in relation to creditor claims and indicated that the AiB's decision depended upon an incorrect reading of section 123 of the 2016 Act. Evidence from the debtor was ignored.

[10] In considering the nature of the joint obligation the Trustee had considered a factor which was not a ground of appeal relied upon by the objectors; the Trustee's acknowledgement that a dividend would be paid out against only half of the claim was ignored. Mr Docherty also submitted that the AiB had erred in suggesting that a further adjudication of the claims can be considered and completed by the Trustee. Revocation of the original decisions was an inappropriate use of the AiB's powers and in the second and third appeals the Trustee's decisions should have been amended.

[11] For the AiB Mr Lloyd submitted that the Sheriff could only interfere with the AiB decision if satisfied that one of the grounds identified in *MacPhail on Sheriff Court Practice* at paragraph 18.111 was made out. Mr Lloyd took issue with the appellants' position that the AiB is constrained by the terms of the objections put forward in the application for review. He also refuted the suggestions that the AiB had erred in dealing with sufficiency of evidence; concerns about the documentation provided by the appellants did not invert the burden of proof. The AiB was entitled to take into account that no steps had been taken to pursue or confirm the debt. No error had been made in the treatment of the joint claims or in the conclusion that the appellants could submit a further claim.

Discussion

The role of the AiB

[12] The review function of the AiB in relation to adjudications was conferred by amendments to the Bankruptcy (Scotland) Act 1985 ("the 1985 Act") introduced by the Bankruptcy and Debt Advice (Scotland) Act 2014 and consolidated in the 2016 Act. Previously the review was performed by the Sheriff. A number of the Trustee's decisions are open to review by the AiB including decisions taken to accept or reject a creditor's claim following an adjudication. Although parties have different views about the scope of the AiB's role and its functions under the 2016 Act they are agreed that in reviewing the Trustee's decisions the AiB is acting in a quasi-judicial capacity.

[13] In relation to the powers of both the AiB and the Sheriff Mr Lloyd relied on the statements made in MacPhail: *Sheriff Court Practice* (3rd Ed 2006) where the learned author explains that where an appeal is taken against a decision involving the exercise of judicial discretion it is not the function of the appellate court to interfere merely on the ground that

the appellate court would have done something different. The exercise of discretion can only be set aside for certain reasons; this is described as a restrictive approach. The acceptable reasons are stated thus:

> "The appellant court may intervene if it is satisfied that the judge did not exercise his discretion at all; or in exercising it he misdirected himself in law; or misunderstood or misused evidence or the material facts before him; or took into account an irrelevant consideration; or failed to take into account some relevant consideration; or if his conclusion is such that, though no erroneous assumption of law or fact can be identified, he must have exercised his discretion wrongly.[1]"

That test was confirmed by the Inner House in *Britton* v *Central Regional Council* 1986 SLT 207. In a unanimous decision their Lordships stated that a decision may not be interfered with unless discretion was exercised upon a wrong principle or that, the decision being so plainly wrong, discretion must have been exercised wrongly. In the unreported case relating to the *Sequestration of Nicola Hutcheon*[2] Sheriff Napier expressed the view that the court should be slow to interfere with the exercise of discretion by the AiB unless there is a clear and demonstrable departure by the decision-maker from a rational decision-making process[3].

[14] Where parties differ is in the assessment which should be made by the AiB to justify interference. Mr Docherty's position was that the Trustee had to have failed the test set out above before the AiB could over-turn his decision. In his submission there were no such errors made by the Trustee and the AiB had therefore erred in revoking the decisions. He did not consider that the AiB had power to consider matters afresh particularly in relation to matters of fact and criticised the AiB for failing to identify the fundamental flaws in the

---

[1] Parapgraph 18.111
[2] Aberdeen Sheriff Court 26 April 2019 ABE-SQ56-18
[3] Paragraph [85]

Trustee's decision and the reasons the decision was outwith the range of reasonable decisions the Trustee could have made.

[15] I disagree with that position. The point was decided by the Sheriff at Hamilton in *Japan Leasing (Europe) plc* v *Weir's Trustee* Hamilton Sheriff Court 21 November 1996 which dealt with the Sheriff's review powers under the 1985 Act. The Trustee argued that the court required to look at what was presented to the Trustee and decide whether he was right or wrong to reject the claim; and the court would not be likely to interfere unless the Trustee had been manifestly wrong. The Sheriff rejected that submission and held that in hearing an appeal against an adjudication all admissible and relevant evidence concerning the claim may be heard and not just that which was presented to the Permanent Ttrustee; he then had to decide, on the evidence before him, whether the claim was well founded. The point was not argued when the case was considered by the Inner House on appeal about the admissibility of certain evidence considered by the Sheriff; their Lordships noted that parties proceeded on the basis which the Sheriff had adopted[4]. Although the case in terms of the 1985 Act concerned review by the Sheriff not the AiB, it is thought that the same approach should apply in relation to a review prior to appeal where appropriate[5]. I consider that to be the correct approach in this case; matters should be considered afresh by the AiB where a misdirection in law or a misunderstanding of the evidence is identified.

[16] Section 127 provides for the debtor or any creditor to apply to the AiB for a review of the acceptance or rejection of any claim. If an application is made, in terms of section 127(5) the AiB must take into account any representations made by an interested party within 21 days of the application and must confirm, amend or revoke the decision within 28 days.

---

[4] *Japan Leasing (Europe) plc* v *Weir's Trustee* (No2) 1998 SC 543

[5] McKenzie Skene: *Bankruptcy* 1st Ed paragraph 16-32

Sheriff Napier was clear that the provision of a right of review must contemplate more than simply reviewing representations. He supported an interpretation of the review provisions which expects the AiB to review the matter *ab initio*. He stated that "it cannot be correct to delimit the AiB to considering only any representation as the Trustee and creditor effectively suggest[6]". I reject Mr Docherty's submission that this is incorrect because without express wording in the legislation the AiB cannot substitute its decision for the Trustee's. The Sheriff Court cases are not binding on this court but the approach taken in them seems eminently sensible; otherwise the review function is a review without substance.

[17] In my view the AiB was correct to reject representations which did not pertain to the adjudication of claims. However, having received an application for review I consider that the AiB can address any relevant issues about the claims which concern him whether raised by the objector or not. Section 127 of the 2016 Act does not prescribe any form for the objection application; indeed there is no requirement for grounds to be stated at all. An application which simply sought review would appear to be competent in terms of section 127; an application raising a general objection that the claims were not genuine is therefore also competent.

[18] I reject the argument that the applications were not presented on a stateable ground. An objection to the genuineness of the claims is a valid reason for review in my opinion (and as noted above no ground is required). It is argued that no basis is offered for the criticism other than that the claims were submitted by family and friends of the debtor. The AiB did not err in considering this objection. Given the conclusion I have reached on the AiB's powers to review matters afresh then whether the claim is genuine must be at the heart of

[6] Paragraph [73]

the investigations. I consider the AiB had power to revoke the decisions on a ground not relied on by the objectors. I take on board the point made by the appellants that the AiB did not determine that the claims were not genuine but in my view that does not restrict the wider analysis. The original claim may be deemed genuine at the same time as queries are raised about whether the debt is still outstanding.

Evidence supporting the claims

[19] What was provided to the Trustee and subsequently to the AiB in respect of the loan by Khalid Masood and KM Investments Corp was the claim form by each creditor, the loan agreement and personal bond and bank statements showing payments into an account bearing the debtor's name (and that of a limited company) for the period 28 February 2006 to 26 May 2006. Those bank statements show international transfers to the account from KM Investments Corp. In his decision letter the AiB states that it was satisfied from the supporting documentation that Khalid Masood and KM Investments Corp jointly lent the debtor the sum of £110,000 plus interest at 5%.

[20] The supporting documentation submitted by Javid Ali and Kushwar Sultana was the claim form from each creditor, the loan agreement and guarantee and what bears to be a screenshot from Intelligent Finance showing ten payments of £5,000 to the debtor between 10 April 2007 and 13 July 2017. In his decision letter the AiB states that it was satisfied from the supporting documentation that Javid Ali and Kushwar Sultana jointly lent the debtor the sum of £50,000.

[21] I do not agree with Mr Docherty that the AiB cannot be concerned with matters of fact. If the AiB forms the view that the Trustee relied upon misinformation or failed to investigate the material before him properly then that is a matter affecting the exercise of the

Trustee's discretion. Mr Docherty also submits that the AiB was not entitled to decide that further information was required to satisfactorily evidence that the loans made by Shaheena Akhter and Khalid Masood and KM Investments Corp were still outstanding. It is suggested that by seeking such evidence the AiB erred in the interpretation of section 123 and inverted the burden of proof.

[22] Section 123 of the 2016 Act gives the Trustee the power to require the creditor, or any other person who can produce relevant evidence, to produce that further evidence in order to satisfy himself as to the validity or amount of a claim submitted by a creditor. That is a wide power. Mr Docherty submits that the AiB's reading of section 123 was incorrect in that it was stated that a creditor has to produce evidence with his claim. He also submits that if the Trustee was satisfied with the information provided to him the AiB had no locus to investigate the supporting documentation further. I cannot accede to that proposition. In order to determine what factors and factual material were taken into account or ignored, the AiB has to consider all the material provided and come to a decision about acceptance of the claim. Having declared that there was sufficient evidence to support the loans to the debtor the AiB was not prevented from investigating the evidence available to support the fact that the loans remained outstanding and to show in what amount. The creditors' approach to repayment is relevant. In not considering that element the Trustee misunderstood the evidence before him.

[23] What the AiB had by way of documentation was a statement in an informal email from the debtor (Production 5a) that no payments had been made to any of the creditors; the debtor's statement was not considered to be sufficient evidence that the full debts remained outstanding. The AiB did not ignore that statement. In the decision letter the AiB goes on to comment that it was not unreasonable to expect Shaheena Akhter and

Khalid Masood and KM Investments Corp to have provided the debtor periodically with statements or other correspondence referencing the debt owed , the amount which remained outstanding and the amount of interest that had accrued. The AiB states that this is usual practice when a loan remains outstanding for any length of time.

[24] Mr Lloyd submitted that in making the legislative changes which gave the AiB these powers of review Parliament would have understood that the reviewer was not legally qualified and allowance should be made for that and for the drafting of the decision letter. I am not inclined to take a narrow view of the AiB's wording in the letter of 30 November 2020. Looking at the decision as a whole is an accepted way of dealing with the decision of a non-legally qualitied body. Those who review such decisions are encouraged not to get too involved in semantics and to adopt a fair reading of the findings as a whole. On a fair reading of the decision as a whole the AiB was entitled to hold after an examination of the supporting evidence that the decisions should be revoked. It is not an error to mention in the commentary how the AiB might have expected the creditors to have progressed matters. Those remarks in passing were intelligible when read fairly in the context of the decision as a whole; they do not represent an error in law.

The possibility of a further claim

[25] Mr Docherty submits that the AiB erred in stating that a further claim could be made by the creditors if further information became available. In terms of the timetables set out in section 122 of the 2016 Act claims must be submitted within 120 days of the Trustee giving notice inviting claims. The Trustee has a discretion to allow claims late if the claim is submitted not later than 8 weeks before the end of the accounting period and there were exceptional circumstances preventing the claim from being submitted timeously.

Mr Docherty submitted that both of these time periods are long past. For those reasons the appellants' submission is that the AiB should have amended the joint claims not revoked them.

[26] Mr Lloyd suggested in his submissions that the Trustee could still exercise his discretion to allow a claim late but given the terms of the legislation I do not agree that that is the case. In her book on *Bankruptcy* Ms McKenzie Skene suggests that, where a claim has been rejected as a result of the lack of further evidence in some cases the proper course might be for the claimant to raise an action to constitute the claim[7]. I have formed no view on that suggestion. However Mr Lloyd's primary position was that the AiB having formed a view that the claims as lodged were incompetent, what the appellants were going to do thereafter was irrelevant. I agree with that submission; the suggestion about future claims is part of the commentary in the decision letter, not a matter which constitutes an error in law as suggested.

The nature of the obligation

[27] The sums claimed by the appellants in the second and third appeals are joint debts on single loans. The loan agreement and relative personal bond relating to the loan by Khalid Masood and KM Investments Corp are lodged (Productions 6d, 6e, 6f, 6g and 6h). In relation to the loan by Javid Ali and Kushwar Sultana a document described as a loan agreement and guarantee is lodged (Production 9e and 9f). From these documents it is clear that Khalid Masood and KM Investments Corp lent the debtor the sum of £110,000 with interest (or profit) payable at 5 % per annum. Javid Ali and Kushwar Sultana lent the sum

[7] Paragraph 16-32

of £50,000 with no interest payable. The personal bond and the guarantee describe the debtor's liability in respect of both loans as joint and several.

[28] The concept of joint and several liability presents difficulties when applied to the role of creditor. Joint and several liability means that two or more persons are liable both jointly and also severally. In terms of more than one debtor that means that if one debtor repays the full loan outstanding he has a right of relief against the other debtors. Where there are one or more creditors the concept of a right of relief presents difficulties. Were the two creditors to sue the debtor for repayment in either of the cases here the action would require to be raised by both of them since the loan agreement does not specify any share due to the individual creditors. Where the obligation is indivisible all the creditors must sue.[8] However the important thing to note is that were the creditors to sue this debtor the sum sued for would be the sum of £110,000 plus interest or the sum of £50,000. Each of the creditors would not be able to sue for £110,000 or £50,000. It is for that reason that I consider the Trustee has erred in his treatment of the joint obligation and that the AiB was correct to revoke the claims admitted.

[29] In the second appeal the appellants both claimed a sum of £196.307.13. In the third appeal the appellants both claimed £50,000. The Trustee admitted the claims of Khalid Masood and KM Investments Corp in a total amount of £392,614.26 and the claims of Javid Ali and Kishwar Sultana in a total amount of £100,000. The AiB considered that they should either have submitted single claims for £196,307.13 and £50,000 respectively or two individual claims for the total. The appellants submit that the Trustee was correct in his treatment of the joint obligations and that the AiB's approach was incorrect.

---

[8] McBryde on Contract 3rd Ed paragraph 11-24

[30] Where a debtor has multiple creditors on a single obligation either all creditors must sue, if the obligation is not divisible, or each creditor may sue for their own share if it is divisible. What is not permitted is that all of the creditors on an obligation may sue the debtor separately for the whole obligation[9]. Mr Lloyd submitted that the same approach should be followed when a debtor is sequestrated and multiple creditors on a single obligation wish to submit a claim; they must either submit a single joint claim for the full amount or submit individual claims for the share of the full amount that they claim is due to them.

[31] Mr Docherty submits that the AiB ignored the Trustee's stated intention to treat these joint claims as entitling each creditor to one half of the sum for dividend purposes. I do not accept that the AiB ignored that intention. The commentary from the Trustee to the email sent by the AiB dated 24 November 2020 (Production 4b) enquiring as to the position clearly states that the debt is on a joint and several basis allowing a claim for the full amount for each party but the dividend payable will not exceed the debt across the two parties. The AiB was appraised of the way in which the Trustee approached the question.

[32] In my view the Trustee has made an error in law which is not corrected by the Trustee's declared intention to treat only one claim as being valid for dividend purposes. I reject the argument that this intention indicated that the Trustee was accepting the claims only in part, as he was entitled to do in terms of section 127(7) of the 2016 Act[10]. I also reject the argument that, properly construed, the Trustee's decision was that the appellants in the second and third appeals had indeed submitted one joint claim[11].

---

[9] ibid

[10] Paragraph (d) in notes of appeal re 2nd and 3rd appeals

[11] Paragraph (e) in notes of appeal re 2nd and 3rd appeals

[33] The purpose of the adjudication schedule is to list the total admitted claims for the information of all creditors. It also has relevance to voting at any creditors' meetings. Acceptance of one creditor's claim will almost inevitably result in a corresponding reduction in value to other accepted claims[12]. The way in which the Trustee in this case has listed the accepted claims inflates the total accepted claims in the adjudication schedule by £246,307.13. The pot available to creditors is therefore artificially and wrongly reduced. As Professor McBryde puts it:

> "To allow the same debt, or part of it, to be claimed twice in the same sequestration by different people would be unfair to all other creditors. Therefore there cannot be a double ranking of one debt.[13]"

[34] Stating that dividend will be paid out in another way does not remedy that error. I agree with the AiB that allowing two creditors to submit separate claims for a joint debt gives the two creditors an unfair preference over other creditors. Acceptance of the claims means that each creditor will be entitled to receive an interim and final dividend against their claims when their entitlement is only to receive dividend against the total owed to them. The AiB was correct to say that the two creditors should either submit one joint claim for the full sum or two individual claims adding up to the total. There is no information in the documentation for either loan which would allow each creditor's share of the total to be determined; the suggestion that the £50,000 could be claimed as two amounts of £25,000 is incorrect but that does not detract from the overall conclusion that the total can only be claimed once.

---

[12] Richard Aird JLSS 1997 42(6)

[13] McBryde: Bankruptcy 2nd Ed paragraph 16-55

[35] I reject the argument that that the Trustee's treatment of the joint debts was an acceptance of a single claim and it would then be for the individual appellants to ascertain among themselves as to who should receive what share of any dividend[14].

[36] It is not the AiB who has misunderstood the nature of a joint debt, as argued by the appellants. The Trustee's treatment of the joint claims was incompetent; the decision constituted an error in law. In that situation the decision to revoke was correct; I agree that amendment was something available to the AiB but in the face of incompetent claims I do not consider that would have been an appropriate outcome.

Decision

[37] There was no error made in accepting the objectors' applications for review. The AiB is not limited to considering only any representation suggested by the objector or the creditor. Having identified a misunderstanding of the material facts in relation to the debts the AiB was entitled to consider all admissible and relevant evidence concerning the claim whether presented to the Trustee or not.

[38] The AiB is entitled to look at matters of fact and to take a view on the sufficiency of the evidence regardless of the Trustee's view. The AiB did not misinterpret section 123 and seek to invert the burden of proof. In considering sufficiency the AiB did not ignore the debtor's statement; the statement was considered and deemed insufficient. The commentary about why the evidence about the debts was insufficient and what the AiB might have expected to see is not an integral part of the decision. The AiB's commentary does not represent an error in law. The AiB's comments about submitting a further claim

[14] Paragraph (f) in notes of appeal re 2nd and 3rd appeals

are not an integral part of the decision either. They do not form part of the reasoning and are simply a suggestion as to how matters might progress.

[39] I am clear that the Trustee's treatment of the joint obligations is an error in law; I have no doubt that the AiB was correct to revoke the decisions on that basis. The Trustee's position on dividend was not ignored; it was considered but, because it was part of the error, rightly rejected by the AiB. The decision was so plainly wrong that the Trustee's discretion was exercised wrongly.

[40] My powers in this matter are also restricted by the test discussed above in relation to interference with discretionary decisions. I find that the AiB did exercise discretion properly. The AiB did not misunderstand or misuse evidence. The matters taken into account were relevant; no relevant factors were ignored and no erroneous assumptions in relation to the law or the facts were made. I will refuse the appeals. I was not addressed on the subject of expenses. I will make no further order meantime but if parties wish to enrol a motion in relation to expenses that can be dealt with later.