OUTER HOUSE, COURT OF SESSION

[2021] CSOH 76

A220/19

OPINION OF LORD TURNBULL

In the cause

STEWART McLEOD

Pursuer

against

BANK OF SCOTLAND PLC

Defenders

Pursuer: Party
Defenders: Edward; Blacklocks

23 July 2021

[1] In this action the pursuer seeks reduction of a decree granted in Kilmarnock Sheriff Court and interdict against the defenders preventing them from enforcing that decree. At a procedure roll hearing on 9 July 2021 the defenders moved me to dismiss the action in terms of their first plea-in-law.

Background

[2] For the purposes of this decision, the relevant facts and history can be drawn from the pleadings as set out in the closed record. These may be supplemented by the content of

the affidavit sworn by the pursuer on 5 July 2021 and lodged by him in advance of the procedure roll hearing.

[3] The pursuer is the owner of Corsehouse Cottage, Old Glasgow Road, Stewarton in Ayrshire. His title to the property is recorded in the Land Register of Scotland under title number AYR3860. In around June 2001, the pursuer granted a standard security in favour of Halifax plc over the property. In October 2012 an action for recovery of possession of the subjects under security was raised in Kilmarnock Sheriff Court by the present defenders. Decree in absence was granted on 23 July 2014. The decree was extracted on 25 August 2014.

[4] The defenders aver that a calling up notice was served on the pursuer on 25 June 2012 and that he signed for this notice on 30 June 2012. The pursuer denies that a calling up notice was served on him and states he was not residing at the premises at that time.

[5] In 2016 the pursuer raised an action in the Court of Session (A210/16) for reduction of the decree which is the subject of the present action. In those proceedings he sought interim interdict against the defenders from enforcing the decree. At the hearing of his before calling motion for interdict, the defenders gave an undertaking that they "will not take or instruct steps to enforce the decree dated 23 July 2014 pending the judicial resolution or extrajudicial settlement of these proceedings". Thereafter the summons was not lodged for calling.

Submissions for the defenders

[6] On behalf of the defenders, Mr Edward submitted that the pursuer's pleadings set out three apparent arguments in support of reduction of the sheriff court decree. First, the defenders had no title to the standard security over his property. Second, that the granting

of the standard security and the defenders' actions in seeking to enforce it were tainted by fraud. Third, that there was insufficient evidential material placed before the sheriff to entitle her to award decree in the defenders favour.

[7] Since the pursuer admitted granting a standard security to Halifax plc his claim that the present defenders had no title to enforce it was bound to fail. The effect of the HBOS Group Reorganisation Act of 2006 was that the right to the standard security vested in the defenders.

[8] Whilst the pursuer made certain vague and contradictory averments concerning fraud it was clear that a standard security was registered. On the pursuer's own averments he accepted making repayments towards a mortgage loan. There were no relevant or specific averments of fraud which could bear in any way on the obtaining of the loan by the pursuer, or on the circumstances in which he granted a standard security.

[9] The decree granted in the sheriff court was a decree in absence. The pursuer did not address the fact that the requirements for raising such an action by way of summary application are set out in section 24 of the Conveyancing and Feudal Reform (Scotland) Act 1970. The pursuer does not specify which if any of those requirements was not complied with. His third argument was irrelevant and lacking in specification.

[10] The pursuer's conclusion for interdict flowed from an interlocutor pronounced by Lord Doherty in action A210/16. On 14 June 2016, in a motion for interim interdict before calling, counsel appearing for the defenders gave the undertaking referred to at paragraph [5] above.

[11] The undertaking was recorded in the minutes of proceedings. The summons in that action was not lodged for calling and the instance had fallen. The interpretation of the undertaking was a matter of law. The defenders' submission was that it was an undertaking

given in connection with the previous proceedings and could not be held against them a number of years later when that case had not been progressed by the pursuer. The contention that the undertaking existed for all time without further action being taken to address the merits of the defenders' entitlement to decree was untenable. An application for interim interdict in the present case, based on the pursuer's contention as to the interpretation of the undertaking, had been refused on 16 July 2019 by Lady Carmichael. On 13 March 2020 the Inner House refused the pursuer's motion for review of that interlocutor.

[12] Mr Edward submitted that the relevant legal framework within which to consider an application for reduction of a decree in absence could be found in the opinion of Lord Woolman in the case of *Jandoo* v *Jandoo* [2018] CSOH 14. He submitted that the pursuer had set out no relevant basis upon which he could have a defence to the merits of the sheriff court action. He did not deny being served with that action and offered no explanation as to why he did not enter the proceedings. His application for interdict would fall with the conclusion for reduction but in any event had no relevant foundation.

[13] In all of these circumstances Mr Edward moved me to uphold the defenders' first plea-in-law and to dismiss the action.

Submissions for the pursuer

[14] The pursuer's principal submission was that the defenders had no legal basis upon which to obtain a decree for recovery of possession against him as they did not lawfully hold a standard security over his property. He contends that the HBOS Group Reorganisation Act 2006 has no effect, as a contract entered into between private parties could not be affected without the prior consent of each party to that contract.

[15] Separately, the pursuer argues that the standard security granted to Halifax plc was obtained through deception.

[16] The third proposition advanced by the pursuer is that there was insufficient evidence placed before the sheriff to entitle her to grant decree on 23 July 2014. He avers that no principal or verified copy of the calling up notice was lodged in court. In his submissions to this court he contended that the original standard security required to be produced to the sheriff.

[17] In support of his contentions the pursuer read the content of the affidavit sworn by him on 5 July 2021. He contended that support for his proposition regarding principal documentation could be found in what Lord Tyre had said in his opinion in a previous case seeking reduction of a decree for recovery brought by the pursuer in May 2014 - *McLeod* v *Prestige Finance* [2016] CSOH 69. He relied in particular on the passage at para [8] of his opinion where Lord Tyre had said:

> "Where a party comes to court founding upon a document as the basis of the right which it seeks to vindicate the 'best evidence' rule requires production of the principal document. There is no relaxation of that rule to be found in procedure for summary applications".

[18] Various other references were made to legal principles which the pursuer contended ought to apply, such as were to be found in the Requirements of Writing (Scotland) Act 1995 and the Companies Act 2006 and he sought support from what was said in the 12th edition of Gloag and Henderson *The Law of Scotland*.

[19] In support of the allegations of fraud set out in his pleadings the pursuer drew attention to various documents which he had lodged setting out what he considered to be evidence of widespread fraud within the banking industry and within the defenders group.

The pursuer's motion was that the case should be allowed to proceed to a proof on the merits.

Discussion

Reduction

[20] The legal framework within which an application for reduction of a decree in absence should be considered was conveniently summarised by Lord Woolman in the case of *Jandoo* v *Jandoo* [2018] CSOH 14. Drawing upon the legal propositions set out in the cases of *Robertson's Ex* v *Robertson* 1994 SC 23 and *Nunn* v *Nunn* 1997 SLT 182, he articulated the following propositions:

a. a court decree is not to be lightly set aside

b. there is no precise test

c. the pursuer must show that:

    i. the decree ought not to have been granted on the merits

    ii. there is a reasonable explanation why he did not enter the proceedings

    iii. the whole circumstances of the individual case justify reduction

[21] Although the pursuer rejected the suggestion that Lord Woolman had accurately set out the applicable legal propositions in this summary he was unable to identify what he claimed the correct legal approach would be, asserting only that the decree which he was attacking was different because of fraud.

[22] I adopt Lord Woolman's summary as the correct approach to be followed in assessing the submissions in the present case.

[23] On this basis then, the first question to determine is whether the pursuer has set out any ground upon which the decree obtained in the sheriff court ought not to have been

granted. Put another way, does the pursuer have any defence which might have been presented in opposition to decree being granted?

[24] Section 2 of the HBOS Group Reorganisation Act 2006 provides that the term "transferor company" means, amongst other organisations, Halifax plc. The same section provides that "undertaking" means the business and all property and liabilities of a transferor company and "the Bank" means the Bank of Scotland. Section 10 provides for the vesting of the undertaking being transferred to the Bank and that the Bank shall succeed to the relevant undertaking as if in all respects the Bank were the same person as the transferor company.

[25] The Act of Parliament plainly has the effect which Mr Edward explained and there is no basis upon which the court could decline to give effect to it. The pursuer's contention that the present defenders had no right to raise an action in respect of a standard security granted to Halifax plc is misconceived.

[26] In the first condescendence for the pursuer (where he replies to the answer for the defenders) the pursuer admits that he granted a standard security to Halifax plc in June 2001, which he understood formed a binding contract. He makes averments in Article 3 of condescendence which acknowledge the existence of a mortgage debt in relation to the property and he explicitly states in the first article of condescendence that he stopped making payments. These averments make it clear that he accepts the existence of a loan and the fact of an outstanding debt.

[27] However, he then goes on to make an averment to the effect that in 2013 it was "brought to the attention of the pursuer" that the defenders' companies were engaged in fraud. He then sets out an averment that they did not lend any money to him but merely created what he calls a "deceptive document" in order to make a pretence that they were the

lender and thereby managed to deceive him to grant a standard security over his property. He goes on to make various averments about subsequently contacting Halifax plc, or those acting on its behalf, seeking production of a signed contract with him and seeking confirmation that they did lend him money. He avers that this correspondence was not responded to.

[28] There are no averments anywhere in the pleadings which explain the circumstances in which the pursuer came to grant a standard security over the property known as Corsehouse Cottage. There are no averments to support a claim that he was deceived into granting a standard security.

[29] When given an opportunity in court to explain in what way there had been deception, the pursuer offered two explanations. First, he stated that Halifax plc had not lent him any money. He created the money involved by putting his signature to the original document. Until he had done that the document had no life. Second, he believed that "the Bank" had sold on the security, that was where the fraud was. The Bank did not have a contract.

[30] The pursuer's averments relating to fraud are entirely irrelevant. Such general allegations of fraudulent behaviour as are made are not linked in any way to the security which he admits granting. The allegations of fraudulent conduct contained within the various documents which the pursuer relied on have nothing at all to do with the loan granted to him, nor have they anything to do with the standard security granted in connection with that loan. It is clear that the pursuer has failed to identify any defence on the merits to the defenders' claim for recovery of possession.

[31] The pursuer's contention that there was insufficient evidence before the sheriff to entitle her to grant decree is not a defence on the merits of the action. In any event his propositions are again misconceived.

[32] The pursuer contends that what he refers to as "original documentation", or some other "verified documentation supported by an affidavit from a director" required to be presented to the court. He avers that decree was granted without a principal copy of the calling up notice being lodged and without witnesses speaking to the claim made by the creditor. In court he explained that the original standard security should have been lodged. He seeks to advance his argument in the second article of condescendence by averring that the sheriff "may" have erred in law by failing to inspect the documentation for validity. The defenders respond to this contention by averring that they complied with all the procedural documentary requirements necessary for granting the decree sought. As Mr Edward explained, what the pursuer refers to as the principal calling up notice was served on him. He explained that the copy notice together with certification of service as signed for by the pursuer was lodged in the sheriff court action.

[33] As a separate strand of this argument the pursuer appears to think that the defenders cannot enforce their rights against him without responding to his demand that they provide him with sight of the original loan documentation. Various averments to this effect appear in his pleadings and similar propositions were set out in the affidavit which he read to the court. As he explained in responding to Mr Edward's submissions, had the defenders produced the original agreement he would have made all the necessary payments. They have not done so because they do not have it or are unwilling to supply it and, in his view, that proves the case.

[34] This is a similar argument to one of the propositions which the pursuer appears to have presented to Lord Tyre at the hearing in his case against Prestige Finance. At para [15] of his opinion, Lord Tyre explains that it was unnecessary as a matter of law for Prestige to seek or obtain the pursuer's consent to an assignation of his debt and he had no legal entitlement to have the principal assignation exhibited to him. "Nor was he entitled to demand sight of the principal agreement as a condition of settling any debt due by him to Prestige as an assignee of the original lender." The pursuer did not explain why he continued to argue the same point despite being told by Lord Tyre that his view did not correspond with the law of Scotland.

[35] Section 19 of the Conveyancing and Feudal Reform (Scotland) Act 1970 provides that where a creditor in a standard security intends to exercise any power conferred by that security he shall serve a calling up notice in conformity with Form A of Schedule 6 to the Act. Subsection (6) provides for the methods of serving a calling up notice. Schedule 3 to the Act provides for the standard conditions. Paragraph 9(1)(a) of that schedule provides that a debtor shall be held to be in default where a calling up notice has been served and not complied with. Section 24(1B) of the Act permits a creditor in a standard security to apply to the court for a warrant to exercise any of the remedies which the creditor is entitled to exercise on a default within the meaning of standard condition 9(1)(a). Section 24 subsection (1D) provides that an application of this sort may be made by summary application and subsection (3) requires the creditor to serve on the debtor a notice in conformity with Form E of Schedule 6 to the Act. Subparagraph (4) provides for how such a notice may be served. Before making an application to the court the creditor is required in terms of subsection (1C) to comply with the pre-action requirements imposed by section 24A of the Act.

[36] It can be seen then that the procedural requirements associated with actions for recovery of possession are set out in statute. Such actions are common within the Sheriff Court. The pursuer makes averments in Article 3 of condescendence about an entitled resident Anne Steel attending at the court and making proposals for repayment. After decree was first granted a minute for recall was lodged by Ms Steel and consideration of that minute was continued twice. The decree now sought to be reduced was ultimately granted on 23 July 2014. It is plain from these facts alone that the application and the circumstances upon which it was based were brought to the sheriff's attention on a number of occasions.

[37] There is no reason to question the procedural propriety of the decree pronounced in the sheriff court action. There is a presumption of regularity which applies in the law of evidence (*omnia rite et solemniter acta praesumuntur*), see Walker and Walker *The Law of Evidence* in Scotland 5th edition paragraphs 3.6.1 to 3.6.6. In any event, the decree in question was a decree granted in absence. This distinguishes it from the circumstances described by Lord Tyre in the case of *McLeod* v *Prestige Finance* where decree was pronounced at what was a contested evidential hearing.

[38] Unless the pursuer is in a position to make a vouched and relevant statement about what documentation was or was not available to the sheriff the presumption of regularity should be given effect to. Even if there was a relevant procedural deficiency this would not necessarily lead to decree of reduction being granted.

[39] Finally, there is the question of why the pursuer did not enter the sheriff court proceedings and why he did not apply for recall of the decree. The action for recovery would have been served on the pursuer in a lawful manner. Certification of such service would accompany the summary application. The sheriff must have been satisfied that there

was lawful service. The pursuer makes no averments at all as to why he did not enter the sheriff court proceedings.

[40] In Article 3 of condescendence the pursuer states that he did not learn of the decree being passed against him until some months later. However, Lady Carmichael records at para [10] of her opinion that when the pursuer appeared before her at the interim interdict hearing he explained that he had been made aware of the decree being granted on the day that it was granted. As she also notes, the pursuer was aware of the procedure for recalling a decree in absence as he had successfully enrolled such a motion in the earlier case brought by Prestige Finance.

[41] In conclusion, and returning to the legal framework, the pursuer has failed to set out any basis upon which he might legitimately argue that the sheriff court decree ought not to have been granted on the merits of the case. He has failed to provide a reasonable explanation for not entering the sheriff court proceedings and there are no other relevant circumstances which would justify reduction of the decree. I am therefore satisfied that the pursuer has failed to state a relevant case in law for reduction of the decree granted to the defenders. As this limb of his case is bound to fail no further enquiry into the facts is necessary and I shall uphold the defenders' first plea-in-law insofar as directed towards the conclusion for reduction.

Interdict

[42] The pursuer's third conclusion is for interdict against the defenders from enforcing the decree awarded in the sheriff court. Mr Edward's submission was that this part of the action fell with the conclusion for reduction. The pursuer's contention is that his entitlement to interdict flows from the undertaking given to the court on 14 June 2016. His contention is

that through this undertaking the defenders in effect abandoned their right to enforce the decree. There are no averments explaining why the defenders would give up their rights under the security which they hold. There are no averments which otherwise suggest the existence of circumstances pointing towards the interpretation argued for by the pursuer being reasonable or appropriate. In this state of affairs the argument contended for by the pursuer is simply untenable. The undertaking was not one for all time coming but was framed so as to continue until those proceedings were at an end. In light of the pursuer's decision not to present the summons for calling those proceedings are at an end and the undertaking has no further effect.

[43] It follows that the pursuer has also failed to set out any relevant basis upon which interdict might be granted against the defenders and I shall also uphold the defenders' first plea-in-law insofar as directed towards the conclusion for interdict.

[44] The pursuer's action is therefore dismissed. I shall reserve the question of expenses meantime.