SHERIFF APPEAL COURT

[2017] SAC (Civ) 26
GLW-A1160-15

Sheriff Principal D L Murray
Sheriff Principal M W Lewis
Appeal Sheriff A G McCulloch

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D L MURRAY

in appeal by

ELIZABETH MILLER

Appellant

against

STEVEN SMITH & OTHERS

Respondents

Appellant: Reid
Respondents: Thompson

Edinburgh, 29 August 2017

[1] This appeal is against the decision of the sheriff following a debate at the instance of the first and second respondents. The sheriff upheld the first and second defender's first pleas-in-law, and dismissed the action, awarding expenses in favour of the first and second defenders.

[2] The appellant resides at 39, Third Avenue, Auchinloch, Kirkintilloch. She appeals on her own behalf and as executrix dative of her late husband. She and her late husband are the parents of the third respondent. The third respondent was previously in a relationship

with the second respondent. The fourth respondent is their daughter. The first respondent is the brother of the second respondent. The action is defended by the first and second respondents. The third and fourth respondents have not entered appearance in the proceedings

[3] It is averred by the appellant that on or around May 2004, the subjects at 39 Third Avenue, Kirkintilloch, hereinafter referred to as "the subjects", were purchased by the third respondent. The purchase price paid was £75,000. The first appellant and her late husband provided approximately £50,000 of the purchase price, which sum came from receipt of proceeds from the sale of the first appellant and her late husband's former property which was sold on or around 19 April 2001. Following the sale of that property, the first pursuer and her late husband resided at an address in Lenzie, before taking up residence in the subjects. Title to the subjects was transferred by way of a series of dispositions inter family: from the third respondent to the fourth respondent; from the fourth respondent to the second respondent; and from the second respondent to the first respondent. No consideration was paid in any of these transactions.

[4] The appellant and her late husband (until his death) had continuously occupied the subjects since their acquisition. The subjects were modified at their cost to meet their special needs. They have met the ordinary maintenance and repair expenses of the subjects, but have not been required to pay anything in the way of rent in respect of the subjects. The appellant avers that these arrangements reflect an agreement with the third respondent that she and her late husband be allowed to reside in the subjects, without payment, other than the ordinary maintenance and repair expenses, until their respective deaths and that the subjects would be held for the benefit of and in trust for their grandchildren. The appellant

categorises this agreement, as was done before the sheriff at debate, as an "improper liferent", although that phrase is not referred to in her pleadings.

[5] A separate action has been raised by the first respondent seeking recovery of possession of the subjects from the first appellant and her late husband. This action has been sisted pending the outcome of the instant action which seeks a number of declarators as well as reduction of the various dispositions.

Submissions for the Appellant

[6] The appellant invited the court to recall the interlocutor of the sheriff, to repel the first and second respondent's pleas-in-law and to appoint the case to proof. Counsel for the appellant submitted that the debate before the sheriff proceeded on a narrow point as set out in the Rule 22 notes of the first and second respondent, which are in identical terms. The sole challenge taken in these notes was:

> "The pursuers seek to rely on a verbal agreement which relates to real rights in lands, being either ownership of property or possession of property. Any such agreement required to be in writing. The verbal agreement was not in writing and accordingly the agreement falls. The pursuers' case is irrelevant and bound to fail."

[7] The appellant submitted that in terms of the Rule 22 note the first and second respondents' challenge before the court was that the verbal agreement was invalid because of the absence of writing. However, at the debate a further challenge was raised by the respondents about the bare declarators sought, which followed from the analysis of the first and second respondent that as the agreement was invalid because of an absence of writing, the remedy of reduction was not available. Despite objection by the appellant, the argument extended into title and interest. These issues, which were not foreshadowed in the Rule 22 Note, appeared to have diverted the sheriff from consideration of the appellant's submission

that the remedy of reduction can flow from a personal right and the disponee's title where a transfer was gratuitous and also where the donee was in bad faith. It was also possible for bad faith to be maintained in subsequent transactions after the initial breach of the personal obligation. In so far as the sheriff had taken these additional factors into account, she was in error.

[8] The appellant sought to reduce the dispositions relying on the "offside goals" rule, on the basis of the knowledge of the respondents of the agreement, which is admitted. The dispositions may be reduced as the transactions were not for value and the disponees were aware that the granting of the dispositions was in breach of the agreement between the appellant and her late husband, and the third respondent. Such an agreement can be characterised as an "improper liferent" as described in Vol. 18 of the *Stair Encyclopaedia* paragraph 74 and in Scottish Land Law 2nd edition paragraph 17.36. This imposes the obligations of a trustee on the third respondent, as seen in *Accountancy in Bankruptcy v Mackay* 2004 SLT 777. There a beneficiary for whom property was held in trust was found to have a personal right which could be vindicated against the trustee. The Lord Ordinary also accepted that writing was not required to constitute a trust of the nature averred, at least prior to the Requirements of Writing (Scotland) Act 1995.

[9] The appellant criticised the sheriff's reasoning because her examination focused on the nature of the remedy sought, rather than the nature of the right itself. The respondents do not dispute in their note of argument that it is a personal right that has been claimed by the appellant. The appellant asserted that a personal right is sufficient for the remedies claimed against the chain of transactions. This because the transferees all are said to have had knowledge of the "improper liferent" agreement on which the appellant relies and because the transactions were gratuitous. In these circumstances the Rule 22 note was

directed at an issue which is irrelevant and fails to address the case which the appellant seeks to make, which founds on a personal right by virtue of an "improper liferent". The sheriff has erred as she proceeded on the basis that the right being claimed is a real right, as set out in paragraph 24. The appellant submitted the sheriff is in error when she stated: " In Scots law the right to possession is a real right." Rather, possession is the consequence of the right enjoyed by the appellant and does not characterise that right. The appellant submitted the right to possession may arise from either a real right or a personal right as set out in Vol. 18 of the *Stair Encyclopaedia* paragraph 126:

> "Possession is either as of right or without right. There are or appear to be two categories of rightful possession. The first is possession by one, such as the owner of property or its tenant or liferenter who, by virtue of that ownership or other right, holds a right to possession in relation to that property … The second category is possession by one who, while not himself holding a real right to possession, has a personal right to possession as against a person who does."

In relation to the first category, the reference to a real right of a liferenter is to a proper liferent, where they have a registrable liferent. An improper liferent, such as the appellant argued for, does not establish a real right. It is said to be analogous to the right of a beneficiary under a trust. This passage from the *Stair Encyclopaedia* demonstrated the error in the sheriff's analysis.

[10] An improper liferent is merely a beneficial interest under a trust. In an improper liferent of land, therefore, the liferenter has no direct legal connection with the land at all, title being held solely by the trustees. W.M. Gordon's *Scottish Land Law* at paragraph 17.26:

> "The improper liferenter has no real right in land, nor can he claim a conveyance in liferent, even if the right given is simply a liferent and he is of full age, if the trust is required in order to protect the interest of the fiar."

It was argued before the sheriff that the agreement between the appellant and her late husband, and the third respondent, the existence of which is admitted by the first and

second respondents, constituted an improper liferent. The sheriff erred in not determining how the agreement be categorised. In so far as she considered it to be a lease, she was in error. It could not be a lease as it was accepted that payment of rent, a cardinal feature of a lease, was not present. The improper liferent gave the appellant a personal right against the third respondent.

[11] The sheriff fell into error in failing to recognise that the basis for reduction under what is termed by Lord Justice Clerk Thomson in *Rodger (Builders) Limited* v *Fawdry and Others* 1950 SC 483 the "offside goal" rule, can apply where there is a breach of a prior obligation, even where that obligation only establishes a personal right. Even if there is a difficulty in establishing the creation of a trust there is a personal right as against the third respondent.

[12] Criticism was directed against the failure of the sheriff to explain why the case of *The Accountant in Bankruptcy* v *McKay* 2004 SLT 777 was not analogous to the instant case. Lord Bracadale held in the *Accountant in Bankruptcy* case, albeit prior to the implementation of the 1995 Act, that writing was not required to establish a trust of the nature averred in the particular facts of that case. Further criticism was directed at the sheriff for having focused on the nature of the remedies as opposed to the nature of the agreement in determining whether the first and second respondents' preliminary pleas should be sustained.

Submissions for the Respondents

[13] Mr Thomson appeared for both the first and second respondents. He invited us to adhere to the sheriff's interlocutor and to dismiss the appeal. He submitted that the appellant and her late husband do not have real rights over the subjects but have at best a personal right against the third respondent, a submission which reflected the submissions

made on behalf of the appellant. He pointed out that what the appellant sought was to reduce a series of dispositions which would have the effect of transferring back the heritable interest in the subjects to the third respondent, who it was accepted had acted in breach of his agreement with the appellant and her late husband.

[14] The personal bar provisions within section 1 of the Requirements of Writing (Scotland) Act 1995 were inapplicable as they are not available to real rights and in a personal context adopting Lord Drummond Young's phrase in *Advice Centre for Mortgages* v *McNicoll* 2006 SLT 591 act as "a shield rather than a sword".

[15] In respect of the submission that the appellant enjoys an improper liferent, there was a lack of specification in the pleadings of the creation of a trust. As a consequence even if there might be a basis in law for the argument which the appellant may endeavour to advance there are insufficient averments to support the claim. Accordingly the sheriff was correct to uphold the first and second pleas in law of the respondents and dismiss the action.

[16] Where the claim was only for a personal right the "offside goals" rule had no application as against singular successors. Absent there being a claim by the appellant founding on a real right the appellant had no case in law beyond a claim against the third respondent.

Decision

[17] A difficulty which arises in this case is that the Rule 22 note focused on the appellant seeking to rely on a verbal agreement to create real rights in land, but that is not the argument which the appellant seeks to put forward. In the appeal the appellant seeks only to maintain the argument that the agreement constitutes an "improper liferent", and it is conceded by the appellant that the agreement does not create a real right. The respondents

conceded before this court that, although they did not agree with what the sheriff stated at paragraph 8, namely:

> "The parties are agreed that the ancillary agreement at the time the third defender purchased the subjects in 2004 in relation to the pursuers' occupation is a liferent."

they now accepted the agreement, on which the appellant seeks to rely, is for an "improper liferent".

[18] The appellant's counsel has constructed an ingenious argument founding on the creation of the "improper liferent" granted by the third respondent in favour of the appellant and her late husband and the respective rights and responsibilities of each of those parties which flow from the "improper liferent." The improper liferent places the appellant in the position of a beneficiary under a trust, the trustee being the third respondent as the heritable title holder, which results in the appellant having a personal right as against the third respondent. This right is said to transfer down the chain of transactions to the first respondent as the subsequent dispositions were accepted in the knowledge of the agreement and granted for no consideration (taking the appellant's averments at their highest). A similar position is said to apply to the grant of the standard security by the first respondent in favour of the second respondent.

[19] This argument, which may not have been presented in exactly the same terms to the sheriff, is dealt with by her at paragraph 27 of her Note by saying there is no need to go into the good faith or knowledge of the third parties to whom title of the property was transferred and whether the offside goal rule applies, but she gives little by way of explanation of her reasons for reaching such a conclusion. We agree with the appellant that the sheriff has fallen into error when she states that "in Scots law the right to possession is a real right". We also have some sympathy for the appellant's criticism that the sheriff

focused on the nature of the remedies sought as opposed to the nature of the agreement in determining whether the first and second respondents' preliminary pleas should be sustained.

[20] We have determined the question to be answered to resolve this appeal is whether the appellant can rely on the "offside goal" rule in the circumstances of this case. Taking the averments of the appellant at the highest, the transactions were not for value, and the disponees were aware that the granting of the dispositions was in breach of the agreement between the appellant and her late husband and the third respondent. On this basis, is the "improper liferent" sufficient to enable the personal rights which the appellant claims against the third respondent to have the effect of reducing the subsequent dispositions? This is a different issue from that raised in the Rule 22 note. Nonetheless, we consider, given the full argument which we have heard, it is appropriate that we determine the appeal on this basis.

[21] The sheriff was not referred to the case of *Wallace* v *Simmers* 1960 SC 255 and we have reached the view that it is of considerable assistance in determining this appeal. The facts are as taken from the headnote:

> "The owner of a farm entered into a minute of agreement with his son, whereby he agreed to sell the farm to his son, under the reservation of the right of occupancy of one of the cottages in favour of himself, his wife, and his daughter, so long as they desired. The disposition of the farm in favour of the son which followed the minute did not contain a reference to the reservation, and was duly recorded in the appropriate division of the General Register of Sasines. After he had sold the farm, the owner, his wife, and his daughter occupied the cottage. The owner and his wife died and the daughter continued in occupation. Some time thereafter, the son exposed the farm for sale by public roup. At the roup, the farm was sold to purchasers who had been informed before the roup that the cottage was subject to the daughter's right of occupancy. After the sale, the daughter continued in occupation of the cottage. The purchasers completed title to the farm and brought an action to eject the daughter from the cottage."

[22] The First Division found that the daughter's right of occupancy was a personal right, exercisable only against the granter, and not capable of being made a real right, it was not valid against singular successors even if the singular successor had prior knowledge of it. Lord President Clyde who gave the leading judgment, recognised under reference to *Gloag on Contract*, (2nd ed.) at p. 178 , the general rule that a purchaser is entitled to rely on the title as it stands in the Register of Sasines, and is not bound by any agreement, although binding on the seller, of which he had no notice. A rule which he noted has an exception where the purchaser is aware that the seller has entered into a prior agreement to dispose of the subjects as seen in *Rodger (Builders), Limited* v *Fawdry and Others*. The Lord President concluded at page 259:

> "…the exception only operates where the right asserted against the later purchaser is capable of being made into a real right. If it is nothing but a mere personal obligation not capable of being so converted, then the ultimate purchaser is not in any way bound or affected by it. Any other result would be surprising indeed, for it would convert what was and has never been anything but a mere personal right into something real and enforceable against a singular successor."

That is also the view reached in *The Advice Centre for Mortgages* v *McNicoll*. There Lord Drummond Young, sitting in the Outer House, after analysing the authorities concluded that where the rights conferred on the occupier or tenant are purely personal, they do not survive the sale of the property. We do not accept the submission of the appellant's counsel that the Lord Ordinary's comments are restricted in application only to leases.

[23] There is a distinction between the facts of *Wallace* v *Simmers* and *The Advice Centre for Mortgages* v *McNicoll* and the instant case, because in the instant case the dispositions are said not to have been granted for value. We have however concluded that even although the dispositions are not granted for value, where the agreement between the appellant and

her late husband only establishes a personal right between the appellant and the third respondent, this does not give a basis to reduce the subsequent dispositions, granted by the fourth and second respondent respectively. This because the personal right against the third respondent is enforceable only against him and does not, even where the subsequent transactions are not for value, give the appellant the right to reduce the subsequent transactions. That view accords with what is written by Professor Reid in Vol. 18 of the *Stair Encyclopaedia* at paragraph 697. Having reached that view the questions relating to the application of the Requirements of Writing (Scotland) Act 1995 and personal bar are irrelevant. Accordingly, albeit on a different basis we conclude that the sheriff was indeed correct to uphold the first and second pleas-in-law for the first and second respondent and dismiss the action. We therefore adhere to the sheriff's interlocutor and refuse the appeal. As far as expenses are concerned, parties were agreed that expenses should follow success and in these circumstances we award the expenses of the appeal in favour of the first and second respondents.