SHERIFF APPEAL COURT

[2022] SAC (Civ) 21
EDI-SQ7-21

Sheriff Principal N A Ross
Appeal Sheriff A MacFadyen
Appeal Sheriff A M Cubie

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in appeal by

SAMANTHA WARBURTON, as Trustee on the sequestrated estate of PS

Appellant

against

THE ACCOUNTANT IN BANKRUPTCY

Respondent

Appellant: O'Brien QC; Creditfix Ltd
Respondent: Thomson QC; Harper MacLeod LLP

6 July 2022

[1] This appeal is about whether the cost of storage by a trustee of data relating to a sequestration is an outlay cost or an overhead.

[2] The appellant (the "trustee") is the trustee on a protected trust deed registered on 28 January 2016. The administration of the trust deed was regulated by the Protected Trust Deeds (Scotland) Regulations 2013, as amended (the "2013 Regulations"), as a result of being executed prior to 30 November 2016 (on which date the Bankruptcy (Scotland) Act 2016, the "2016 Act", came into force).

[3] This action started, in error, as an appeal under section 188(1)(c) of the 2016 Act. It ought to have been under Regulation 28 of the 2013 Regulations. Parties agreed that the sheriff should continue to deal with the matter, but on the basis of the 2013 Regulations. As a result, the procedure has become somewhat unorthodox, to use the sheriff's term. It has caused an additional layer of complexity in this appeal. The action called for debate.

The facts

[4] There is no dispute on the facts of the action. Perhaps for that reason the facts received little discussion in the appeal, and were not altogether focused. They were the subject of a joint minute and affidavit, the former not produced in the appeal. From the sheriff's judgment at debate we note the following:

[5] The trustee administered the sequestrated estate and prepared a scheme of division. That document contained several items to be recovered as outlays. One item was a charge for £35 for "secure data and call recording storage". In normal circumstances, to comply with GDPR requirements, the trustee's firm operated a practice of deleting call records after 3 months. However, the trustee's professional body, the Insolvency Practitioners Association, have instructed that insolvency legislation takes precedence over GDPR legislation, and accordingly that sequestration records, including call records, required to be retained for 6 years. The trustee's firm did not have in-house facilities for storage of data for extended periods.

[6] For that reason, the firm entered into a contract with a third party to store their data, including for this trust deed. The contract dated 30 December 2019 allowed for longer term storage of data. Although the sheriff makes some reference to the specific terms of the

contract, these were not relied upon in the appeal and we do not rehearse them here. Where the effect of this contract is relevant, we have referred to it below.

[7] That disbursement of £35 was rejected by the respondent (the "AiB") on the grounds that it was a basic overhead. It is against that decision that this appeal is taken.

The procedure

[8] The sheriff noted that the parties had belatedly recognised that the wrong statute had been invoked by the AiB, and that the matter was governed instead by the 2013 Regulations. He accordingly granted the appeal of consent, in respect that the AiB's direction had been issued under the wrong statute. Parties remained keen to obtain a ruling on the substance of the dispute. With considerable hesitation, the sheriff accepted that the rights and obligations arising under the 2013 Regulations and the 2016 Act were sufficiently equivalent to allow the parties' submissions to be accommodated. Accordingly, at the parties' behest, this action is now brought under Regulation 27 and 28 of the 2013 Regulations. The procedure is unusual and somewhat confusing, and we comment further below.

The law

[9] The 2013 Regulations provide:

> "2(1) 'remuneration' means reasonable fees and outlays.
>
> 23(1) - For work done by the trustee in administering the trust, the trustee under a protected trust deed is entitled to remuneration which may consist only of –
> (a) a fixed fee which must be set out in the Form 3 ('fixed fee');
> (b) an additional fee…;
> (c) outlays incurred after the date on which the trust deed was granted…"

[10] The Form 3 is completed by the trustee at the outset and sent to all known creditors. It sets out details of the sequestration, and includes a table showing the trustee's fee.

Referred to as a "fixed" fee, it is nonetheless set at the trustee's discretion, and fixed only in the sense of being agreed by the creditors. No estimate of outlays is required by Form 3.

[11] The 2013 Regulations do not define "outlays". They do not limit the fee which can be quoted. Regulation 27 provides for the present appeal procedure. In addition, Regulation 23(8) provides: "The [AiB] may, at any time, audit the trustee's accounts and fix the outlays of the trustee in the administration of the trust".

[12] Although not part of the Regulations, the Insolvency Practitioners Association has produced various Statements of Insolvency Practice, or SIPs. These are produced to

> "promote and maintain high standards by setting out required practice and harmonising the approach of insolvency practitioners to particular aspects of insolvency practice. They apply in parallel to the prevailing statutory framework" (SIP 1, paragraph 1).

They set standards with which insolvency practitioners are required to comply (SIP 1, paragraph 6). While they set out required practice "they are not statements of the law or the obligations imposed by insolvency legislation…." (SIP 1, paragraph 8).

[13] SIP 9 (in the 2012 version in force at the relevant time) states:

> "18. Costs met by and reimbursed to an office holder in connection with an insolvency appointment should be appropriate and reasonable. Such costs will fall into two categories:
> (a) Category 1 disbursements: These are costs where there is specific expenditure directly referable both to the appointment in question and a payment to an independent third party. These may include, for example, advertising, room hire…
> (b) Category 2 disbursements: These are costs that are directly referable to the appointment in question but not to a payment to an independent third party. They may include shared or allocated costs that can be allocated to the appointment on a proper and reasonable basis, for example, business mileage."

Category 1 disbursements can be drawn without prior approval (paragraph 19) but Category 2 disbursements require approval (paragraph 20). The term disbursements has the same meaning as the Scottish term "outlays".

Submissions

[14] Senior counsel for the trustee submitted that the sheriff had either erred in law or alternatively had given inadequate reasons, depending on whether his task was viewed as an appeal or the exercise of a discretionary power under Regulation 28. The trustee was bound by the direction to retain data for 6 years. Her firm had entered into a contract with a third party data services provider. The recovery of outlays was regulated by Regulation 23 of the 2013 Regulations. The question was whether this cost was an outlay.

[15] Counsel referred to principles of statutory interpretation to be found in *R* v *Secretary of State for the Environment* [2001] 2 AC 349 at 397 per Lord Nicholls, and in *MacMillan* v *T Leith Developments Ltd* [2017] CSIH 23 at para [54] per the Lord President (Carloway). He submitted that the task of the court is to seek the meaning of the words used, and the appropriate starting point was that language is to be taken to bear its ordinary meaning in the general context of the statute. Where there is ambiguity, the court may have reference to certain internal or external aids. These principles were not in dispute in this action.

[16] The 2013 Regulations did not define what outlays were. Counsel referred to guidance to be found in the SIPs issued by ICAS. These have regulatory force for the profession. He referred to paragraphs 2, 18 and 21 of SIP 9. He then referred to the meaning of overhead in the Oxford English Dictionary as: "of costs or expenses: incurred in the production of a batch of articles apart from the prime cost of each…or in the upkeep of plant and premises".

[17] Here, the storage charge was properly to be regarded as an outlay. It is specifically referable to a particular trust deed; there is a charge for each trust deed; the payment is made to an independent third party; it is not an apportionment of an overhead cost, either

in form or substance. It was not an overhead because the payment to the third party provider depended directly on the number of trust deeds. Counsel noted that a new version of SIP 9 had been produced in 2021, and omitted examples of category 1 and 2 expenses. It also stated in guidance that the "revised SIP deliberately didn't include a definition of an overhead, and deliberately moved away from providing a list of potential overheads". It then proceeded to refer to a rule of thumb in identifying overheads. It further set out how storage charges were to be treated, which were either category 1 or 2 expenses; in other words, outlays.

[18] He referred to certain features, and submitted that they all pointed toward the storage charge being an outlay. These included that the trustee required the storage facility because of professional requirements; that the trustee had paid the sum; that the storage charge was directly related to the appointment in question; that it was incurred for the trust deed, and that it was an outlay.

[19] The sheriff had then utilised SIP 9 principles, and had decided on that basis that it was not an outlay. In doing so he had erred.

[20] Senior counsel for the AiB submitted that the sheriff correctly considered matters in the context in which they arose. The factors found by the sheriff were only part of the overall statutory context. He did not dispute the principles of statutory interpretation founded on by the appellant.

[21] SIP 9 had been correctly taken into account. It provided (paragraph 18) that costs should be appropriate and reasonable. They then fell into the two categories 1 and 2, depending on whether they were paid to an independent third party, or not. In each case they required to be directly referable to the appointment in question. It was not permissible (paragraph 21) to charge an outlay as a percentage of remuneration, or as an administration

fee, or to recover basic overhead costs such as office and equipment rental, depreciation and finance charges.

[22] The context was a scheme which allowed a fixed fee which was meant to cover general overhead costs. For an outlay to be recoverable, SIP 9 required it to be appropriate and reasonable and directly referable to the appointment in question. It was not permissible to recover basic overhead charges. The findings of the sheriff did not support these requirements having been met.

[23] Separately, the sheriff's reasoning was adequate and sufficient to support his conclusion.

Decision

[24] The form of this appeal, being a consensual amendment at the bar of an otherwise irrelevant appeal, has given some difficulty in establishing what the sheriff was asked to decide. From the decision it emerges that the sheriff in fact carried out two functions, the first in dealing with the appeal against the AiB's direction, and the second in making a new direction under Regulation 28. While appeal from the sheriff against the former is incompetent (Regulation 27(7)), neither party disputes that the sheriff correctly allowed the appeal against the AiB's direction. The AiB had made that direction under the wrong statute, namely the 2016 Act, an error belatedly recognised by the parties when preparing the appeal to the sheriff. Had the sheriff not sustained that appeal, there is a real question whether a direction under Regulation 28 was competent, in circumstances where there was a pre-existing and unchallenged direction from the AiB. We note that Regulation 19(4) requires compliance with a direction from the AiB within a period of 30 days. We share the

sheriff's profound reservations about the procedure followed in this case. It should not be repeated.

[25] The sheriff proceeded to make a new direction under Regulation 28. Neither submission in this appeal focused on the limits of Regulation 28, concentrating instead on the merits of the sheriff's decision. Regulation 28 provides:

> "(1) Any person with an interest may at any time apply to the sheriff for a direction as regards the administration of the trust deed.
> (2) A direction by virtue of paragraph (1) may include –
> (a) any order the sheriff thinks fit to make in the interests of justice; or
> (b) an order to cure any defect in procedure…"

[26] In this case the sheriff, in express exercise of this power, made directions that the storage charge was not a category 1 disbursement as defined in SIP 9; that it was not an outlay for the purposes of Regulation 23 of the 2013 Regulations, and that it cannot be reimbursed through payment of a cost charged against the trust deed.

[27] The unfettered nature of this power received only passing recognition in this appeal. Although the AiB's submission relied on this direction not being "plainly wrong", neither party examined the nature of the decision made under this Regulation. The issue was treated as identical whether the question was an error of law or whether it was a matter of inadequate reasons.

[28] We do not accept these different questions lead to identical results. The sheriff's powers were unfettered except by the general principles applying to the exercise of discretionary decisions. Parties did not make submissions on this, so we do not embark on a discussion of the law. The effect of Regulation 28, on a plain reading, is to render the sheriff's decision unimpeachable except, by implication of general common law principles, where it is established the decision was irrational, improper or failed to give proper regard to the facts.

[29] The trustee has not persuaded us that the sheriff so acted. The sheriff produced a careful and detailed analysis of the law and of the facts. He determined that the charge was of the nature of an outlay, but proceeded to consider whether it complied with SIP 9, as SIP 9 was relied on by both parties. He decided that the storage charge did not qualify as "appropriate and reasonable" under SIP 9, because it was charged as an essential part of the business of an insolvency practitioner. Storage charges were a fundamental part of good business and professional practice. The sheriff's conclusions were rational and supported by the agreed facts. The appellant disagrees. That disagreement is not enough to justifying a finding that the sheriff did not properly perform his function under Regulation 28.

[30] For that reason, the appeal must fail.

[31] In the event that Regulation 28 did not resolve this appeal, we turn to consider the merits of the present appeal. At the outset, we note the trustee's acceptance that it is difficult to provide a definition of "overhead" (and consequently what is an outlay) which will apply without modification in every situation. The AiB did not demur from that. What follows is necessarily specific to the facts of this case and to the 2013 Regulations.

[32] Whether an outlay is properly so regarded will depend on the circumstances of each case. In the present case the following facts were considered significant:

[33] The contract with the data storage provider was with an independent contractor. It required a large initial fee, of £2,336,740, payable in instalments. That payment, however, was described by counsel for the trustee as directly referable to the number of trust deeds. He stated that there were always going to be a large number of such deeds, hence the initial fee, but theoretically if there were none, then the contract was such that no payment was due. The sum divides exactly by £35. The ultimate contractual sum payable is £35 per trust

deed. It is therefore not a global fee but an individually-attributable expense, directly referable to each trust deed. We have proceeded on that basis of fact.

[34] Further, the data storage facility was required by the trustee to meet her professional obligations. It was necessary because her firm did not have data storage facilities, which are time consuming and expensive to run. The charge of £35 per case was fair and reasonable by comparison with market rates.

[35] In addition to these factors, we also consider that the fee arrangements are relevant. These are set out by reference to Form 3 to the 2013 Regulations. There is reference to a "fixed fee". That might prompt a fear of commercial temptation to inflate any fee by inclusion of items as outlays when they should properly be treated as overheads, included in the fixed fee. However, the fee is not fixed at any financial limit. Rather, the fee is "fixed" only in the sense that it is identified and proposed by the trustee at the outset, and "fixed" by the consent of the creditors to that fee. Form 3 sets out the information to be given to the creditors. This accordingly mitigates what might be a potential mischief of disguised remuneration.

[36] The starting point of the statutory regime is that the 2013 Regulations do not attempt to define the term "outlay". In such circumstances the word will be given its ordinary meaning, unless there is an apparent ambiguity, in which case external aids can be founded upon in arriving at the correct meaning (*Macmillan* v *T Leith Developments*, above). Neither counsel referred to any dictionary definition of outlay. The appellant referred to a dictionary definition of overhead, as the opposite of an outlay. Neither party submitted that there was any general definition of outlay which would resolve matters.

[37] The problem is that a cogent argument can be made either way. On one view, the storage of data is a routine task of a trustee, and the professional obligation to do so is a

general one, independent of this trust deed. The need for storage capacity arises as a general requirement of business, quite independently of the trust deed in question. Those features might tend to indicate the storage charge was an ordinary business overhead. The AiB reached that view. On the other hand, the storage charge would not be incurred if this trust deed had not been administered, and it is reasonable for the trustee to outsource what is a burdensome task of data storage. The charge of £35 is directly referable to this trust deed, and not to any general arrangement. Those features might tend to indicate that the storage charge was an outlay. The trustee reached that view.

[38] In our view the 2013 Regulations provided for resolution of such a problem. It did so by allowing for case-by-case determinations, rather than imposing a universal definition of outlay. Where the status of a cost is uncertain, it is not to be resolved by application of a prescribed definition, but rather by reference to a bespoke dispute resolution mechanism. The strained procedure in this action has somewhat served to disguise this basic statutory structure.

[39] We were not referred to any of the customary external aids (such as evidence of the intent behind promulgating the relevant statute) in understanding the meaning of outlay for the purposes of Regulation 23. We note that the sheriff reached his decision under reference to SIP 9 and to the terms of the third party contract between the trustee and the data storage provider. In our view the specific terms of these are not available to construe the meaning of the Regulations, as they are private arrangements and, in the case of the contract, post-date the Regulations. They do not in any event assist in defining outlays for the purpose of the 2013 Regulations, and the sheriff did not rely on them for that purpose.

[40] There is no general definition of outlay which will resolve the present dispute. The profession, in the form of the Institute of Chartered Accountants of Scotland, have moved

away from giving instances of what will comprise category 1 or category 2 outlays (see FAQ document, paragraph 8, accompanying the most recent (April 2021) version of SIP 9). The term is in frequent use and is widely understood. The 2013 Regulations are promulgated against that background, and also that those applying the rules are members of a profession which is entrusted with regulating its own conduct. It is therefore entirely coherent that the 2013 Regulations refer to the widely understood meaning of outlay, and leaves any specific cases of doubt, where a charge falls on the borderline between outlay and overhead, to be adjudicated upon. The resolution is either by the AiB's direction under Regulation 19 or by the court under Regulation 28. The statutory regime allows the trustee some flexibility, including making an express agreement with creditors as to how specific charges are to be treated, but in the case of dispute will allow a final ruling to be sought.

[41] In the present case, we consider the sheriff's initial reasoning in provisionally identifying the charge as an outlay was correct. The sheriff then proceeded to consider the effect of SIP 9. He identified that it could not enlarge what was covered by Regulation 2(1). He considered that whether the storage charge was recoverable as an outlay depended on whether it qualified as "appropriate and reasonable" under paragraph 18 of SIP 9. He considered that "appropriate" referred to whether it was properly to be regarded as an outlay, and concluded that storage charges did not qualify as an appropriate outlay. That view was reached in accordance with the Regulation, and in our view resolved the dispute in accordance with the statutory dispute resolution procedure.

[42] We would not have come to the same view: paragraph 21 of SIP 9 expressly excludes only "basic" overhead costs "such as office and equipment rental, depreciation and finance charges". These are items which are not referable to any individual trust deed, unlike the present charge. In considering appropriateness, this storage charge is referable to this trust

deed and no other. We would not have viewed it as inappropriate to charge this as an outlay. The sheriff regarded it as an essential cost of the business and therefore an overhead. In our view he has given insufficient consideration to the fact that, had it not been for this trust deed, this storage charge would not have been incurred at all. We would have found the sheriff to have erred in that regard. However, as the matter is resolved by the sheriff in accordance with the statutory procedure, that observation does not affect the outcome.

[43] For completeness, counsel for the trustee referred to the ICAS guidance on the application of SIP 9. He accepted it had no legal force. We accept it might be available for consideration during the dispute resolution process at first instance, but it is of no assistance in this appeal, which engages a different test.

[44] Parties agreed that expenses should follow success, and that sanction for senior counsel should be granted. We therefore sanction this appeal as suitable for the employment of senior counsel, and find the trustee liable to the AiB in the expenses of the appeal as taxed.