SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2023] SC EDIN 21

EDI-B1385-22

JUDGMENT OF SHERIFF DONALD CORKE, ADVOCATE

in the cause

KEVIN McKENZIE

Applicant

against

THE CITY OF EDINBURGH COUNCIL

Respondent

and

THE BANK OF SCOTLAND

Interested Party

in an Application for Recall of an Arrestment pursuant to section 73M
of the Debtors (Scotland) Act 1987

Edinburgh, 5 July 2023

The Sheriff, having resumed consideration of the cause and pursuant to section 73M of the Debtors (Scotland) Act 1987, finds the Applicant entitled to recall of the arrestment of 28 October 2022 served at the instance of the Respondent upon the Interested Party; thereafter assigns 29 August 2023 at 2pm as a Hearing on expenses, said hearing to be conducted by remote means unless otherwise directed by the Court; appoints parties to provide, no later than 12 noon on 25 August 2023, a contact telephone number and email

address where they can be contacted prior to said diet with the relevant web link to allow parties access to the remote hearing by video; and decerns.

"D Corke"

NOTE

Decision

[1] The decision in this case is that the applicant is entitled to recall of arrestment pursuant to section 73M of the Debtors (Scotland) Act 1987 ("the 1987 Act") as an incompetent or irregular arrestment of benefits, in this case benefits falling under section 187 of the Social Security Administration Act 1992 ("SSAA 1992"). His notice of objection was correctly made under section 73M(1) of the 1987 Act on Form 63F, as provided for in Rule 69D of the Act of Sederunt (Proceedings in the Sheriff Court under the Debtors (Scotland) Act 1987) 1988/2013 ("the Act of Sederunt").

[2] The protected minimum balance under section 73F of the 1987 Act as at the date of the arrestment on 28 October 2022 was £566.51. The subsequent modification to £1,000 by virtue of section 22(2)(a) of the Coronavirus (Recovery and Reform) (Scotland) Act 2022 ("the 2022 Act") has no effect in relation to arrestments executed before 1 November 2022: section 22(3) of the 2022 Act.

[3] There was no competent application before the court to find the arrestment to be unduly harsh in terms of section 73Q of the 1987 Act. An application for release of property where arrestment is unduly harsh proceeds under section 73Q(2)(5) of the 1987 Act and must be made on Form 63G under Rule 9E of the Act of Sederunt.

Procedure and law

[4] On 23 May 2022 a summary warrant was granted to the respondent, the City of Edinburgh Council ("the Council"). That authorised the recovery of unpaid council tax in respect of the applicant, Mr McKenzie.

[5] On 28 October 2022, an arrestment was served at the instance of the Council on the interested party, the Bank of Scotland plc ("the Bank") pursuant to the summary warrant. The arrestment was in the sum of £527.59.

[6] Section 73F of the 1987 Act is headed "Protection of minimum balance in certain bank accounts" and is applicable in cases such as the present (section 73F(1)(b) and (c)). The next step for the Council would be an action for furthcoming, that is one raised to recover the sums arrested in the hands of the Bank in excess of the minimum balance.

[7] Warrant was granted to Mr McKenzie in this application for recall of arrestment under section 73M of the 1987 Act on 9 November 2022. His specific ground was under section 73M(4)(b), that all money within the bank account arrested was due to him by the Department for Work and Pensions ("DWP"), so this was an unlawful arrestment under section 187 of the Social Security Administration Act 1992 and section 83 of the Social Security (Scotland) Act 2018 ("the 2018 Act").

[8] The application was served along with a letter and schedule from Jobcentre Plus, the UK-wide government-funded employment agency and social security office, relating to him and dated 4 November 2022. That confirmed he had been claiming Universal Credit ("UC") since 4 January 2019, with the last payment being £689.19. He had also been claiming Personal Independence Payment ("PIP") since 8 November 2020, being ongoing standard care of £61.85 per week paid four-weekly.

[9] It is within judicial knowledge that UC is a means-tested benefit to help with living costs, and PIP is not means-tested but helps with extra living costs for those with a long-term physical or mental health condition or disability and difficulty in performing everyday tasks or getting around as a result. Both are intended to be and are alimentary in nature.

[10] Scots common law has long recognised that alimentary funds are set up for the support and maintenance of the beneficiary and are not in general attachable by creditors.

[11] This common law principle is extended by statute, for example by the SSAA 1992 (a UK statute) and the 2018 Act (a Scottish statute).

[12] Section 187(1) of the SSAA 1992 is headed "Certain benefit to be inalienable" and provides, insofar as relevant, that subject to the provisions of that Act, every assignment of or charge on UC (section 187(1)(za)) and PIP (section 187(1)(ad)) and every agreement to assign or charge such benefit shall be void.

[13] In the Scottish context, "charge" includes arrestment.

[14] UC and PIP are benefits relevant for the purposes of section 187 of the SSAA 1992 so that, rather than the 2018 Act (regarding Scottish benefits) or the common law relating to alimentary funds, should be the thrust of this decision.

Initial hearing

[15] At the initial hearing, Mr McKenzie argued conform to his application that as his sole income was derived from benefits, those funds could not be arrested in the hands of the Bank: section 187 of the SSAA 1992.

[16] It was argued on behalf of the Council that, as a matter of settled law, such funds cease to be protected once paid into the bank, save for the statutory minimum. They are simply subject to the secondary relationship between banker and customer. In that regard,

the Council relied heavily on the first instance decision in *North Lanarkshire Council* v *Crossan* 2007 SLT (Sh Ct) 169, a decision of Sheriff Galbraith at Airdrie by interlocutor dated 3 July 2007.

[17] That has become the conventional view, expressed as follows in Gloag and Henderson *The Law of Scotland* 15th edition, Volume 2 at footnote 71 on page 655:

In *North Lanarkshire Council* v *Crossan*, 2007 SLT (Sh Ct) 169, the debtor received social security benefits that were alimentary in nature. However, once paid into her bank account, they were nevertheless arrestable and could be subject to an action of furthcoming.

[18] It was Mr McKenzie's information via an Edinburgh Housing Advice Partnership ("EHAP") representative who was with him in court that the decision of the Sheriff in *Crossan* had been overturned on appeal and they were hopeful of getting a copy of the unpublished judgment. The Council was unable to assist on that matter and urged a decision.

[19] It was obviously unfair to proceed where there was a distinct possibility that practice had been led for a number of years by a mistaken view of the law through reliance on an overturned decision. Accordingly I gave time for the missing judgment to be found and for both parties to provide written submissions.

The continued hearing

[20] After sundry procedure, the case came back to court several weeks later.

Mr McKenzie and the Council by then had counsel (Ms Boffey and Mr Tosh, Advocates, respectively). The Bank had entered appearance for the first time as an interested party and was also represented by counsel (Mr McWhirter, Advocate).

[21] An extensive joint list of authorities (running to 39 items and 353 pages on an inventory) was lodged. It included the judgment of Temporary Sheriff Principal Brian Kearney in the relevant appeal *North Lanarkshire Council* v *Crossan*, Unreported, 2 May 2008. The typed judgment produced is the internet version that is missing page 3. Thanks to the efficiency of library and Airdrie Sheriff Court staff, a complete copy of that judgment is now available for belated publication.

The decision of the Sheriff Principal in Crossan

[22] *Crossan* arose out of an action of furthcoming raised by the respondents (North Lanarkshire Council) against the appellant (Ms Crossan) and the arrestees (Airdrie Savings Bank). The sum sued for arose out of summary warrants granted by the Sheriff in respect of council tax. Arrestments were laid in the hands of the savings bank as arrestees. Ms Crossan argued that the funds involved were state benefits and therefore protected from attachment by arrestment. She argued that state benefits were alimentary in nature and not lawful subjects of arrestment at common law. The provisions of section 187(1) of the SSAA 1992 and another statute were to like effect.

[23] It was further argued for the appellant that arrestment could not have been laid on in the hands of the DWP, the government authority responsible for delivering the benefits, and it was immaterial that the arrestments had been laid on in the hands of the savings bank. When alimentary funds were paid into a bank and not inmixed with other funds then their alimentary character persisted and they by statute could not be arrested: *Woods* v *The Royal Bank of Scotland* 1913 1 SLT 499, a decision of the Sheriff-Substitute in Greenock. This involved a payment under the Workmen's Compensation Act 1906.

[24] Counsel for the respondent council in that case accepted that if the arrestment had been made in hands of the DWP then the obligation to account to the common debtor for alimentary payments could not be arrested. However, the relationship between banker and customer was simply that of debtor and creditor so once the money arrived in the bank it had lost its alimentary character and therefore also lost its immunity from arrestment: *Royal Bank of Scotland* v *Skinner* 1931 SLT 382. The statutory provisions only protected the funds from payment only while in hands of the DWP. Once paid into an account, the beneficiary's bank had an obligation to account to the beneficiary and that could be arrested.

[25] The Sheriff in *Crossan* took the view that the statutory provision in *Woods* was not in point and in terms of *Skinner*, once monies had been paid into a bank the funds were simply consumed by the banker who gave an obligation to account therefor to the customer. She was fortified in her review by the consideration of certain observations by the Scottish Law Commission.

[26] The Sheriff Principal considered that since the funds concerned were the product of statutory provision then the question of whether or not they were arrestable in the hands of the savings bank had to be determined principally by consideration of the statutes concerned. The purpose of the appeal (at paragraph 43)

> "… was to decide the matter on principle the principle being whether an exemption from diligence which attached to a fund in the hands of a person having a duty to pay that fund to a beneficiary remains so attached when the fund is paid into the beneficiary's bank."

[27] The Sheriff Principal considered that the case of *Woods* was correctly decided, distinguishing *Skinner*, after a consideration of what the Scottish Law Commission had stated. The provisions of the statute in *Woods* constituted an exception to the banking norm.

[28] The Sheriff Principal considered it legitimate to consider the underlying purpose of the Social Security legislation and agreed that it was to provide the beneficiary and her dependants with the necessities of life. That being so, he considered that an interpretation of the provisions relating to immunity from diligence conferred by statute which allowed the immunity to persist where the funds were held by the bank in identifiable form was to be preferred (paragraph 51).

[29] In the circumstances, the Sheriff Principal allowed the appeal and recalled the interlocutor of Sheriff Galbraith dated 3 July 2007.

The continued hearing

[30] The hearing before me proceeded upon extensive written submissions produced on behalf of each of the parties.

[31] It was argued for the Council that there had to be a factual enquiry first but in any event the application required to be refused. The Bank agreed that the application should be refused.

[32] For Mr McKenzie, Ms Boffey submitted that Scots common law had long recognised that alimentary funds are set up for the support and maintenance of the beneficiary and are not in general attachable by creditors. This was now recognised in section 187 of the SSAA 1992. The UC and PIP being received by Mr McKenzie were inalienable against creditors. The underlying purpose of Social Security benefits was to provide the beneficiary and any dependants with the basic necessities of life. The intention of Parliament was that those benefits were for the protection of the person in need and not for the satisfaction of creditors. Such benefits were highly regulated by Parliament and were a creature of statute. In determining whether such benefits might be arrestable, the question fell to be determined

principally by reference to the relevant statutory provisions. Had the UK or Scottish Parliaments wished to provide otherwise, that would have been reflected on the statute books. She submitted that the Sheriff Principal's judgment on appeal in *Crossan* was to be regarded as the correct of the law of the law in this area. The treatment of the law had been extensive, thorough and detailed.

[33] For the Council, Mr Tosh argued under reference to authority that it was the obligation to account that is attached by an arrestment rather than any money or other property. The effect of section 187 of the SSAA 1992 and section 83 of the 2018 Act was to render any entitlement or right to receive certain benefits inalienable and beyond the reach of arrestment. So an arrestment served in the hands of the Secretary of State responsible for the DWP would not attach any entitlement of the applicant to receive benefits administered by that department. In this particular case, the application arose from an arrestment in the hands of Mr McKenzie's bank. It proceeded on what counsel referred to as "… the common misconception that a bank's customer has some proprietary right over the money deposited into his account." Rather, the relationship between customer and bank was not a creditor-debtor relationship. A bank was not, in the general case, the custodier of money. When money was paid into a bank account it was consumed by the bank and the bank was the owner of funds deposited with it. It was merely obliged to account to the customer for a sum equivalent to the credit balance on the customer's account. This was contrasted with the position where a trustee gratuitously received trust money and deposited it in their own bank account, which was not the case here.

[34] It was further argued on behalf of the Council (and the Bank) that the arrestment served on the Bank would have attached any obligation to account that it owed to Mr McKenzie as its customer at the time when the arrestment was served. It did not attach

his entitlement to any benefit or monies deposited into the account by way of benefit. Where money was deposited into Mr McKenzie's bank account in satisfaction of his entitlement to any benefit, it became owned by the Bank upon deposit, could not be traced, and was not what had been attached by this arrestment. It followed that *Woods* had been wrongly decided.

[35] Additionally, according to Mr Tosh for the Council, the Sheriff in *Crossan* had come to the right decision for the wrong reason. The funds arrested in that case ceased to be governed by section 187(1) of the SSAA 1992 when paid into the debtor's bank account. *Crossan* had been wrongly decided on appeal and in any event was not binding on this court. The Bank was in agreement with those propositions.

[36] It was also disputed for the Council that the benefit payments were necessarily alimentary in nature. Anything in excess of what was necessary for the support and maintenance of the particular recipient in their particular circumstances was arrestable.

[37] According to the Council and the Bank, the purpose of the common law protection for alimentary funds was now served (at least in Scotland) by the protected minimum balance under section 73F of the 1987 Act, as explained in the policy memorandum accompanying the Bill.

[38] Counsel for Mr McKenzie argued against the proposition put forward by the Council and the Bank that benefits, once paid into a bank account, ceased to be protected save as to the minimum balance. She submitted that no weight should be attached to *Crossan* at first instance but rather that the Sheriff Principal's judgment on appeal should be regarded as the correct statement of the law.

[39] She also put forward an argument that the protected minimum balance was £1,000 so only £141.18 ought to have been arrested. That justified recall and release of the funds,

which failing the arrestment was unduly harsh pursuant to section 73Q of the 1987 Act. The other parties opposed those propositions, which are discussed further below.

[40] The Bank's main concern was to protect its own position. They required to comply with the arrestment served upon them as to funds in excess of the protected minimum balance. If they failed to do so they could be subject to a damages claim by the creditor. They had a practical concern that if Mr McKenzie was correct in his position, the Bank would be subject to a highly onerous obligation to trace the origin of funds in any common debtor's account subject to a schedule of arrestment. They could receive around 6,000 schedules arrestment in any one month, acted as quickly as possible and did not carry out any tracing exercise to ascertain the origin of the funds. They had met their legal obligations by arresting funds in excess of the protected minimum balance.

Discussion

[41] The Council solicitor at the first hearing had sought to rely on a case that had been overruled. Absent explanation then or since, a reasonable explanation is that the reliance was innocent and inadvertent, resulting from the judgment of the Sheriff Principal not having been published. The court is grateful to EHAP for ensuring that the court was not in fact misled.

[42] Although the judgment of Sheriff Principal Kearney is from another Sheriffdom and hence not binding upon this court as a decision of the Sheriff Appeal Court nowadays would be, I do find it to be persuasive and I rely on it insofar as relevant. The decision of the Sheriff had initially been urged upon me as persuasive. By the time the case was argued the second time, the position of the Council was that the Sheriff had reached the correct result but that her analysis was wrong.

[43] The Council and the Bank made much of the relationship between banker and customer in deciding whether specified benefits can be subject to an arrestment once paid over and having in banking law become an obligation to account rather than funds.

[44] In finding in favour of Mr McKenzie, I respectfully adopt the reasoning of Sheriff Principal Kearney. That would be enough to decide the matter, but giving due respect to the arguments advanced, I shall deal with various other points raised.

[45] I have not found it necessary to hear evidence to establish the factual position. Neither the Council nor the Bank can dispute that Mr McKenzie subsists by way of these benefits. That is the nature of these benefits. The Council obtained a summary warrant that they should not have sought if incompetent or irregular, as it appears on the face of the application for recall to be. The Bank have intervened against the interests of their own customer, yet have not stated he is wrong as to the source of the funds being paid into his account. I see no merit in putting Mr McKenzie to formal proof beyond the documents lodged, in this summary application for recall, nor any requirement to do so. That would be to put the onus on the wrong party.

[46] If there were deemed to be a technical right for the Council to put Mr McKenzie to proof of his financial position, I would hope that this could simply be agreed between parties in advance of the inevitable appeal. The Council attempt to rely on an overturned judgment has turned this routine case into a matter of general importance that requires to be fully aired.

[47] Has the purpose of the common law protection for alimentary funds now been served in such cases by section 73F of the 1987 Act?

[48] The arrestment was served on the Bank on 28 October 2022. At that time the protected minimum balance under section 73F was only £566.51. That it had increased

to £1,000 by 2 November 2022, as submitted for Mr McKenzie, does not affect pre-existing arrestments: section 22(3) of the 2022 Act.

[49] The existence of section 73F plainly does not elide or eliminate the purpose of the statutory protection of alimentary benefits. Whatever the Scottish Law Commission or the Scottish government understood the position to be prior to the judicial determination of the Sheriff Principal in *Crossan*, section 73F is a general solution for arrestment of funds of whatever origin held for the benefit of indigent persons. It is not an answer to the problem of arrestment of specific funds in a statutory scheme. It is clear that statutory protection of alimentary benefits was the aim of section 187 and that could extend beyond the current £1,000 protection afforded to all by section 73F.

[50] To put it another way, a benefits claimant like Mr McKenzie gets alimentary benefits protected by UK statute: an exemption based on source of funds. It is then thin comfort to him if another statute purports to protect only part of what the DWP has deemed he requires in order to get by. It would be no comfort at all to a claimant in England and Wales, given that it is a UK statute. I was not addressed on the position there.

[51] It cannot have been the purpose of statutory provisions such as section 187 of the SSAA 1992 simply to save the DWP from the inconvenience of having funds arrested in its hands. It is no protection at all to the individual if the benefit has to be paid into a bank account and the statutory protection flies off as soon as it leaves the DWP. The DWP could itself face difficulties if demand grows for payment of benefits in a form not subject to arrestment.

[52] The argument that it was the obligation to account that is attached by an arrestment rather than any money or other property has already been noted. That may technically be correct, but it is not the way that it is ordinarily put. So section 73F uses ordinary and

sensible language, referring to "the sum standing to the credit of the debtor" and stating that the arrestment shall "in any other case, attach no funds". That section interferes with the bank/customer relationship. So too does the SSAA 1992, section 187.

[53] Another example lies in the case of *Woods*. The Sheriff Principal found, and I respectfully agree, that it was correctly decided. It was not appealed and has suffered no adverse judicial treatment in all the years since. It is an example of statutory payments, in that case under the Workmen's Compensation Act of 1906, being protected from diligence even when paid over into a bank. However, as also pointed out by the Sheriff Principal, the question of whether funds are arrestable in the bank must be determined principally by consideration of the statutes concerned. Had that case never been reported, the answer would still be the same in this case.

[54] There was no competent application before the court to find the arrestment to be unduly harsh in terms of section 73Q of the 1987 Act, as that requires to be made on a separate form.

[55] As far as the position of the Bank is concerned, it has not been suggested that they are not acting properly by implementing the schedules of arrestment served upon them. How these schedules are dealt with administratively cannot be a reason to deny benefit claimants the protection offered by statute. The responsibility rather lies upon the creditor not to use summary warrants to the detriment of those deemed to require protection. If the Bank has laid itself open to criticism or action for their part in implementing arrestments, that is not relevant to a consideration of the instant case.

[56] A hearing has been fixed on expenses, though that can be discharged in the event of agreement.