



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 75  
P1442/15

Lord Justice Clerk  
Lord Brodie  
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Petition

by

HER MAJESTY'S ADVOCATE

Petitioner

against

MOHAMMED YOUNAS and FARZANA ASHRAF

Minuter and Reclaimer

**Petitioner: Byrne; COPFS**

**Minuter and Reclaimer: Richards QC; Bell and Craig (then party)**

7 December 2018

**Background**

[1] On 8 March 2016 the court made an order in terms of section 128 of the Proceeds of Crime Act 2002 appointing an enforcement administrator to realise property which had been made the subject of a Confiscation Order in the High Court of Justiciary in 2014. This appeal concerns the decision of the Lord Ordinary (Lady Wise) to refuse an application to vary the interlocutor of 8 March so as to exclude property at 1f1, 82 Polwarth Gardens, Edinburgh

from the property to be realised by the administrator. The background to the application is set out by the Lord Ordinary in para 2 of her opinion:

“[2] The relevant Confiscation Order was made by Lord Pentland following contested proceedings in 2014. Those proceedings followed the conviction of the respondent, Mohammed Younas, at Glasgow High Court on 5 September 2012 of the offence of being concerned in the supply of diamorphine. The interested party, Farzana Ashraf, a sister of Mr Younas was represented in the Confiscation proceedings and opposed the Order being made. At that hearing she, the respondent, and their sister Ruksana Ashraf all contended that when deciding on the available amount for a Confiscation Order the court should exclude from the benefit calculation the value of subjects at 82 Polwarth Gardens, Edinburgh. The Lord Ordinary rejected that argument, the reasons for which are set out in his Opinion- *HM Advocate v Younas* [2014] HCJ 123.”

[2] Title to the property in question is held in the name of the claimer's brother. On the brother's sequestration in 1993, the property was vested in the Accountant in Bankruptcy, who, in 2002, had concluded missives in respect of which the equity in the property was to be transferred to the claimer and her sister for £25,000, to be payable in two instalments. The instalments were paid in July 2002 and June 2003. It seems that the money was obtained from loans from various relatives. The nub of the argument in the High Court advanced by the claimer's brother, was that despite holding title, he no longer had any interest in the property; and it should thus be excluded from the Confiscation Order. It seems that the claimer and her sister argued that they had a personal right under the missives to have the property conveyed to them; that they had personally made the mortgage payments on the property from 2004, their father having done so until that date; and that to include the property in their brother's realisable assets would be a breach of their rights under A1P1 of ECHR. These arguments were rejected by the court. The evidence of the claimer and her sister as to the mortgage payments and other alleged dealings in

relation to the property was rejected as incredible, the judge having concluded that they had made a deliberate decision that the title should not be transferred from their brother.

### **The current proceedings**

[3] In the hearing before the Lord Ordinary, the submission for the reclaimer was that the administrator should not be allowed to sell the property in question and apply the free proceeds to settlement of the Confiscation Order, for these reasons:

1. The loans on the property had been serviced by the reclaimer and her family.
2. The reclaimer and her sister were the beneficial owners of the property under the missives concluded with the Accountant in Bankruptcy – the power to dispose of the property in satisfaction of the Confiscation Order should be exercised in such a way as to allow her to recover the value of her interest (section 132(3)(a)). The Confiscation Order should thus be varied accordingly. (Although the argument to the Lord Ordinary had been advanced on the basis that the reclaimer and her sister were the owners of the property, in the reclaiming motion it was submitted that the sister had transferred any rights she had to the reclaimer. This was not vouched, but the matter was of no moment, since the critical question was how any interest should be categorised, rather than whether it was held by the reclaimer alone).
3. To include the property would be a breach of her rights under A1P1 of the ECHR. She had a reasonable expectation that she would acquire heritable ownership of the property by means of a disposition following the missives.
4. She had applied to have the Accountant in Bankruptcy reinstated as trustee so that a disposition may be executed and delivered to her.

## Legislation

[4] Power to vary an order made under section 128 is contained in section 135 of the 2002 Act. Section 132 (2) provides that this power:

“(a) must be exercised with a view to the value for the time being of realisable property being made available (by the property’s realisation) for satisfying any confiscation order that has been or may be made against the accused;

(b) must be exercised, in a case where a confiscation order has not been made, with a view to securing that there is no diminution in the value of realisable property or of the proceeds of realisation;

(c) must be exercised without taking account of any obligation of the accused or a recipient of a tainted gift if the obligation conflicts with the object of satisfying any confiscation order that has been or may be made against the accused;

...”.

Section 132(3) provides:

“Subsection (2) has effect subject to the following rules:-

(a) the powers must be exercised with a view to allowing a person other than the accused or the recipient of a tainted gift to retain or recover the value of any interest held by him;

...”.

For these purposes “interest” is defined in section 150, which provides:

“(2) The following rules apply in relation to property—

...

(g) references to an interest, in relation to land in Scotland, are to any estate, interest, servitude or other heritable right in or over land, including a heritable security;

[(h) references to an interest, in relation to property other than land, include references to a right (including a right to possession).”

## The Lord Ordinary’s decision

[5] The claimer gave evidence, the content of which is recited in detail in the opinion

of the Lord Ordinary (2018 SLT 277). The reclaimer maintained that since 2003, although her sister had made some payments, she herself had substantially serviced the mortgages on the property from her own funds; that she knew that she required a disposition to secure title, but understood that title would remain with her brother until the inhibition was discharged and the loans cleared; and that she understood that any disposition would have to be granted by the Accountant in Bankruptcy. She accepted that she had never simply asked her brother to sign a disposition.

[6] The reclaimer's former solicitor gave evidence that the sisters gave instructions in 2003 that they did not wish to take title and that he had no cause to interrogate their reasons for that. He recognised that between 2004 and 2011 the sisters could have had the missives, which remained in force for 20 years, implemented at any time by having a disposition signed by their brother. A policy development officer in the office of the Accountant in Bankruptcy gave evidence that the reclaimer was clearly told in both 2013 and 2014 by the Accountant in Bankruptcy that her brother merely had to sign a disposition in favour of the reclaimer and her sister to effect transfer of title, and that the Accountant in Bankruptcy would have no objection to that course of action.

[7] The Lord Ordinary had considerable reservations about the reclaimer's credibility and reliability, and rejected her evidence on all material points. On the contrary the Lord Ordinary accepted the evidence of the solicitor and the officer of the Accountant in Bankruptcy. She considered that the reclaimer did not have an interest for the purposes of the 2002 Act. Her interest was a personal, contractual one, and was not such that she was capable of "retaining" or "recovering" in terms of the Act. Moreover, having chosen not to convert her personal right into a real one, despite being aware throughout that a disposition was necessary to complete her title, the reclaimer could not advance any claim under A1P1.

**Preliminary issues**

[8] The claimer has been unrepresented throughout the current proceedings. On the morning of the reclaiming motion Mrs Richards QC appeared to ask for the case to be sisted for 8 weeks to enable clear concise grounds of appeal to be framed, and to enable her to discuss extra judicial settlement of the case. She had had no opportunity to consider the case in detail, and could not say whether further grounds of appeal might exist. On the second point, she wished to present the Crown with further bank documents which were said to have come to light. We considered that the application came far too late in the day to be granted and was in any event based on speculative considerations. We accordingly refused the motion, upon which Mrs Richards sought, and was granted, leave to withdraw. The claimer then proceeded to present the reclaiming motion herself, in respect of which she had previously prepared both the grounds of appeal and the Note of Argument.

[9] It might at first blush seem strange that the claimer should be entitled to make an application to vary the Confiscation Order on essentially the same grounds upon which she unsuccessfully sought to prevent the order being made in the first place. The respondent conceded that she was entitled to do so, notwithstanding that she had been entitled to make representations to the High Court of Justiciary under section 92(8). Counsel understood that issues relating to third party interests were to be addressed in any civil enforcement proceedings which might follow a Confiscation Order, rather than at the time of the making of the Order itself. Thus the correct time for considering the claimer's arguments had been in the current proceedings, rather than in the Confiscation proceedings before Lord Pentland, although no objection to that procedure had been taken by the Crown at the time.

[10] It is perhaps debatable whether the reclaimer should have been permitted to appear in the Confiscation proceedings, and in particular to “oppose” the making of the order, having regard to the limited terms of section 92(8), the provision in Rule 37AA.2 (2) of the Criminal Procedure Rules, and the fact that a Confiscation Order operates merely to fix the responsibility of an accused person, rather than to have any direct effect on any property taken into account in determining the level of that responsibility (see *Voudouri v HMA* 2008 JC 431, paras 8 and 25). However, determination of what procedure should be followed in relation to section 92 is a matter for the High Court of Justiciary, not for this court. There is however no doubt that a person in the position of the reclaimer would be entitled by means of the current proceedings to seek to protect any interest she may have.

### **Grounds of appeal**

1. The Lord Ordinary erred in concluding that the Crown had an interest in the property in question, despite the existence of the missives. The equity in the property, as the Crown well know, belongs to the reclaimer.
2. It is maintained that a “letter of comfort” from the Accountant in Bankruptcy, referred to in the reclaimer’s solicitor’s correspondence file, but not produced to the Lord Ordinary, supports the reclaimer’s case that she is the beneficial owner of the property.

[11] The submissions for the reclaimer essentially repeated the arguments that by virtue of the missives, and the payment of mortgages, she was the beneficial owner of the property. She maintained that the effect of the letter of comfort was to confirm that she purchased the interest in the property prior to the date of any Confiscation Order. The Accountant in Bankruptcy, in whom the property was vested, having in that letter renounced any claim to her brother’s “share and interest or former share or interest”, is proof that the brother no

longer had an interest in the property, which was not “abandoned back to him”. The bargain was concluded, and the letter of comfort confirmed that the reclaimer had an interest for the purposes of section 132(3)(a). This letter was not before the Lord Ordinary, although referred to in the conveyancing file, and would have had a big impact on her decision. The reclaimer referred to an e mail from the Accountant in Bankruptcy in 2015 stating that the Accountant in bankruptcy would sign the disposition, but would require to be reappointed for this to happen. The letter concluded “Alternatively, as previously advised Mr Younas could sign the disposition in favour of your client without the requirement of any of the above.” Ms Ashraf referred to the affidavit of her former solicitor which states that in 2002 he was instructed to, and did, negotiate the missives with an agreement that the missives should remain in force for 20 years. The reason for that was that the reclaimer’s father was to go to Pakistan to secure the funds to pay off the loans. This did not happen, but the reclaimer was aware that she had 20 years to arrange this. At times, the submission for the reclaimer came close to suggesting that the effect of the Missives, with the letter of comfort, was to transfer the property to her. Such an argument is clearly untenable in law, but is also untenable in fact since it was clear from her evidence to the Lord Ordinary that she knew she required a disposition in her favour before she could obtain a title to the property.

[12] For the respondent it was submitted that the Lord Ordinary had been correct in the decision that she had reached, that no error in law or fact could be identified and that the reclaiming motion should be refused. The reclaimer’s interest was a personal interest under the missives, and she would neither retain nor recover the value of that interest by any order varying the Confiscation Order. In any event to grant the motion would be in breach of section 132(2) of the Act, since it would mean having regard to an obligation which conflicts



with the object of satisfying the Confiscation Order. That object must take precedence -

*Director of Serious Fraud v Lexi Holdings plc (in administration) and another*, [2009] 2 WLR 905.

An earlier objection to reference being made to the letter of comfort was withdrawn, it being maintained that the letter of comfort demonstrated merely the contractual rights held by the claimer under the missives, and that she was free to take steps to obtain title at any time.

### **Analysis and decision**

[13] The issue before the Lord Ordinary turned on the question of whether the claimer had “an interest” in the property within the meaning of section 132(3) of the Act. We interpret the first ground of appeal as suggesting that the Lord Ordinary erred in the conclusion she reached, and that she ought to have concluded that the claimer did have such an interest. Although the criticism in the Note of Appeal is that the Lord Ordinary erred in holding that the Crown had an interest in the property, which is not what the Lord Ordinary concluded, we have again, favourably to the claimer, proceeded on the basis that her complaint is that the Lord Ordinary erred in holding that the right she has under the missives did not create such an interest.

[14] In considering whether the claimer has any interest in the property in question for the purposes of section 132, regard has to be had to section 150 where the meaning of “interest” in relation to land in Scotland is defined with reference to heritable rights. It is plain that the claimer does not have an interest in the property in question within the meaning of the definition contained in section 150(2)(g). We see no basis upon which the word “interest” in the phrase “value of any interest” in section 132(3)(b) should be interpreted in anyway differently to the definitions of “interest” given in section 150, with reference either to heritable or moveable property. The interpretation of section 132 under

reference to section 150 accords with the way the matter was approached in England in respect of parallel legislation applying there by virtue of sections 69 and 84 of the Act: see *Lexi Holdings* para 64. We note with interest that this is also the way the matter is addressed in an English textbook in relation to those parallel provisions (Mitchell, Taylor & Talbot: *Confiscation and the Proceeds of Crime*, para VII.031). In our view it is appropriate that whether a third party has any interest in terms of section 132 should be examined by reference to the meanings attributed to the word “interest” in section 150, depending on whether the interest is said to be in heritable or moveable property.

[15] The reclaimer does not have any heritable right in the property having only a personal right under the missives. The Lord Ordinary was correct to state that the reclaimer had no more than a personal, contractual interest in the missives, that her rights were no greater than those of an unsecured creditor, (such as were found not to have “an interest” for these purposes in *Lexi Holdings*) and were not such as to come within the protection offered by section 132(3).

[16] Apart from her argument based on section 132(3), the reclaimer appears to argue that her right under the missives created a legitimate expectation of obtaining title to the property, constituting a possession for the purpose of A1P1. She relies on the terms of the missives, her alleged understanding that any disposition had to be granted by the Accountant in Bankruptcy, and her alleged payment of the mortgage instalments, as the source of her legitimate expectation, and argues that to allow the property to be sold, applying the proceeds to the Confiscation order, is an unwarranted interference with her possessory rights. However, the factual situation is destructive of any claim which the reclaimer might advance. The reclaimer has never enjoyed a right of possession in the property, title to which remains with her brother. During many years when it was within

her power to do so she took no steps to secure title to the property. The Lord Ordinary found (para 34) that the claimer took a decision in 2003 positively to refrain from obtaining title. Thereafter, despite knowing full well that all that was required was a disposition from her brother, she did nothing. The Lord Ordinary found that the claimer deliberately (and falsely) sought to create an impression that there were legal obstacles (or at least that this was her understanding) to her taking title, when she knew this not to be the case, and when in fact her stated intention not to take title had remained constant since 2003 (para 37). The Lord Ordinary was not persuaded that it had ever been the claimer's intention to obtain title to the property, and moreover, that even if her intervention were to be successful, the title would thereafter remain with her brother. The Lord Ordinary also rejected the claimer's assertions that she had serviced the mortgages personally, from her own funds. On the facts as found, the claimer's claim under A1P1 could not succeed.

[17] For all these reasons the reclaiming motion will be refused.