OUTER HOUSE, COURT OF SESSION

[2020] CSOH 9

P517/19

OPINION OF LADY WOLFFE

In the Note

DONALDA THERESA SWEENEY

Noter

For an order in terms of rules 1.56 and 7.21 of the Insolvency (Scotland) (Receivership and Winding Up) Rules 2018 in relation to the winding up of

WEST LARKIN LIMITED

Petitioner: O'Brien; TLT LLP
Respondent: Sandison QC; Currie Gilmour & Co

14 January 2020

Background

Liquidation of the Company

[1] On 12 December 2018 this Court directed that West Larkin Limited ("the Company") be wound up and it appointed Alexander Iain Fraser as *interim* Liquidator ("the Liquidator"). The Company was placed into liquidation on the petition of the first respondent, Amanda Urquhart. The second and third respondents, respectively the Company and the Liquidator, have not lodged answers to this Note. Accordingly, I shall refer to the first respondent as "the Respondent". For completeness, I should record that after the debate in this Note (which is hereinafter referred to as "Note 1"), I heard a debate in

a note presented by another member of the Sweeney family, namely by one of the Noter's sons, Joseph Sweeney. I shall refer to those proceedings as "Note 2".

The judgment debt

[2] The Respondent was a creditor of the Company by virtue of an award of expenses in her favour in an earlier litigation in this Court (concerning entries on the share register of the Company) to which the Company and the Noter were also parties ("the share register litigation"). It was explained in submissions that, while technically a party to that action, the Company played no active part in the share register litigation. The Respondent's position was that the Noter had been the sole cause of the expenses in that litigation (see Answer 22). Notwithstanding this factor, the Respondent obtained an award of expenses against the Company as well as the Noter on a joint and several basis in the sum of £38,140.31 ("the judgment debt"), with interest at 8% *per annum* from 2 August 2018 until payment. A charge served on the Company shortly thereafter expired without payment and the Company was placed in liquidation on the Respondent's petition.

[3] It was also explained by way of background that the Company's principal asset was a parcel of land which had been the subject of dispute between two families, the Urquharts and the Sweeneys, for several decades and which dispute had been productive of a number of legal proceedings.

The Noter's payment of the judgment debt

[4] In about mid-January 2019, a few weeks after the Company was put into liquidation, the Noter's agents wrote to the Respondent's agents offering to pay the judgment debt. This offer was declined and renewed repeatedly over the ensuing months, though the

Respondent's agents finally accepted payment of the judgment debt after presentation of this Note in June 2019 (see Statements 8 to 22 of the Note).

Rights of relief inter se co-obligants subject to a joint and several decree

[5] The Respondent resists the Noter's demand for an assignation because she anticipates that the Noter may seek to recover the sum she (the Noter) has paid to the Respondent to satisfy the judgment debt. It is an example of a situation in which a person (here, the Noter) seeks to recover a payment made by it to a third party (ie the Respondent) pursuant to a common liability (ie the Noter as co-obligant with the Company for the judgment debt). I shall refer to this as the Noter's "right of relief" against the Company *qua* co-obligant. (It may be contrasted with a right of indemnity, whose foundation is contractual rather than restitutionary).

[6] On the facts of this case, the Noter may or may not seek repayment of a *pro rata* contribution from the Company for a share of the judgment debt (and which, in the case of two co-obligants, is be presumed to be equal shares). Given the liquidation of the Company, the Noter would need to make a claim in the liquidation, in place of the Respondent, *qua* creditor of the judgment debt. If that claim were accepted, even if not in its entirety, the Noter would enjoy the rights available to a creditor to participate in the liquidation of the Company, including exercising a vote and (if her claim is accepted for this purpose) drawing a dividend.

The orders the Noter seeks

[7] As a consequence of the payment the Noter has made, and which the Respondent has finally accepted, the Noter asserts:

1) that she is entitled to an assignation in terms of rule 7.21(4) of the Insolvency (Scotland) (Receivership and Winding Up) Rules 2018 ("the Insolvency Rules");
2) if the Respondent refuses, her refusal constitutes "a failure to comply with any requirement of the Rules" for the purposes of rule 1.56(1)(a) of the Insolvency Rules and the court should rectify this; and
3) that, in alternative to (1), the court should grant an assignation in the terms set out in the schedule to the Note.

The Respondent's response to the orders the Noter seeks

[8] The Respondent argues:

1) that the Noter is not entitled to any order under rule 7.21;
2) that the Noter's reliance on rule 1.56 is inept, as the Noter's refusal was not the kind of failure or error falling within the scope of that rule. That rule was directed to curing technical deficiencies, not altering substantive rights; and
3) that in any event, even if an assignation was due, the terms of the Noter's assignation went further than any assignation she was entitled to in law.

Scope of Debate

[9] In the course of submissions it was agreed that, if the court were minded to grant an assignation in the terms sought by the Noter, the court should put the case out By Order as it was likely that the terms of an assignation could be agreed. Accordingly, I need only note parties' submissions in respect of the Noter's orders under rule 7.21(4) and rule 1.56 of the Insolvency Rules. I note the terms of those rules in the next two paragraphs.

The Insolvency Rules

Rule 7.21

[10] So far as material, rule 7.21 of the Insolvency Rules provides:

> "**7.21 Liabilities and rights of co-obligants**
> (1) Where a creditor has an obligant bound to the creditor along with the company for the whole or part of the debt, the obligant is not freed or discharged from liability by [*various matters are specified that are not here relevant*].
>
> […]
>
> (4) The obligant may require and obtain at the obligant's own expense from the creditor an assignation of the debt, on payment of the amount of the debt, and on that being done may in respect of the debt submit a claim, and vote and draw a dividend, <u>if otherwise legally entitled to do so.</u>
>
> (5) Paragraph (4) is without prejudice to any right, under any rule of law, of a co-obligant who has paid the debt…".
>
> (Emphasis added.)

Parties differed as to whether the words underlined at the end of rule 7.21(4), "if otherwise legally entitled to do so", qualified the whole of that sub-paragraph (as the Respondent argues) or only the phrase "submit a claim, and vote and draw a dividend" (as the Noter argues).

Rule 1.56(1)

[11] Rule 1.56(1)(a) of the Insolvency Rules provides:

> "(1) The court may, on the application of any person having an interest-
> (a) If there has been a failure to comply with any requirement of the Act or the Rules, make an order waiving any such failure and, so far as practicable, restoring any person prejudiced by the failure to the position that person would have been in but for the failure…."

[12] Rule 1.56(2)(a) provides that an order under this rule "can dispense with the performance of any act in the insolvency proceedings".

Submissions

[13] I have had regard to parties' Notes of Argument and the volume of authorities provided in advance of the Debate. Parties' arguments are summarised in the following paragraphs.

Submissions on behalf of the Noter

Assignation based on rule 7.21(4) of the Insolvency Rules

[14] Mr O'Brien, Counsel for the Noter, submitted that consequent upon the Noter's payment of the judgment debt to the Respondent, this case fell squarely within rule 7.21(4). The Noter was "an obligant bound to the [Respondent] for the whole or part of the debt": rule 7.21(1). The Noter has made "payment of the amount of the debt": rule 7.21(4). Therefore, the Noter is entitled to an assignation of the debt: *ibid.* That was the natural meaning of the rule. In respect of the Respondent's arguments, to the effect that (i) the rule only applied where the co-obligant was entitled to recover a contribution from the Company and (ii) the Noter was not entitled to do so here, the Respondent was wrong on both points.

[15] Looking at rule 7.21(4), this had two parts: the first was that an obligant (here, the Noter) was enabled to require and obtain at her own expense an assignation from the creditor (here, the Respondent), on payment of the amount of the debt; and, secondly, having done so, the Noter was entitled to submit a claim in the liquidation, and vote and draw a dividend, if otherwise legally entitled to do so. That last phrase - "if otherwise legally entitled to do so" - only qualified the second part of the rule. The possibility of the Company having a defence to the co-obligant's (ie the Noter's) claim arose only at the

second stage. It was irrelevant to the first stage, being the Noter's entitlement to the assignation.

[16] In relation to the Noter's entitlement to a contribution from the Company, this flowed from the consequences of the joint and several decree that the Respondent had obtained. This was expressly on a joint and several basis and, having paid the debt, the Noter was entitled to a contribution from the Company. While in Answer 22 to the Note, the Respondent averred that the decree was not conclusively *pro rata* as between co-obligants, Mr O'Brien submitted that that was wrong. Mr O'Brien relied on Lord Watson's observation in the House of Lords in the case of *Palmer* v *Wick and Pulteney-Town Steam Shipping Co Ltd* (1894) 21 R (HL) 39 at 47 ("*Palmer*") that

> "the sum decreed [under a joint and several debt] is simply a civil debt, and the meaning which the law attaches to a decree constituting a debt in these terms is, that each debtor under the decree is liable *in solidum* to the pursuer, and that *inter se* each is liable only *pro rata*, or, in other words, for an equal share with the rest".

That was so, regardless of blameworthiness (*per* Lord Herschel LC at 41). He submitted that this remained a correct statement of the law, as demonstrated by Lord Hodge's comments in *Joint Liquidators of Simclar (Ayrshire) Ltd* v *Simclar Group* [2011] SLT 1131 ("S*imclar*") at paragraph 19.

[17] The Noter had a right of relief on a *pro rata* basis unless some exception to the general rule applied. None was identified. The only consideration the Respondent had advanced was that the Company had taken no part in the share register litigation. He submitted that that amounted to no more than saying that the Respondent might have argued for a different award of expenses. The Noter was entitled to a *pro rata* contribution from the Company. The Respondents' arguments resisting an order under rule 7.21(4) were without merit and an order should be pronounced.

Remedy and waiver under rule 1.56(1)(a)

[18] If the Noter was correct, then there were two means by which the court could overcome the Respondent's refusal to grant an assignation: (i) by dispensing with any requirement for an assignation, so that the winding up could proceed as if the assignation had been granted. The basis for the latter was the court's power, by virtue of rule 1.56(1)(a) to waive any failure ("the waiver argument"), or (ii) by directing the Respondent to provide an assignation (the issue of its precise terms was the argument held over).

[19] The Respondent had failed to comply with a requirement of the Insolvency Rules, by not providing an assignation. The court could accordingly make an order waiving that failure and restoring the Noter to the position she would have been in but for that failure.

Submissions on behalf of the Respondent

[20] The Respondent's position was that the Note was irrelevant and fell to be dismissed.

Response to Noter's reliance on rule 7.21(4) of the Insolvency Rules

[21] Mr Sandison QC, Senior Counsel for the Respondent, argued that rule 7.21 (whether in its current or previous forms) was intended to do no more than reflect, as a matter of liquidation procedure, rights of relief and rights to demand an assignation from a creditor that may arise at common law. This was the impact of the last phrase of the current emanation of the rule. Rule 7.21, as a whole, was principally concerned with ensuring that the rules on ranking and distribution in an insolvency were not disrupted, especially to the detriment of the bankrupt estate, where a creditor in an insolvency has recourse to a

co-obligant: cf *Scottish Law Commission*, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot Law Com No. 68, 1982) ("the SLC Report"), at paragraphs 16.26-16.28.

[22] He submitted that there were a variety of situations in which co-obligations can arise. In this case, the co-obligation arises from a liability imposed by a decree of court granted against the Noter and the Company, jointly and severally, in respect of an award of expenses. In that particular context, it was, he submitted, important to note three basic principles:

(1) Any right of relief is equitable in nature. This is consistent with the basic rationale that the right of relief is based on recompense for unjustified enrichment: *Caledonia North Sea Limited* v *Lothian Bridge Engineering Limited* 2000 SLT 1123 at pages 1141-1145 (Lord Rodger of Earlsferry), ("*Caledonia*") and *Simclar, ibid,* at paragraphs 19-20;

(2) Any assignation would only carry such share of the debt as would *truly* be reflective of any right of relief enjoyed by the Noter against the Company, because the working out of any true right of relief is the sole legal justification for the grant of any assignation (see, Bell, *Principles* (10th ed) paragraph 558); and

(3) The right to demand an assignation was purely equitable in nature. A creditor was entitled to refuse an assignation where he had a legitimate interest to do so, or even if it would be reasonably likely to involve him in inconvenience and trouble: see McBryde, *Contract* (3rd ed) at paragraphs 12-101 to 12-103; *Mitchell* v *McKinlay* (1842) 4 D 634 at page 638 (Lord Moncrieff and Lord Justice-Clerk Boyle) ("*Mitchell*"), and *Bruce* v *Scottish Amicable Life Assurance Society* 1907 SC 637 at page 643-644 (Lord President Dunedin) ("*Bruce*").

For these reasons, the Noter's reliance in the Note on rule 7.21 is irrelevant.

[23] Mr Sandison submitted that the Noter's averments were premised on the bold assertion that she is entitled to an assignation of the entire debt paid, simply in consequence of such payment. He submitted that the Noter had not engaged with the Respondent's averments or the reasons given for continuing to refuse to grant an assignation. In particular, despite detailed averments from the Respondent about the circumstances of the award of expenses being made, the Noter had no relevant averments to support the propositions (i) that the Company has been unjustly enriched at all by the Noter's payment; or (ii) that the liability for the decree for expenses properly falls to be regarded as even *pro rata* as between her and the Company, let alone that she is entitled to receive an assignation of the entire judgment debt. Mr Sandison reiterated the Respondent's basic concern, articulated in averments that, in fact, the Noter has no "true right of relief" from the Company, a proposition with which, he submitted, the Noter failed to engage, let alone to engage relevantly and specifically, in her pleadings. The Respondent reasonably apprehended that the grant of an assignation in favour of the Noter would not be used for the sole purpose for which she could properly be compelled to grant such an assignation (ie to enable the Noter to work out her true right of relief, if any, against the Company), but to enable the Noter to attempt to direct the liquidation in a way favourable to the interests of her family in the context of a long-standing and bitter dispute about the land owned by the Company and forming its sole asset. That, he submitted, was a legitimate reason for not granting any assignation. However, the Noter simply did not address this in her pleadings. The Noter bears to take a stand on the bald assertion that she has an absolute and indefeasible entitlement to an assignation of the entire debt. That approach was, he submitted, wholly misconceived.

Response to the Noter's reliance on rule 1.56(1)(a) of the Insolvency Rules

[24] Mr Sandison's submission was that this provision was wholly procedural in nature, and intended to deal with administrative or technical failures. Reference was made to the SLC Report (at paras 7.41 to 7.47 and observations in *Pattison v Halliday* 1991 SLT 645 at 648C to F and 649B to D (*per* Lord Caplan) and *Thomas's Trustee, Noter* 2003 SLT (Sh Ct) 99 at 101H to 102H (*per* Sheriff Principal Stephen). Such a power was not, he argued, intended to be available to alter substantive rights and obligations imposed by mandatory statutory provisions or common law. The Noter's proposed use of the power here, to treat her as if a creditor had assigned her debt, was misconceived.

Discussion

The Respondent's invocation of unjustified enrichment to resist the Noter's right of relief

[25] I consider first Mr Sandison's submission that the principles of unjustified enrichment apply. As I understand his argument, he relied on the proviso at the end of rule 7.21(4) as the basis for invoking this principle. Generally, in order to succeed in an action based on unjustified enrichment, one party must show that the other party from whom payment is demanded has been (or potentially has been) enriched at the claimant's expense. The party seeking to reverse that unjustified enrichment must also show (i) that the enrichment by the prospective defender was unjustified, ie that there was no legal obligation to benefit the defender, and (ii) that it is equitable to compel the defender to make payment to the claimant to reverse that unjustified enrichment.

[26] In this case, the question of unjustified enrichment potentially arises between the two co-obligants subject to the judgment debt, namely the Company and the Noter. Accordingly, the party asserting unjustified enrichment must show that, as between the

Company and the Noter, the burden of paying the Respondent *qua* creditor rests in whole, or at least in part, on the Noter such that it would make it unjust for the Noter to be relieved of this whole (or partial) liability to the creditor (ie the Respondent) by reason of her payment to the creditor.

The context in which disputed right of relief arises in this case

[27] As noted at the outset, the Noter was rendered liable, on a joint and several basis with the Company, for the expenses in the share register litigation. The Respondent chose to enforce this solely against the Company, as she is entitled to do (for the reasons explained by Lord Young in the Inner House in *Wick and Pulteny-Town Steam Shipping Co Ltd* v *Palmer* (1893) 20 R 275 at 285 ("*Wick and Pultney-Town*" and reported as *Palmer* in the House of Lords). The Company having failed to satisfy the civil debt constituted by that decree, the Respondent served a charge on the Company and, upon its expiry without payment, put the Company into liquidation. It was explained in submissions that the Respondent was the principal creditor in the liquidation on the basis of the judgment debt. In that capacity, she will potentially have significant influence on the conduct of that insolvency process.

[28] At no point, apparently, did the Respondent seek to enforce that decree against the co-obligant under it, namely the Noter. However, as also noted above, shortly after the Company went into liquidation the Noter repeatedly tendered payment to the Respondent *qua* creditor in respect of the judgment debt until that payment was ultimately accepted. As a consequence of that payment, the Noter invokes rule 7.21(4) requiring the Respondent to assign her claim (ie in respect of the judgment debt) to her. The practical effect, if that is granted, is that if the Noter herself makes a claim in the liquidation, the Noter will achieve a like position as the Respondent had had *qua* principal creditor of the Company in the

liquidation. This forms the basis of the Respondent's apprehension, that the Noter will (as it was put at paragraph 14 of her Note of argument):

> "attempt to direct the liquidation in a way that is favourable to the interests of her family in the context of a long-standing and bitter dispute about the land owned by the [Company] and forming its sole asset….This is a legitimate reason for not granting any assignation."

How rights of relief can arise

[29] The circumstances of the Noter's claim for an assignation are an instance where one party, A (here, the Noter), having paid the whole of a debt (owed by D) to a creditor, C (here, the Respondent), seeks repayment (in whole or in part) from D (here the Company) on the basis that D has been enriched by A's payment to C. A right of relief may arise in many contexts. Other instances where a third party payer may seek to exercise a right of relief include claims by a cautioner (being the payer, A) against the principal debtor (D), or by a cautioner against a co-cautioner (eg because the principal debtor is insolvent); an insurer who has paid an insured and who wishes to exercise rights of subrogation, to pursue a party whose conduct may have caused the insured's loss, or against another indemnity insurer in respect of the same insured risk. The extent of any right of relief in the foregoing examples (eg of cautioner against principal debtor, or among co-cautioners, or among different indemnity insurers or re-insurers) will, generally, be defined by the relevant contractual terms or by the applicable statutory provisions (an example of the latter is the ultimate liability of a drawer of a bill of exchange to the acceptor thereof). Similar rights of relief can arise as between co-defenders found liable for separate breaches of delict (discussed in *Palmer*), in which case the court's finding of their respective degrees of fault will inform the extent of their respective individual liabilities *inter se*. (Another example, albeit arising in a different context is the provision enabling one or more joint wrongdoers

called as defenders to an action for damages for any wrongful or negligent act to seek a contribution, by virtue of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.) In the present case, a statutory right of relief of a payer co-obligant (ie the Noter) is provided for in statutory form, in rule 7.21(4) of the Insolvency Rules.

Restitutionary basis for rights of relief

[30] The position in Scots law as to the legal basis for a right of relief has been long-settled (at least from the time of Stair), to be an obligation in recompense (or "unjustified enrichment" in modern usage). As Stair explained:

> "From the natural obligation of recompense doth arise the obligation of relief, whereby, when many persons are obliged in solidum, and thereby liable conjunctly and severally, payment or satisfaction made by one <u>for more than his own share</u> doth oblige all the rest pro rata, although there be no conventional clause of relief, nor any law or statute, but the natural obligation of recompence; for he who paid, not only for himself, but for others, is not presumed to do it animo donandi." (Emphasis added). *Inst* I viii.9

See also Bell's *Principles*, section 62. That this is the legal basis for rights of relief is affirmed by Lord President Rodger (as he then was) in *Caledononia* at 1141F, where he referred to "the obligation of relief based on <u>unjustified enrichment</u> [which] arises among co-cautioners and other co-obligants in a joint and several obligation" and, a little further on, after distinguishing between a right of relief and a right of indemnification, he reaffirmed "that the obligation of relief is similar in each case (<u>unjust enrichment</u>)" (*ibid* at 1141G-H) (emphasis added). It may be helpful to consider the practical stages by which a right of relief is worked out.

Stage 1: Securing A's entitlement to seek payment from D

[31] In the examples or rights of relief above (in para [29], there are generally two discrete stages required to enable A to secure payment from the true debtor, D (ie as the principal obligant or as a co-obligant with A), and for whom A has paid (in Stair's formulation) "more than his own share" to D's creditor, C. The first step involves putting A into the place of C so that he can exercise particular rights. With typical erudition, Lord Rodger traced the early procedural device of constituting A as the *procurator in rem suam* of C (see *Caledonia*, at p 1139L) as a form of subrogation, and the later use of an assignation (eg in favour of a cautioner) consequent upon the cautioner paying the creditor of the principal debtor. In the latter instance, the common law recognised that upon payment the cautioner had a right of relief against the principal debtor and which "arises de jure without any formal assignation by the creditor" (eg *per* Gloag and Irvine, *Law of Rights in Security* at 796-797, cited with approval by Lord Rodger in *Caledonia* at 1141E-F). Lord Roger traced this back to the *benficium cedendarum actionum* under Roman Law, which entitled the cautioner to demand an assignation from the creditor in exchange for payment of the debt (see page 1142G-K/L, and his citations *inter alia* of Bell's *Principles* at paragraphs 255, 268). As it was explained by Lord Chancellor Westbury in *Ewart v Latta* (1865) 3 M (HL) 36 at 40 ("*Ewart*"), "the surety also, under certain circumstances, is, when he has paid the debt, entitled to stand in the shoes of the creditor, and to be placed in possession of all rights possessed by him against the debtor, and that, again, is called the right of relief".

Stage 2: Liability inter se A and D

[32] The second stage is the procedure or means by which A, in exercise of rights acquired from C, makes good that right of relief against D. A may acquire rights from C as

procurator in rem suam (see Lord Rodger in *Caledonia*, *cit. supra*), as assignee (whether express or *de jure*), or under a contractual indemnity. Recourse is against D, "for the simple reason that the principal debtor is the person who is to bear the final responsibility of paying the debt to the creditor" (*Caledonia* at 1141K-L), whom I shall refer to as "the true debtor". In the case of a cautioner who has paid the debtor's creditor, his claim would be for total relief against the principal debtor as the true debtor; in the case of co-obligants, the right of relief (sometimes referred to as a right of contribution) is for payment from a co-obligant (B) to the extent to which A has paid "more than his own share" to A and D's common creditor (C), and to D's (unjustified) enrichment. (The rule of public policy precluding recovery by one wrong-doer against another was held not to apply in respect of persons found jointly liable in delict: *Palmer, cit. supra*, in the House of Lords).

Stage 3: Division or apportionment of liability inter se A and D

[33] A further question may arise, namely, the working out of the contribution by co-obligants correctly to reflect their respective shares of liability. Generally, subject to the express terms of any contractual term to the contrary, the presumption is that the liability is *pro rata* or an equal division among the co-obligants and, there is usually no dispute as to the liability *inter se* co-obligants. The same presumption, although not termed as such, operates in relation to a joint and several decree. This further question *does* arise in this case, albeit in a particular and, perhaps unusual, way: the Respondent contends not only that the apportionment of liability for the judgment debt *inter se* the Noter and the Company should not be on a *pro rata* basis; but that, because (it is asserted) the Noter was wholly causative of the expenses of the share register litigation, she should be solely liable for the award of expenses represented by the judgment debt. If that is correct, the decree should not have

been taken on a joint and several basis against the Company. I will return to terms of the decree below, at paragraph [46]. It is for this reason the Respondent invokes the equities (as she would have it) of the Noter's claim, on the basis that the proviso at the end of rule 7.21(4) is the means by which the Noter works out her true right of relief. I turn to consider the meaning of that proviso.

The proviso at the end of rule 7.21(4): "if otherwise entitled"

[34] The Noter's position is straightforward, even mechanical: she has paid the judgment debt in full to the Respondent (as creditor) and by virtue of rule 7.21(4) she is entitled to an assignation of the Respondent's claim against the Company based on the judgment debt. There is no enquiry into the equities of her demand. It is the Respondent who relies on the proviso at the end of rule 7.21(4), "if otherwise entitled", to invoke the principles of unjustified enrichment and to argue that, on the equities here, the Court should refuse to order or sanction any assignation on the basis that the Noter was wholly responsible for the expenses incurred in the share register litigation.

[35] Does the proviso permit such considerations, or does it do so at this stage?

Scope of the proviso at the end of rule 7.21(4)

[36] The origin of the right to an assignation from a creditor from a paying co-obligant is early and well-established in the common law. See *Bell Comm* at ii 417 and 420, *Ewart* and *Harvie's Trs v Bank of Scotland* (1885) 12 R 1141 at 145 ("*Harvie's Trs*") (*per* Lord President Inglis, albeit his general observation is *obiter*, as the decision in *Harvie's Trs* turned on the terms of the guarantee). The import of these authorities is that a co-obligant or cautioner is not entitled to claim or draw a dividend out of the estate of the principal or true debtor,

except upon payment of the creditor's claim and taking that creditor's place. See also *Bruce* at 643 *per* Lord President Dunedin and *Villaswan Ltd in Receivership)* v *Sheraton Caltrust (Blytheswood) Ltd (in liquidation)* 1999 SCLR 199 at 207 *per* Lord Penrose (discussing certain limitations of the equitable and practical rule, (providing for an assignation in favour of the person who pays the creditor) which are not here relevant). That common law rule now finds expression in rule 7.21(4) of the Insolvency Rules. It was not suggested that the statutory rule altered the common law on which it was based.

The rule against double-ranking

[37] The classic rights of a creditor in an insolvency process, whether bankruptcy or liquidation, are to participate by way of vote and to draw a dividend, in accordance with the creditor's claim (to the extent accepted or adjudicated upon by the insolvency practitioner for these purposes) and subject to the rules governing the ranking of claims. A creditor's rights can be subject to limitations.

[38] The rule against double-ranking is one of several well-established equitable rules in Scots law in certain forms of collective insolvencies. (Other rules, including the treatment of securities by ranking creditors and rules about catholic and secondary securities, involve greater degrees of complexity and are not here relevant). The rule against double-ranking only operates in some insolvency regimes. Generally, it requires as a precondition the divestiture of the insolvent debtor of his estate and its transfer to a trustee in sequestration (in personal bankruptcies) or to a liquidator to be applied for the general body of creditors, after allowance for (ie deductions of the value of) securities, consequent on a ranking of their claims. (It does not apply to private contracts of composition, because this does not involve a universal divestiture of the insolvent.) In short, the rule against double-ranking provides

that the same debt cannot be ranked for more than once on the insolvent estate, whether by the original creditor or by any person deriving right from him (ie such as an assignee of the creditor). The classic description of the rule against double ranking may be found in *Mackinnon* v *Monkhouse* 1881 9 R 393. As Lord President Inglis stated in that case (at page 401):

> "In a proper bankruptcy the debtor is completely divested of his estate, and the trustee is completely invested in the property of that estate for behoof of the creditors. There is, thus, a separation of interests between the bankrupt and what was his estate. When the estate is divided among the creditors, the estate has paid the debts so far as concerns the estate and the trustee who holds it, and of course the estate and the trustee are discharged of each debt in consideration of the dividend paid on it. But not so the bankrupt. He has not paid the debt. He remains personally liable for the whole balance of the debt, beyond the dividend, unless under the indulgent provision of the bankruptcy laws he succeeds in obtaining his discharge. Until he obtains his discharge, he remains personally liable, and if, through dishonesty or fraud, he never gets a discharge, his personal obligation is perpetual, and will transmit, as an obligation, against anyone who is rash enough to represent him.
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> This is the foundation of the doctrine of double ranking. The debt being paid to the creditors by the bankrupt estate, the circumstance that that debt was secured to the creditors by a subsidiary obligation of another party who has relief against the bankrupt to the extent to which he has contributed to satisfy the creditors cannot be allowed to affect the bankrupt estate, because equity intervenes to protect the other creditors against the demand that the estate shall pay the debt, in the form of dividend, first to the proper creditor and then to the surety claiming in relief. But for this equitable rule the other creditors would not receive their proportionate share of the bankrupt estate."

[39] The prospect of multiple claims on the insolvent estate in respect of the same debt can arise in many circumstances. One of those is where a creditor claims against his debtor's estate, is ranked and receives a dividend, and then secures payment of the unsatisfied amount from a cautioner of the insolvent debtor. The cautioner cannot thereafter make a claim on the insolvent estate for the amount the cautioner has paid to the creditor. This is because in a collective insolvency, such as bankruptcy (and by application of statutory equivalences, liquidation), the effect of payment of a dividend on the debt is treated in law

as equivalent to payment of the debt itself, discharging the estate of the debt (though not necessarily the insolvent debtor). As, in this example, the insolvent estate has already paid the creditor a dividend, the cautioner's claim against the estate (ie for the shortfall he has had to make good) is not permitted. If it were, the cautioner would be claiming a second time for the same debt to the detriment of the other unsecured creditors (it was for this reason that the cautioner's claim in *Harvie's Trs* was disbarred (see p 1146)). Accordingly, a co-obligant's claim will not be permitted in the event the creditor or the co-obligant has already claimed and has been ranked in the insolvent estate in respect of the same debt.

[40] As just noted, the risk of double-ranking can arise where a co-obligant makes a claim on an insolvent estate in respect of debt which has already been subject to a claim and ranked. Returning to the words of the proviso "if otherwise entitled" at the end of rule 7.21(4), in my view that phrase is to preserve the application of the common law rule against double-ranking just described. On that analysis, the proviso falls to be applied at the point when a creditor's claim, including one who claims by virtue of a statutory assignation available under rule 7.21(4), is adjudicated on by the trustee in sequestration (in personal insolvency) or by the liquidator (in a corporate insolvency). In other words, it is a rule that comes into play at "stage 2", as I have termed it (see para [32], above).

[41] It follows that the proviso qualifies only the latter part of rule 7.21(4): ie when the creditor's entitlements to vote and draw a dividend based on the creditor's claim (and for which different rules are applied to determine those respective entitlements). For present purposes it suffices to conclude that the proviso does not provide a basis for a more wide-ranging enquiry into the equities, as the Respondent would have it or to do so at stage 1. Indeed, no case was cited to me in which an argument that could be taken at stage 2 was used to preclude any assignation (ie at stage 1). More importantly, there is nothing to

suggest that the rule against double-ranking will be contravened; the effect of an assignation by the Respondent in favour of the Noter is that the Noter stands in the shoes of the Respondent in respect of the judgment debt. The Respondent's challenge based on the proviso to rule 7.21(4) or on the principle of unjustified enrichment fails.

Can the Court conclude ab ante that the Noter will necessarily be unjustifiably enriched?

[42] The Respondent's argument is predicated essentially on the proposition that the Noter is (or will be) unjustifiably enriched at the expense of the Company. It respectfully seems to me that it cannot be said *ab ante* that the Noter will necessarily be enriched such as to justify the Respondent being relieved of the statutory obligation under rule 7.21(4) from granting an assignation in favour of the Noter of the Respondent's claim *qua* creditor holding decree for the judgment debt (even if that argument could be entertained at this stage). The question of the Noter's asserted unjustified enrichment which the Respondent seeks to have answered *ab ante* at stage 1 is, in fact, a question which arises between the Company and the Noter, and only if the Noter claims to be ranked in the liquidation by virtue of the judgment debt. Assuming it is correct that the Noter was solely responsible for the expenses in the share register litigation, as the Respondent contends, there may be scope for unjustified enrichment if the Noter submits a claim in the liquidation – essentially, exercising a right of relief as co-obligant under the decree – and seeks repayment (in whole or in part what she has paid to the Respondent) from the estate of the Company. In considering whether the Noter has been enriched at the expense of the Company, it may be relevant to consider the particular circumstances by which the Company was rendered liable for the expenses, which was the joint and several decree obtained and enforced against it by the Respondent. In other words, if the Respondent is correct that the Noter has been

enriched at the expense of the Company, this flowed from the Respondent's own conduct. That factor *may* be relevant to any consideration of the Noter's enrichment, whether it was unjustified or whether it is open to the Respondent so to contend. I express no view on these matters, but they do suggest that the question of whether any enrichment is unjustified may be a question of some subtlety. As matters stand, however, that potential enrichment, which may or may not be unjustified (and on which I express no view), has not occurred. At this point in time, no payment has been made out of the estate of the Company toward the judgment debt.

[43] Further, it respectfully seems to me that it is only when the Noter makes a claim against the Company in respect of the judgment debt that the arguments the Respondent seeks to make could competently arise (ie at stage 2). Subject potentially to the terms of the decree, whether or not the Noter's conduct in the share register litigation was or was not productive of expense, which it may or may not be unfair (or unjustified) for the Company to bear, is a matter that is properly raised (by a person having title and interest to do so) in the adjudication of the Noter' claim (if made) to be ranked on the Company's estate, based on the judgment debt in the liquidation. As matters presently stand, the foregoing assertions were the subject only of submissions. Also as matters presently stand, the Noter has borne the totality of the judgment debt. It is only if and when the Liquidator accepts the Noter's claim in respect of the judgment debt (or part of it), that, arguably, the Noter has been enriched and, further, only arguably *unjustifiably* enriched, if the Company should not have borne any share of the expenses in the share register litigation.

[44] All of these are matters for the Liquidator. In any event, it is hard to identify what legitimate interest the Respondent has in that question in the context of the liquidation. It is not otherwise suggested that the Respondent is a creditor of the Company, given that the

judgment debt has been paid in full to her. *Prima facie,* any interest she may have *qua* shareholder is postponed to the adjudication on the creditor's claims. In any event, on the hypothesis of fact on which the Respondent's argument proceeds, it is the Company (not the Respondent) who would resist the Noter's claim on this basis. Accordingly, even if I had held that the Respondent's challenge based on the proviso to rule 7.21(4) or on the principle of unjustified enrichment fails was relevant, it is premature.

[45] Implicit in the Respondent's argument is the assumption that the Court may go behind or disregard the express terms of the decree constituting the judgment debt. I consider next whether it is permissible for her to do so. The Noter challenges this.

The joint and several decree pronounced at the instance of the Respondent

[46] The Noter's argument on this branch of the argument is simple: the judgment debt constitutes a civil debt enforceable on its terms and this Court cannot go behind (or "beyond") the decree: see *Wick and Pulteny-Town Steam Shipping Co Ltd* (*per* Lord Watson at 285, and *per* Lord Trayner at p 288). In light of that authority, it is not possible, nor appropriate, to go behind the decree. It binds the parties and this Court.

[47] The Respondent does not engage directly with that argument but seeks to elide it by recourse to the "equities" involved in the application of the principles of unjustified enrichment. (I have already held that the Respondent's opposition to the Noter's order for an assignation is ill-founded and not consistent with the proper interpretation of rule 7.21(4).) Is it permissible for the Respondent to disregard the decree constituting the judgment debt?

The Respondent's disregard of the decree constituting the judgment debt

[48] The Respondent's basis for resisting the Noter's order for assignation (or its equivalent) is premised on the Noter being unjustifiably enriched. On the facts as presented at the stage reached, this has not been established. The Noter has paid the full amount of the Respondent's claim to her, being the total amount of the judgment debt. The Company has, as yet, paid nothing toward the judgment debt.

[49] However, in my view, there is a further difficulty with the Respondent's argument. In substance, the Respondent is inviting the Court to disregard the decree constituting the judgment debt, ie by asking the Court in these proceedings to proceed on the basis that the liability *inter se* the Company and the Noter in respect of the expenses of the share register litigation is otherwise than appears on the face of the decree. For the purposes of this approach, Mr Sandison relies on a sentence in *Palmer* (at p 285) to the effect that the court would generally not contemplate a division other than on a *pro rata* basis "in the absence of something conclusive to the contrary". The difficulty for the Respondent is that there is simply no material before the Court which conclusively establishes that an assignation by the Respondent of the judgement debt to the Noter is demonstrably unjust. Absent something "conclusive", the Respondent's approach to the decree constituting the judgment debt is ill-founded. That decree is *ex facie* valid. It finds the Noter and the Company jointly and severally liable to the Respondent. That decree has not been reduced or recalled. It is not suggested that any steps will be taken to do so. At the very least the Respondent's position adopted in these proceedings is materially inconsistent with the position she adopted in obtaining a decree in these terms. That factor alone may give a court pause before looking

behind the decree to enforce a liability potentially but so radically inconsistent with its joint and several character.

[50] Approaching the matter on the application of *Palmer*, there is, in my view, considerable force in Mr O'Brien's reliance on that case. The case of *Palmer* is binding on me. Nothing in Mr Sandison's submissions persuades me *Palmer* can be distinguished or disregarded. The decree falls to be construed and enforced according to its terms. Absent that decree being modified or set aside, I am not persuaded that what the Respondent seeks to do is in fact competent.

[51] Even if this kind of disregard of on an *ex facie* valid decree were competent, it is not clear by what means the Court is to entertain or give effect to that attack. Mr Sandison did not suggest an evidential hearing was necessary or apt to determine that matter. He did not really grapple with this difficulty. Having secured a joint and several decree for a particular purpose (ie to become the principal creditor in the Company's liquidation), the Respondent cannot simply disregard the joint and several character of decree because (by reason of the Noter's payment of the judgment debt and her right to an assignation thereof), its terms have become inconvenient for the Respondent's purposes.

Can the creditor decline on the ground of inconvenience?

[52] Finally, it is necessary to deal with Mr Sandison's submission that a creditor whose claim has been paid by a third party, may decline on the ground of inconvenience to assign his claim to that third party (see para [22(3)], above and cases referred to). This submission can be dealt with shortly. The cases of *Mitchell* and *Bruce* are both readily distinguishable. In both of those cases the court was concerned with an assignation of the *securities* held by the creditor, not an assignation of the creditor's underlying claim against the debtor. In that

context, the question of prejudice was to another security held by the creditor called upon to assign a security held in respect of the debt. That this rule relates to an assignation of a creditor's security (and not of the right to the debt it secured) is clear from the discussion by Lord Hunter of those cases in *Fleming v Black* 1913 1 SLT 387 at 388. Paragraph 12-103 in McBryde, which simply cites *Mitchell*, is too broadly stated to the extent it seeks to extend the *dictum* beyond an assignation of a creditor's security, to assignations of a creditor's claim.

The arguments in respect of rule 1.56 of the Insolvency Rules

[53] The Noter's reliance on rule 1.565 was in essence a fall-back if she was unable to rely on rule 7.21(4). In light of my decision on that issue, it is not necessary to address this ancillary argument.

Decision

[54] It follows that the Respondent's challenge to the Noter's entitlement to an assignation from her of the judgment debt fails. As noted above, the parties' common position was that the terms of the assignation were likely to be agreed. I shall put the matter out By Order to discuss the terms of the assignation, the interlocutor and any ancillary matter arising. I shall reserve meantime all questions of expenses.