OUTER HOUSE, COURT OF SESSION

[2023] CSOH 7

P505/22

OPINION OF LORD CLARK

In the petition of

LD PARTNERSHIP

for return of missing funds

Petitioner

Petitioner: G Dosoo; Lay representative
Respondent: Anderson; DLA Piper Scotland LLP

8 February 2023

Introduction

[1] The petitioner, LD Partnership, had a loan agreement with the respondent, the Royal Bank of Scotland ("RBS"). The petitioner claims that in 2012 it discovered that funds were debited by RBS from the petitioner's current account, but were not in fact used as loan repayments. The petitioner seeks orders for disclosure of the whereabouts of the missing funds, return of the funds with interest, and payment of consequential losses.

[2] The respondent opposes this application and denies the allegations made. In addition, the respondent raises three preliminary points: that the petition is not competent, because raising an action is the proper procedure in a case of this kind, rather than proceeding by petition; that in any event there are no relevant averments supporting the

orders sought; and, even if there were any obligations on the part of the respondent, these have been extinguished by the operation of prescription.

[3] A substantive hearing was fixed to resolve these preliminary issues. The respondent was appointed to lodge its Note of Argument 14 days in advance of the petitioner's Note of Argument, so as to give the petitioner, and its lay representative Mr Dosoo, sufficient time to consider and deal with the points made by the respondent.

The petitioner's averments

[4] Perhaps understandably, having been prepared by a lay representative, the petition does not have the level of clarity that tends to be present in pleadings drafted by experienced counsel. I have taken into account all of the averments, although there are certain passages which do not appear to have a direct bearing for present purposes. What follows in this section is a brief summary of the petitioner's own version of events.

[5] George Dosoo and Brian Leslie set up the firm of LD Partnership for the purpose of purchasing a hotel. The firm, through these individuals, entered into a loan agreement with RBS on 30 June 2005. The loan given by RBS was £2,080,000. The firm bought the hotel. In 2010, the hotel was sold and the remaining balance of the loan was paid to RBS. (In passing, I note that the petition refers to the "hotel/business" being sold, but whether the price included payment for the business is not of any direct relevance for present purposes.) In 2012, Mr Dosoo obtained a completion statement. The petitioner avers that:

> "After analysing the completion statement and the bank statements [Mr Dosoo] discovered that monies debited to [LD Partnership's] current account totalling £142,549.55 and a further £7,336.65 debited (which were all debited without a mandate and without authority) had not been accounted for in the completion statement. [Mr Dosoo] then complained to RBS and asked RBS to disclose where the funds are? The complaint handler sent a letter essentially refusing to disclose where

> the funds are and said his Supervisor should tell [Mr Dosoo] to take complaint to the Financial Ombudsman Service"

[6] Mr Dosoo lodged three separate complaints with the Financial Ombudsman Service ("FOS") between 2012 and 2020, about the missing funds and "other banking misconducts by RBS". On each occasion, the FOS refused to investigate, on the basis that RBS had objected to any such investigation. The complaint about missing funds was also lodged in the RBS Global Restructuring Group review process and RBS again refused to address the issue. That decision was appealed to the Independent Third Party appointed by RBS, Sir William Blackburne. Mr Dosoo instructed an advisor who analysed the banking documents and agreed that RBS had not accounted for the missing funds and had overcharged on the loan. The Independent Third Party refused to investigate these findings, on the basis that he had no mandate to investigate missing funds.

[7] Mr Dosoo reported the missing funds to an organisation named Action Fraud who said that the behaviour of RBS was fraud and abuse of trust and referred it to Police Scotland, but Police Scotland refused to investigate saying it was a civil matter. In 2021, a further complaint was lodged with the British Business Resolution Service, but it determined that the complaint was not eligible to be investigated within its remit.

[8] The orders sought are to have RBS disclose where the missing funds are, to return the funds with statutory interest, and to "[p]ay consequential loss and return the partners to where their finances would have been if RBS had not lent them the money to buy the hotel/business". The first plea-in-law for the petitioner states:

> "1. The Petition is competent because of non disclosure by the Respondent, as it could be as a result of fraud, concealment or error. Resulting in the Partners being significantly financially disadvantaged"

The second and third pleas-in-law say, in turn, that the petitioner's averments are relevant and not lacking in specification and that the petitioner has title to sue. The fourth plea-in-law states:

> "4. The five years prescription rule should not apply because of lack of disclosure by the Respondent and it is in the interests of justice, fairness and certainty to grant the prayer."

Lay representation

[9] In March 2022, Mr Dosoo lodged an application under Rule of Court 4.2(5), which deals with the situation where a party litigant is unable to obtain the signature of counsel or another person having a right of audience and requests the Lord Ordinary to grant leave to proceed without such signature. I considered the application and refused it. The decision to refuse was reached because this is a claim by a partnership, with Mr Dosoo acting on its behalf. It is not a claim by a party litigant and so is not covered by rule 4.2(5). In terms of the Act of Sederunt (Lay Representation for Non-Natural Persons) 2016 (SSI 2016 No 243), if a partnership is to bring proceedings an application for lay representation of the partnership in the form stated in the Act of Sederunt is needed.

[10] In due course, Mr Dosoo lodged an application on behalf of the partnership for him to be the lay representative. The authorisation document stated that Mr Dosoo and Mr Leslie agreed that he should be the lay representative and was signed by each of them. On 9 June 2022, I granted leave under section 97(2) of Courts Reform (Scotland) Act 2014, allowing Mr Dosoo to act as the firm's lay representative. In the letter sent to him by the court's petition department Mr Dosoo was, on my instructions, told:

> "Although leave has been granted to proceed, any other matters, including whether it is competent for the case to proceed by a petition rather than a summons, are not dealt with at this stage and remain open for consideration once proceedings commence."

The issues

Competency

Submissions for the respondent

[11] The petition and the prayer were incompetent. Petition procedure is appropriate where an action is inappropriate, or the law requires a petition: *Hooley Ltd* v *Ganges Jute Private Ltd* 2019 SC 632. A dispute about the parties' patrimonial rights and obligations should ordinarily be resolved in the course of the court's ordinary procedure, namely by action. The first order sought in the prayer could not be granted. The court had no free-standing jurisdiction to order, by petition, one party to a litigation to disclose where something was, when no legal basis was identified. The terms of the first order could not be complied with because bank moneys are not segregated pots of hard cash and it would be impossible to comply with an order seeking the disclosure of "where" funds are. The second and third orders sought in the prayer were essentially unquantified pecuniary craves or conclusions. In any event, Mr Dosoo was supplied with documentation in 2012 and 2013.

Submissions for the petitioner

[12] Mr Dosoo referred to what had been said in the letter from the court on 9 June 2022 about the competency of proceeding as a petition remaining open for consideration once proceedings commence. He took this to mean that the court would deal with this matter on its own initiative and submitted that no decision had yet been made to that effect. There had been no disclosure by RBS about where the monies are, even though Mr Dosoo had made a number of attempts to have it investigated. Reference was made to several of the

productions for the petitioner. Points about competency are also made in the petitioner's first plea-in-law, noted above.

Decision and reasons on issue 1

[13] I acknowledge that as a lay representative Mr Dosoo may not have fully understood what was said in the letter from the court. However, its wording is tolerably clear and Mr Dosoo should have understood that any other matters, including competency, would be considered as part of the adversarial court process. It is not for the court to give advice about competency to a person seeking permission to act as lay representative in a petition process or to decide *ex proprio motu* how a case should proceed. In any event, Mr Dosoo must have been aware of the position from the answers lodged by the respondent some 4 months before the substantive hearing. These very plainly argued that use of the petition procedure was incompetent, including making averments to that effect along with a plea-in-law seeking dismissal on that ground.

[14] Further, the point was again made clear in the discussion that took place at the procedural hearing, over 3 months before the substantive hearing, and is reflected in the resulting interlocutor. It was made known to Mr Dosoo that the competency of the petition would be challenged at the substantive hearing. Mr Dosoo also saw the arguments on competency and the proposed outcome of dismissal sought by the respondent fully articulated in the respondent's Note of Argument, lodged more than 5 weeks before the substantive hearing. In these circumstances, the petitioner had ample notice about the competency issue.

[15] Turning to the merits of the point, Scots law has obviously for very many years had the different procedures of petition or action available to parties in Court of Session

proceedings. It is unnecessary and indeed inappropriate to embark upon a detailed analysis of their distinctive features. In broad terms, a summons will generally have a contradictor, involve contentious or adversarial disputes, will be about enforcing or vindicating a legal right and involve the application of rules of law rather than discretionary powers. In contrast, a petition may be *ex parte*, non-contentious or non-adversarial, can seek a remedy in respect of which the petitioner has no legal right against the respondent, and commonly will involve the discretionary exercise of statutory or common law powers.

[16] However, when one looks at the authorities and how procedures have developed, there is some degree of blurring, or perhaps better put, flexibility, of the two processes and the broad points made above are not comprehensively or universally true. By way of example, a petition for judicial review will very commonly have a contradictor and will involve a contentious or adversarial dispute, seeking the application of a legal right or a rule of law. Cases in which a party has been allowed to seek declarator by means of a petition rather than in an action, or seek suspension in an action rather than by petition, illustrate the overlaps.

[17] There are examples of some vintage of the court finding a petition process to be incompetent and holding that an action is required, such as: *Mackenzie* v *Macfarlane* 1934 SN 16; *Simeone, Petitioners* 1950 SLT 399; and *Heggie* v *Davidson* 1973 SLT (Notes) 47. However, these were all cases involving petitions to appoint a judicial factor and the approach in the latter case, in which the Lord Ordinary referred to the earlier two cases, turned largely on the point that a disputed question of right, which was difficult and complicated, should not be decided *indirectly* in a petition for the appointment of a judicial factor (Lord Keith, at 48).

[18] But there is a clear explanation of the distinctive features between petitions and actions in the more recent decision of the Inner House in *Hooley Ltd* v *Ganges Jute Private Ltd*, Lord Drummond Young giving the Opinion of the court, at [14]-[21]. The court summarised the position thus:

> "[21] Accordingly, in our opinion petition procedure will be competent in any case where either it is necessary to innovate on existing legal norms or the court's order is likely to have an effect on parties who are not represented in the proceedings… We do not suggest that these are the sole criteria that may justify the use of petition procedure, but those two categories perhaps cover the great majority of such cases. The critical feature is that in such cases the court is obliged to exercise an independent element of judgment, or discretion, that goes beyond the interests of the parties and the submissions that they may make in the litigation."

In that leading case, the fundamental reason for allowing the case to proceed by petition was (as stated at [24]) that the orders sought were not confined to determining the parties' pre-existing rights; rather, the orders met the established criteria for petition procedure.

[19] The present case is, on the face of it (albeit not on a clearly averred basis, as discussed below) simply a dispute about the parties' patrimonial rights and obligations, arising from their contractual relationship. The first order sought does not go beyond the interests of the parties. Moreover, it is not something the court can realistically make, when there is no basis averred or otherwise available to the court for concluding that the missing funds are currently held somewhere, and no legal ground for the order is identified. If the respondent debited the amounts and wrongly failed to take them into account in the completion statement, they will no doubt have formed part of the funds in the bank's possession. But a bank's funds do not remain static and are used for a variety of purposes and transactions. Attempting to trace the current location of the debits made in the years before 2010 is of no moment, since the petitioner's key claim is about the loss of the monies caused by the conduct of RBS. The second and third orders sought are plainly appropriate to be dealt with

in an action rather than in a petition. If need be, in such an action commission and diligence could be sought in relation to documents relevant to the debiting of sums from the account. As such, the dispute in this case is a matter to be resolved by an action rather than a petition.

[20] The petitioner's first plea-in-law quoted above, which refers to competency, states that the non-disclosure by the respondent "could be as a result of fraud, concealment or error" and that expression is repeated in the petition. The court was given no reason as to why that has any bearing on the competency issue.

[21] I therefore conclude that this petition is incompetent. The appropriate disposal is to dismiss the petition. If that was to be the only reason for doing so, the petitioner could of course have gone on to raise an action. However, as will be explained, the petition is also dismissed on the ground of prescription.

Relevancy

Submissions for the respondent

[22] Even if the petition is competent, there were no relevant averments supporting the prayer of the petition. There are no relevant averments identifying an actual private law basis for the claims, still less any relevant averments of causation or quantum in relation to consequential losses.

Submissions for the petitioner

[23] The claims made were relevant. The petitioner's position is that its money has gone missing from the bank account. The partners had lost everything they worked for. The court does have an inherent power to try and force the bank to disclose where the funds are

and if the bank is exceeding its powers in order to prevent justice, the court has an inherent power to help the partners with that issue.

Decision and reasons on issue 2

[24] I have already explained the difficulties in relation to the first order sought. No relevant case is made for the court to order the respondent "to disclose where the missing funds are". The reference in the first plea-in-law and the petition that non-disclosure "could be as a result of fraud, concealment or error" is of no substance. It refers only to "could" and raises three possibilities, neither of which is the subject of any further averments. If fraud were to be alleged, the averments would of course have to be capable of yielding an inference of fraud and there would require to be averments of primary fact capable of supporting that inference. There are none.

[25] The second order that is requested, for return of the funds along with statutory interest, is based on the relatively simple premise that the respondent debited sums from the petitioner's account and did not apply those funds for the purposes of the completion statement. In short, they were debited but not used to reduce the loan debt and so should be repaid. It is correct that the petitioner does not aver a clear legal basis for recovery of these sums, such as breach of the terms of the loan agreement, or unjust enrichment. However, in the absence of any reference to the former ground, by implication it must be the latter.

[26] Following the well-established approach, this aspect of the claim cannot be dismissed as irrelevant unless it must necessarily fail even if all the pursuer's averments are proved (*Jamieson* v *Jamieson* 1952 SC (HL) 44, Lord Normand at 50). It is undesirable, except in a very clear case, to dismiss an action on the ground that the pursuer's averments are irrelevant and insufficient in law (*Miller* v *South of Scotland Electricity Board* 1958 SC (HL) 20,

Viscount Simonds, at 32). There is some force in the respondent's position that quantification of the alleged loss is not made out. But proceeding upon the basis that the allegation is that a sum just short of £150,000 was debited from the petitioner's account but not applied as a loan payment and is to be accounted for by RBS, this claim is relatively straightforward and the respondent's challenge to relevancy in relation this part of the case must fail. Accordingly, if the petition had not been dismissed on the other grounds of competency and prescription, this part of the claim would have proceeded.

[27] The third order sought refers to payment of consequential loss and returning "the partners to where their finances would have been if RBS had not lent them the money to buy the hotel/business." There are a several serious difficulties in this part of the claim. There is no explanation of the legal or factual basis for recovery of consequential loss. Given that the previous order seeks repayment plus interest and this third order refers to what would have happened if the loan had not been given, it seems clear that it is loss consequential upon the loan having been given. But there are no averments of any legal ground for the loan to have been unlawful or in breach of any duty or obligation, or as to why it should not have occurred. Moreover, there is simply nothing averred about causation or *quantum*. It is therefore a wholly irrelevant and inspecific part of the case. If the petition had not been dismissed, this part of the claim would have been excluded from probation.

Prescription

Submissions for the respondent

[28] Even if the petition was competent and relevantly averred, any obligation relied upon by the petitioner had been extinguished by prescription. Crave 2, for payment of a liquid sum, was presumably on the basis of contract or unjustified enrichment. Crave 3 was

for payment of damages, presumably on the basis of a breach of contract. The thrust of the petition appeared to be an allegation that, properly construed, the first 12 months of the loan were interest free. That is an argument of contractual construction. The redemption moneys for the loan were, in fact, paid by the petitioner's agents to the respondents on or around 22 July 2010. Any claim arising out of contract or unjustified enrichment which the petitioner might have had to repayment would have arisen at that time. Mr Dosoo alleged in correspondence between June and August 2013 that there had been an overpayment. Information and documentation was demanded from the respondent to "avoid court action". The petitioner was not in error as to its rights, nor was it ignorant of the claim. Any such claims have thus prescribed.

Submissions for the petitioner

[29] Mr Dosoo explained that the petitioner had attempted to try and resolve the issues without coming to court, taking various steps up until 2021. The petitioner had tried all avenues without success and court action was now the only way forward. The claim could not prescribe because the petitioner did not know where the money is and what happened to the money, hence the motion to have the respondent disclose where the funds are held. In order to be able to make complaints to the regulatory bodies and have them determined, the petitioner had to undertake not to take action against RBS. So, prescription would only commence after the claim had been refused. Prescription was also interrupted by the complaint application procedures and the required undertaking not to take proceedings. Moreover, the prescriptive period should only start after the respondent discloses where the missing finds are. In the petitioner's fourth plea-in-law, and in the petition itself, it is said that the 1973 Act is not applicable because there had been no disclosure by the respondent of

where the missing funds are and also that there is a wider interest of fairness, justice and certainty for the court to take into account.

Decision and reasons on issue 3

[30] The starting point on the question of prescription is when the obligation(s) relied upon by the petitioner became enforceable. As noted above, there are significant problems with the petitioner's averments, as the legal basis for the claims is not specifically identified. The respondent makes the point that the thrust of the petition is that, properly construed, the first 12 months of the loan were interest free and that contention by the petitioner is based on the contract (the loan agreement). The productions lodged by the petitioner do indeed show that one major issue raised in correspondence on behalf of the petitioner with RBS was that the first 13 months of the 20-year loan agreement were "a honeymoon period" in which no interest or capital was to be paid, but nonetheless the interest was deducted for that period. It may well be the case that these deductions contribute materially to, or indeed constitute, what is described as the missing funds, but the petitioner's position in its averments is simply that payments were taken by RBS from the current account and not accounted for in the completion statement. Accordingly, it is not made clear that the petitioner founds upon the contract.

[31] As noted earlier, by necessary implication the basis for the second order appears to be unjust enrichment. However, if it is indeed tied in to the contractual terms about interest (which is not averred), it may seek to found upon a breach of contract. The reference to "fraud, concealment or an error" is not developed and, as mentioned earlier, if fraud had been founded upon that would require precise supportive averments. No other legal ground for the second order is capable of being identified in the pleadings. No legal ground

for the third order is made out. But whatever basis is relied upon, viewing the petition as openly as possible the claims must concern obligations that became enforceable, at the latest, in July 2010 when the redemption sums were paid to RBS.

[32] There are of course various grounds stated in the Prescription and Limitation (Scotland) Act 1973 upon which the prescriptive period can be postponed, or interrupted and re-started. These include, in terms of section 6(1), the creditor making a relevant claim (defined in section 9), or the debtor making a relevant acknowledgment (defined in section 10), or, in terms of section 6(4), excluding any period in which by fraud or error, induced by the debtor, the creditor was induced to refrain from making a relevant claim. The petitioner makes no averments on any of these matters, which of itself excludes them from consideration. But even if they are considered in light of the submissions and documents referred to, I am unable to accept that any of these provisions is capable of applying to the facts here.

[33] In submissions, Mr Dosoo referred to the petitioner having to undertake not to raise proceedings if its complaint was to be investigated. Following the debate, without objection, Mr Dosoo lodged additional documents said to support that proposition. The first document is described as "RBS/GRG Review eligibility rules". It states that customers who have commenced or threatened to commence legal proceedings against RBS will not be eligible for redress unless they agree to put those proceedings on hold while the complaint is considered within the review. This does not meet the test for any of the provisions on postponing or interrupting the prescriptive period. In particular, section 6(4) could have no application, with no error having been induced. In any event, the reference is to putting proceedings on hold, which would still have allowed protective proceedings raised by the petitioner to be sisted pending the outcome of the complaint.

[34] The next document, referred to as the "BBRS Scheme Rules" states "you must not be in, or have obtained any ruling from, any court proceedings with your bank about your complaint." One insurmountable difficulty with the petitioner's reliance on this point is that the complaint under that scheme was made in 2021, some 11 years after the prescriptive period had commenced and 6 years after it ended. But in any event this proviso would not satisfy any of the provisions which deal with interrupting or postponing prescription.

[35] Nothing was referred to which could constitute a relevant claim or a relevant acknowledgment and nothing can be found in the submissions or productions to that effect. No basis for the application of section 6(4) of the 1973 Act is identified.

[36] Accordingly, to the extent that they are ascertainable, the obligations relied upon in this petition have been extinguished by the operation of prescription.

Ancillary points

[37] Counsel for the respondent raised two other matters. The first is that the respondent, at the procedural hearing, sought to draw the petitioner's attention to the proper way in which a descriptive partnership should be designated in the instance. A process instigated in the name of a firm with a descriptive name (i.e. a name not disclosing the names of the partners) by one of the partners bearing to act as a representative of the firm, was argued to be defective and fatal to the proceeding: *Kerr* v *Clyde Shipping Company* (1839) 1 D 901 and J Maclaren, *Court of Session Practice* (1916) 212.

[38] I accept that this was raised at the procedural hearing and the petitioner had the opportunity to amend, but in light of the limited procedural relevance of the point and the involvement of a lay representative, I would not have dismissed the petition on this ground. Instead, I would have given the petitioner a further opportunity to amend, essentially to add

the other partner's name in the instance. As I noted at the procedural hearing, that other partner, Mr Leslie, had signed the authorisation document lodged with the application for lay representation.

[39] The second ancillary point raised for the respondent is that the court should not adopt a different approach to the consideration of the petition because the petitioner is unrepresented by a legal practitioner: *Barton* v *Wright Hassall LLP* [2018] UKSC 12, [2018] 1 WLR 1119 at [18] and [42]. That is plainly correct and on the substantive issues I have taken that approach (as was also done by Lady Paton in *AW, Applicant* [2018] CSIH 25, at [14]). As noted, I would have allowed some leeway on purely procedural matters such as allowing greater time to amend, but not in permitting the rules of court or the legal rules on competency, relevancy or prescription to be departed from.

[40] In final adjustments to the petition, the court was asked on behalf of the petitioner to give its view:

> "on any possible conflict of interest on the fact that it was DLA Piper LLP's involvement in the calling up notices and inhibitions between November 2008 and July 2010 that caused the life changing financial losses to the partners…"

There are no grounds for reaching a conclusion that there is a conflict of interest. There is nothing to suggest that the firm of solicitors which acted on the instructions of RBS several years ago did so other than in a properly responsible manner or that, for any reason, the firm cannot remain in that position.

Conclusions

[41] The orders sought in the petition do not fall within the range dealt with by petition procedure and can only competently be raised in an action. In relation to relevancy, there is no relevant basis for the first and third craves in the prayer of the petition. There is just

enough to conclude that the second crave is based upon relevant averments. As to prescription, the obligations apparently or potentially relied upon came into existence much more than 5 years before the petition was raised and the fact that the petitioner took up the various complaint procedures did nothing to interrupt the *quinquennium*. The petition is therefore dismissed on the ground that it is not competent and, separately, that any obligations relied upon have been extinguished by prescription.

Disposal

[42] I shall sustain the first, second (in part) and fifth pleas-in-law for the respondent and dismiss the petition, reserving in the meantime all questions of expenses.