SHERIFF APPEAL COURT

[2024] SAC (Civ) 49
ABE-CA11-23

Sheriff Principal N A Ross
Sheriff Principal K Dowdalls KC
Appeal Sheriff G Murray

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL ROSS

in the appeal in the cause

DAVID BOOTH

Pursuer and Respondent

against

DANIEL LEITH DONALD

Defender and Appellant

Pursuer and Respondent: Reid, advocate; Brodies LLP
Defender and Appellant: Massaro, advocate; Harper MacLeod LLP

5 December 2024

[1] The parties are property developers. Between 2019 and 2020 they entered into talks for the development of a site at Caldonia, Malcolm Road, Peterculter for residential housing. The site was owned by the pursuer and respondent ("the respondent") but, owing to his sequestration in 2013, was vested in his trustee in sequestration. In a series of meetings, the parties agreed that a company would be registered to carry out the development. The parties would each own 50 per cent of the company. The company, Caldonia Developments

Limited (the "Company"), was duly registered. It was agreed that the defender and appellant ("the appellant") would fund the release of the site by the trustee. The trustee agreed to relinquish interest in the site, and another site, in exchange for a total payment of £1,150,000.

[2] During negotiations, the respondent requested the trustee to transfer title to the Company. The trustee refused, and was prepared only to relinquish his interest so that title reverted to the respondent. The consequence, if the deal were to proceed, was that the appellant would make payment but title to the site would remain with the respondent pending transfer of title to the Company. In order to protect the appellant's position until that occurred, the parties discussed the grant by the respondent to the appellant of a standard security over the site.

[3] The transaction proceeded. The appellant made payment to the trustee of £1,150,000. The trustee relinquished title. The respondent granted the standard security ("the Security") in favour of the appellant, which the appellant's agent registered. The respondent granted a disposition in favour of the Company, and delivered it to the appellant. The further sum due in relation to the second site was subsequently repaid. Thereafter the appellant refused to settle the Land and Buildings Transfer Tax (LBTT) due on the transfer of ownership of the first site to the company. He refused to register the disposition. He refused to grant a discharge of the Security. He thereafter sought to enforce the Security.

[4] The respondent raised this action for production and reduction of the Security by reason of misrepresentation or, alternatively, discharge; for an order ordaining registration of the disposition in favour of the Company; and ordaining the appellant to pay the LBTT, and ancillary craves. Following proof, the sheriff found there had been no

misrepresentation, but ordered discharge of the Security, registration of the disposition, payment of the LBTT, and other orders.

[5] The basis of the decision was a finding that the parties had reached a binding oral agreement, prior to the subsequent preparation and execution of the Security, that the Security would be relied upon only in the event of a supervening circumstance preventing the respondent transferring title to the site to the Company. He found there was an implied term that the Security would be discharged upon title being transferred to the Company.

[6] The appellant appeals, on the basis that the sheriff erred in (i) failing to give effect to the terms of the Security; (ii) finding that there was a prior oral agreement; (iii) finding that any oral agreement was binding, as it required to be constituted in writing, and conduct did not amount to personal bar as an exception to that rule; (iv) finding that there was an implied term requiring discharge of the Security; (v) failing to make critical findings in fact relating to the defence, and (vi) in making consequential findings.

Submissions for the appellant

[7] Counsel criticised the judgment on a wide variety of grounds. He submitted that the sheriff erred in failing to give effect to the Security. It contained a clear personal undertaking acknowledging a debt, which should have taken priority to any oral agreement. The respondent was bound by what he had signed. Any variation required to be in writing. The sheriff had distinguished between two subsequent drafts of the Security. It was illogical to find that the oral contract related to the Security, which was not yet in contemplation.

[8] On the evidence, the judgment did not reflect the averments. There was also insufficient basis in evidence for the findings. Personal bar did not operate to complete an agreement. The sheriff had not analysed the legal basis for implying terms. The sheriff's

reasoning was inadequate to support a finding of oral contract. There was no basis for a finding that an agricultural tenancy existed.

Submissions for the respondent

[9] Counsel submitted that the Security formed only a part of a bigger transaction. The real controversy was on other matters: who should pay LBTT on transfer to the Company, and whether the Company was subsequently to grant security. This transaction made sense in context, which was to meet a temporary problem created by the trustee refusing to convey direct to the Company. It was competent to restrict a subsequent security by the terms of a prior agreement.

[10] On the evidence, it was necessary to find that the sheriff reached conclusions not justified by the evidence, and was clearly wrong. There was, in any event, sufficient evidence which the sheriff had relied upon. The evidence which the appellant identified as not discussed was irrelevant. There was no need for writing, as this was a contract to which statutory personal bar applied. Although the sheriff had not discussed the authorities on implied terms, these were clearly met where the secured title was to be disponed to another party. The authorities showed that the bar for reducing the sheriff's decision for lack of clarity was an extremely high one.

Decision

[11] This appeal is taken on a number of different grounds. One ground is to dispute that the sheriff had enough evidence to reach the conclusions he did. It is necessary to deal with that ground first, as if there is insufficient evidence then the decision cannot stand, however analysed.

[12] In relying on this ground, the appellant required to address the difficult task of proving a negative; that there was insufficient evidence. Counsel for the respondent drew attention to certain passages which justified the sheriff's view. These included the respondent's evidence referring to the arrangement (pages 109 to 115 of the transcript). This evidence was that the only purpose of the Security was to give the appellant protection in the event that the respondent did not, or could not, transfer title to the Company, due to incapacity or being "hit by a bus". Mr Ross, his advisor, gave evidence (pages 301 to 303) that the respondent agreed, on that basis, to sign a standard security when drafted. The standard security was to be in place until the transfer of title between the respondent and the Company. That evidence supports, and is capable of justifying, the sheriff's conclusion. There was sufficient evidence.

[13] The appellant also submitted that the sheriff erred in finding that the parties had reached a binding oral agreement on any matter. The findings were insufficient. The appellant sought to rely on authorities setting out the principles on which a contract is held to have been concluded. Reference was made to *Morgan Utilities Ltd* v *Scottish Water Solutions Ltd* [2011] CSOH 112 at paragraph 52 per L. Hodge, *Rodewald* v *Taylor* 2011 WL 1634 at paragraph 33 per L. Bannatyne, and to *Spartan Specialist Services Ltd v LHP Solutions Ltd* [2024] SAC (Civ) 24. It was submitted that the sheriff had not set out these findings and therefore could not have reached the conclusion that the parties had reached an oral agreement.

[14] We did not find these authorities to be of assistance, as they did not relate to the exercise being undertaken by the sheriff. In *Morgan Utilities*, the court's analysis related to assessing the intention to enter into a contract, a different question from whether the parties had agreed enough to amount to an enforceable contract. The court carried out that

assessment separately. In *Rodewald* and *Spartan Specialist Services Ltd*, the respective courts were deciding adequacy of notice in asserting a case on record. The parties' task of giving fair written notice, prior to proof, is quite different from the judge's task of assessing the evidence after it has been heard. The judge is tasked with making a decision on the basis of whichever facts he accepts have been proved.

[15] Here the sheriff, having identified the evidence he accepted, made findings as to the constitution and terms of an oral agreement. These findings were in somewhat diffuse terms for an event of central significance. It may be that the issue of fraudulent misrepresentation, not under appeal, became the main focus. However, we have been able to follow the sheriff's decision and the evidential basis upon which it was made. The sheriff found that Mr Burnett, the appellant's agent, suggested at the meeting of 30 October 2020 that the respondent grant a standard security. Mr Burnett stated that it would not be registered, on the basis that title would be more or less immediately transferred to the Company. The respondent agreed to grant a security in the belief, based on that representation, that it would not be registered. It was the stated intention of both parties that the proposed standard security would be destroyed, without having been registered, once title to the site was transferred to the Company (finding 21). It was an implied term of the agreement that the standard security granted by the respondent would be discharged upon repayment of a (now not relevant) sum, together with the transfer of title to the Company (finding 26). With the knowledge and agreement of the appellant, the respondent relied on the agreement that the standard security would be discharged once title to the site was registered in the name of the Company. In reliance on that he granted the Security, accepted the funds, and acquired title from the trustee at a price considerably higher than valuation (finding 27). The appellant refuses to register the disposition (finding 28), wants

to back out of the agreement (finding 30) and has called up the Security (finding 32). Other terms relating to the agreement are set out at findings 10, 11 and 13.

[16] These findings are sufficient to show that the sheriff accepted that agreement was reached, and what the terms of that agreement were. He found that the parties agreed that the respondent would grant a standard security which would not be registered and which would be discharged upon transfer of title to the Company. The only reason that transaction did not subsequently complete is the appellant's decision not to register the disposition.

[17] We are therefore not persuaded that the sheriff did not have sufficient evidence to justify his findings, or that he erred in finding that the parties reached a binding oral agreement. The appellant relied on there having been no agreement on other matters critical to the deal, such as who would pay the LBTT and whether the Company would grant a security. That may be so, but it did not prevent agreement on the matter of the Security. The sheriff's findings, in effect that the parties agreed the Security was no more than a temporary device to protect the appellant, is both justified on the evidence and consistent with the overall transaction.

[18] The appellant thereafter submitted that, even if there were a sufficiency of evidence, the sheriff nonetheless did not sufficiently explain his reasoning, to the extent that the appellant is unable to follow the decision.

[19] This ground challenges whether the decision was justified by the findings in fact and not, as the respondent submitted, whether the findings in fact were justified by the evidence. We therefore accept the appellant's submission that the respondent's reliance on the line of case law about whether findings are plainly wrong and cannot reasonably be explained (*Grier* v *Lord Advocate* 2023 SC 116 at para 109) is misconceived. Nonetheless, we do not

accept the appellant's proposition. As explained in *SSE Generation Ltd* v *Hochtief Solutions AG* 2018 SLT 579, at paragraphs 296 to 300, a judge requires to provide adequate reasons for a decision. A judgment must nonetheless be capable of being produced within a reasonable time and is expected to be concise. The fact that reasoning is not as clear as it might be does not mean it is inadequately reasoned if the reader is left in no real doubt as to the judge's reasons for reaching a particular view.

[20] We are not left in real doubt about the basis for the sheriff's decision. The judgment sufficiently explains the sheriff's reasoning, against the background circumstances of the overall commercial arrangement, in which the Security played no more than a peripheral part. In so finding we bear in mind the court's observation in *Grier* that;

> "An appellate court must be careful because of the limitations of the appeal process, with its narrow focus on particular issues rather than having, as the Lord Ordinary did, a panoramic vista of the evidence as a whole."

[21] While *Grier* does not apply here, the general observation remains true. The sheriff had an overview of the parties' arrangement, being one which did not contemplate deliberate refusal by one of the parties to allow title to pass and calling up the Security contrary to the parties' original intentions.

[22] The appellant proceeded to submit that the sheriff had failed to make findings in fact on critical matters founded upon by the defence. That argument was particularised by reference to the omission of most of the evidence given by the respondent's advisor, Ms Perfect. It was submitted that her evidence was that she was instructed to act on the respondent's behalf, that she communicated with Mr Burnett about the transaction and preparation of the Security, and that she discussed her instructions with the respondent. That evidence is described as crucial to the appellant's case. The point raises more fundamental issues of what was, or was not, an effective defence in the circumstances.

[23] We do not accept that the evidence of Ms Perfect was of material importance in relation to the central issue to this appeal, namely whether the parties reached binding oral agreement in the meeting on 30 October 2020 about the function of the subsequent Security. We were told during submission that Ms Perfect was not present at that meeting. The appellant identifies as crucial the instructions given by the respondent to Ms Perfect following that meeting. The appellant considered that the terms were to be documented, that prior discussions were about commercial terms only, and that the only legally binding part was the security itself. The appellant insisted that there was a loan to the respondent, and that was advised to Ms Perfect. She knew a security would be required, and informed the appellant. There were subsequent discussion of security terms. This led to the appellant making certain assumptions.

[24] The foregoing analysis does not, however, show that any of this evidence was relevant. The sheriff was not tasked with adjudicating on the whole transaction for acquisition of the site, but only the effect of the Security, which was no more than a peripheral issue to the overall transaction. The fact that negotiations continued on other matters, for example whether a security would be granted by the Company, was not germane to the present dispute. Ms Perfect's evidence did not cover the agreement as to how the Security would be treated, and made no difference to those findings. The sheriff held that the parties reached a binding oral agreement, which included reference to a security. Neither the prior nor subsequent events disturbed that, rendering Ms Perfect's evidence on that point irrelevant. The appellant's assumptions are no more than a subjective position. The sheriff found that he was wrong in those assumptions. Again, Ms Perfect's evidence did not affect that. The appellant insisted that the payment was in the form of a loan. The sheriff did not accept that evidence. The foregoing evidence, identified

by the appellant, does not demonstrate error, or even inconsistency, on the part of the sheriff. It is consistent with his findings, and therefore cannot be a ground for disturbing those findings.

[25] The appellant's next submission founded on the priority of the agreements. The appellant submitted that the sheriff ought to have given effect to the Security, not any prior agreement. The Security was dated 6 November 2020 and post-dated the 30 October 2020 agreement. It incorporated a personal bond, in which the respondent undertook to pay to the appellant the sum of £1,150,000 "when called upon to do so", for which the Security was granted. The Security terms took preference to any oral agreement.

[26] We do not agree. We accept, as did the parties, that there is no principle which prevents a prior agreement being given precedence over a subsequent written security. That proposition is based in the obiter remarks of the court in *Societe General SA* v *Lloyds TSB Bank plc* (unreported, 17 September 1999, Second Division, penultimate page):

> "…The letter showed that it was intended that its terms were to be given effect notwithstanding the terms of the formal security deed. There may be a question as to whether this would apply to a security granted after the letter…We are inclined to the view that there is no sound reason why the same would not also apply to a later security, provided once more that it was clear that the parties intended that it should be treated as governed by the terms of the letter."

[27] While obiter, the statement of principle is clear. Such an ancillary agreement is also expressly provided for in the standard conditions under the Conveyancing and Feudal Reform (Scotland) Act 1970, section 18(1A). That is an entire answer to this submission. It was a matter for the sheriff to determine whether the parties reached such a prior agreement. If they had, the prior agreement was capable of regulating the parties' rights arising from the Security. He held that they did so agree. The oral agreement rendered the subsequent written Security unenforceable in circumstances which did not comply with the

oral agreement. He found that the parties agreed that the Security would not be enforced as long as the respondent transferred title to the Company. The respondent did so, at least so far as was within his power, by delivering a disposition. The appellant refused to register the disposition. A party cannot rely on his own breach of contract to obtain a benefit under the contract (*Crimond Estates Ltd* v *Mile End Developments Ltd* 2022 SLT 570). While reliance on prior oral agreement, to qualify the otherwise binding terms of a subsequent registered security, might be considered a high-risk undertaking, the sheriff found that the respondent successfully proved his case.

[28] The appellant's next submission founded on the formalities of constitution of a binding agreement. It was submitted that the sheriff failed in the application of the Requirements of Writing (Scotland) Act 1995. Even if the oral agreement were established, and was in terms which would otherwise prevent enforcement of the Security, there are certain formal requirements of such agreements which the oral agreement did not meet. There was no dispute that the creation or variation of a real right to land, such as the Security, would require writing (section 1(2)(b)). The respondent, however, submitted that the oral agreement that the subsequent security would not be enforced, was not such an agreement, but was instead a contract for the creation or transfer of a real right in land (section 1(2)(a)). That distinction meant that writing was not required (section 1(3) and (4)) if one of the parties to the contract had acted or refrained from acting in reliance on the contract. We agree with that analysis. The question is whether the sheriff had evidence to justify finding that such acts or refraining from acting had taken place.

[29] He did. He found that:

> "With the knowledge and acquiescence of the [appellant], the [respondent] relied on the agreement that the title to [the site] would be registered in the name of [the

> Company] and that the standard security would be discharged upon that event occurring in doing the following…"

and listed the respondent's acts in reliance. The finding demonstrates that section 1(3) is satisfied. Writing was not required for the oral agreement. The appellant further submitted that section 1(3) was not available to create a prior agreement where there was none (*The Advice Centre for Mortgages* v *McNicoll* 2006 SLT 591 at para 17; *Shaw* v *James Scott Builders* [2010] CSOH 68 at para 64). It is evident, however, that the sheriff did not use personal bar in that way. His references to subsequent conduct were relevant to considering what the parties agreed on 30 October 2020.

[30] The appellant made a further criticism of the sheriff's finding of implied terms. Such terms are only established where they are necessary to give the contract business efficacy and commercial and practical coherence (*Marks & Spencer Plc* v *BNP Paribas Securities Services* [2016] AC 742). The sheriff did not set out why he considered these criteria applied. The precise terms of the Security, as opposed to the eventual creation of the Security, were not in the contemplation of the parties until after the meeting, and are inconsistent with the express terms of the oral agreement. We consider that the sheriff did not err in implying the term. It is correct that the sheriff did not, as he might have, set out how the criteria for implication were met. However, it is also clear that they were, in fact, met. The sheriff implied a term into the oral contract, not the Security. The term implied was that the Security would be discharged upon payment of a sum (since paid) and title being transferred to the Company. It was clearly necessary, as otherwise the security would cover property the respondent no longer held and for a debt which was never his, but that of the Company. The implied term prevented the agreement being legally incoherent.

[31] The appellant made a related point in relation to the undertaking made by Mr Burnett not to register the subsequent standard security. The sheriff found that the undertaking did not relate to the (subsequent) Security, but to an initial draft standard security for a smaller sum. The appellant submitted that this meant it was illogical to find that the oral agreement itself applied to the Security. That, however, is to fail to give effect to the oral agreement, which related not to any particular and identified document, but rather recognised that a standard security, in some form or other, would be drafted and granted. The form did not matter, because parties were in agreement that it was only a temporary, precautionary step and did not affect the overall acquisition of the site by the Company.

[32] The appellant has decided, as he admitted to the sheriff, that he no longer wishes to be part of this transaction. He has, as a result, sought to enforce the Security, a step that neither side foresaw would occur, and indeed agreed would not. As a result, there is no merit in the appellant's *cri de coeur* that he has paid to discharge the respondent's insolvency and has nothing to show for it. His remedy is to proceed with the agreement, and to register the disposition.

[33] These were the points advanced by the appellant. However, the parties also drew attention to the sheriff's finding in fact 12 which found that there was an agricultural tenancy over the site and another site. Parties agreed that this went beyond the evidence and the appellant invited this court to quash the finding. It does not, however, pertain to the matters under appeal, so we will not formally interfere. It is sufficient that we note that the fact is not soundly based on evidence and is incorrect.

Disposal

[34] We therefore dismiss the appeal and adhere to the interlocutor of the sheriff. Parties were unable to agree a disposal of expenses. They should attempt to do so now. If no agreement has been reached within 21 days of this decision, the clerk will arrange a hearing.