(12)

OUTER HOUSE, COURT OF SESSION

CA48/17

NOTE BY LORD BANNATYNE

In the cause

STEVEN MARK SHEAR

Pursuer

against

CLIPPER HOLDING II S.A.R.L.

Defenders

Pursuer: McIvride QC; Harper Macleod LLP
Defenders: Dunlop QC; HBJ Gateley

26 May 2017

[1] In this case the pursuer seeks interim interdict. There are two issues: whether a *prima facie* case is established and secondly, the question of balance of convenience.

[2] I turn firstly to look at the issue of *prima facie* case. The pursuer's position is this: the assignation of the standard security by AIB in favour of the defenders is invalid. This argument is founded on the following provisions of the Conveyancing and Feudal Reform (Scotland) Act 1970: sections 14 and 53; the terms of Forms A and B in Schedule 4; and in particular the terms of note 2 to the said schedule which provides *inter alia:*

> "In an assignation… a standard security in respect of an uncertain amount may be described by specifying shortly the nature of the debt (e.g., all sums due or to become

> due) for which the security was granted, adding in the case of an assignation, to the extent of £ being the amount now due thereunder."

The pursuer argues that the words "to the extent of £ being the amount now due thereunder" must be included in any such assignation. These words he contends are mandatory and any failure to comply by failing to include those words in the assignation is fatal and results in invalidity, namely: the assignation in the instant case does not transfer the standard security to the defenders. I am persuaded by the first argument advanced by Mr Dunlop under reference to *Newbold and others* v *The Coal Authority* [2014] WLR 1288 and *The Central Tenders Board and Another* v *White* [2015] UKPC 39 that the approach of the pursuer is wholly misconceived. I am satisfied that the courts in more recent times have adopted a more flexible approach to such issues. In terms of this approach, in deciding whether the consequences of failure to comply with such a requirement is invalidity a number of factors are considered.

[3] First and perhaps most importantly is the question of the seriousness of the breach. I believe the breach, namely: the failure to put these words into the assignation, cannot be characterised as serious. One could test this issue by asking this: In what way is the pursuer affected by these words not being present? Absolutely nothing was put forward on behalf of the pursuer that he was affected in any way, far less materially affected by their omission. Rather, the position is that the pursuer is relying on what might properly be identified as a purely technical issue. He knows to whom the debt has been assigned, although he disputes the security has been assigned. He does not as I understand it dispute that money is owed to the defenders or the amount owed to them. He does not dispute the granting of the standard security. There is no question of double jeopardy in light of the letter from AIB. The pursuer is doing nothing more than to rely on a technicality to delay payment. On the

other side of the equation there is the considerable inconvenience and in my view injustice in having AIB and the defenders go through the process of a further assignation and dealing with the various other conveyancing issues which arise therefrom.

[4] Overall, I believe to take the approach urged upon me by the pursuer would be to frustrate the purposes of the legislation as set out in the Act. Parliament must be assumed to have intended a sensible result and I believe that if failure to comply with this part of the note, led to invalidity, a sensible result would be wholly frustrated.

[5] The pursuer relied on two cases *Bennet* v *Beneficial Bank Plc* 1995 SLT 1105 and *Beneficial Bank Plc* v *McConnachie* 1996 SC 119 as supporting his position. I believe these authorities can be very easily distinguished. In each of these cases the question at issue was the proper identification of the subjects in conveyancing transactions. Clearly that is a matter of fundamental importance and where there was non-compliance the almost automatic result would be invalidity. They are not germane to the issues which were before me in this matter, which as I say appeared to me to be no more than a reliance on a technicality.

[6] I have to deal with the case from the sheriff court to which I was referred and on which reliance was placed by the pursuer, namely: *Onesavings Bank Plc* v *John Burns and Another* [2017] SC BAN 20. All I would say about that is I do not agree with the conclusion that the sheriff reached. It is perhaps not surprising the sheriff reached the conclusion which he did as he was not addressed in the same way as I was addressed. I simply do not agree with the decision the sheriff arrived at and I do not need to go any further into that.

[7] I think that is sufficient to deal with the matter before me. There is simply no *prima facie* for the reasons which I have just stated. A number of further arguments, however, were advanced by Mr Dunlop and I turn briefly to deal with these. In particular he argued

that the court should have regard to the clear words of the assignation. The commercial intent was clear, namely: to assign the standard security and he urged upon me that I should follow this. It was put this way: I should be slow to elide or destroy the clear intent to transfer the standard security. I accept that what is said in the assignation is crystal clear; I also accept that there is a long and well-established line of authority that the court should be slow to destroy such a clear intent. However, I believe that that is not an argument that applies here, that is an argument which applies I believe *inter se*, that is between AIB and the defenders and I do not believe it is an argument that can be advanced when considering the issue of validity between AIB and the pursuer. It is not an argument which can be advanced when considering the issue of validity with respect to the pursuer, who is of course, not a party to the assignation.

[8] Mr Dunlop also relied on the decision of Lord Dunpark in *Sanderson's Trustees* v *Ambion Scotland Ltd* 1994 SLT 645 as holding that the wording of the note was not mandatory. Lord Dunpark held that there was compliance with section 53(1) in that the assignation was as closely as may be appropriate to the circumstances. So he did hold that the words founded on by the pursuer in the instant case were not required. However, I think the context of this finding has to be taken into account. It is clear that his decision was in the context of the special circumstances present in that case. Such circumstances are not present in the instant case, if anything, the present case is what one might describe as a run of the mill one in which no special circumstances really exist and I do not think that therefore Mr Dunlop could properly rely on the decision of Lord Dunpark.

[9] So far as Mr Dunlop's argument that interest and penalty provisions showed that there was a speciality of the type identified by Lord Dunpark, I am not persuaded by this

argument, I believe that the answer to that argument is provided by section 10 of the Act and I do not think I need to look at that further.

[10] The final argument advanced by Mr Dunlop was that a purposive approach should be applied to the construction of the Act and in particular he referred me to section 14 and he said this:

> "If he was correct then in an all sums due security on assignation it remains an all sums due security, if the pursuer is right then the necessary consequence of an assignation is to take an all sum security and transfer it into a fixed security and he said that having regard to section 14 that did not vest the security in the assignee as effectually as if the security had been granted in his favour."

In other words, if the pursuer's argument was correct, then the purpose of section 14 was defeated. I believe that looking to the whole terms of section 14(1) there is some strength in that argument. Had I not been with Mr Dunlop on the first point he made then I would have found in his favour in relation to this argument.

[11] For these reasons I find that there no *prima facie* case has been shown.

[12] Secondly, had I had to consider balance of convenience I would, without difficulty, have found that the balance of convenience favoured the defenders. There were two bases put forward on behalf of the pursuer why the balance of convenience favoured him. One that he believed that he would get a better price for the property, in my view there was absolutely nothing in this point; the defenders would be under an obligation to get the best possible price. If the pursuer feels that they did not do so and that they breached their duty in that respect then he can raise an action against them for damages. This is not a case whereby the defenders by taking over this property are somehow depriving the pursuer of being able to continue to run his business or something like that, which is a situation where one might have very much thought that the balance of convenience favoured the pursuer. That is not the situation here: the pursuer intends to sell the property as do the defenders

and it would seem to me in those circumstances impossible to see how the balance of convenience could ever favour him.

[13] As regards his second argument that somehow he should get the next rental payment, against the background of this case I think that that argument simply does not even get off the ground.

[14] For these reasons I find that there is no *prima facie* case, and I find that the balance of convenience quite clearly favours the defenders. I accordingly find against the pursuer and I refuse interim interdict.