EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 19
P420/24

Lord Malcolm
Lady Wise
Lord Armstrong

OPINION OF THE COURT

delivered by LORD MALCOLM

in the petition

of

A and OTHERS

Petitioners

Petitioners: Moynihan, KC; Shepherd and Wedderburn LLP

26 July 2024

[1] B died in 2024. He was a director of C Limited. The company had been run by him and the late D since its inception. They both had 450 ordinary shares of 100p each in the company. D's shares are now vested in his executors, and his son has been appointed a director in his place. In his will B appointed the petitioners as his executors. They are willing to act as such but have still to apply for confirmation, thus as yet they have no title to the deceased's shares in the company, see section 14(1) of the Succession (Scotland) Act 1964. (This opinion has been anonymised to protect commercially sensitive confidential information.)

[2] The estate is complex and the obtaining of confirmation will take some time, possibly three to four months or longer. Meantime the company is in financial distress and

urgently requires additional finance. The company's articles of association provide for certain matters ("consent matters") to be approved by a meeting which includes both B and D, or their respective successors. Approving said additional finance and granting security are consent matters, as is the appointment of a director. Until confirmation is obtained the executors have no entitlement to give such consent or appoint a replacement director. Thus as matters stand the necessary finance cannot be obtained. There is a real risk that the company will become insolvent.

[3] In these circumstances the petition asks the court to exercise its extraordinary equitable jurisdiction, also known as the *nobile officium*, to ordain the rectification of the register of members of the company by substituting the petitioners jointly as executors in place of the late B. This will allow a director to be appointed to succeed B.

The petition was served on all with an interest. No answers have been lodged which is unsurprising since it is to everyone's benefit if the prayer of the petition is granted.

[4] The petitioners have drawn attention to certain decisions south of the border, namely *In re Lancashire Cleaning Services Ltd* [2017] EWHC 1094 (Ch), [2017] Bus LR 1255, *Ellott* v *Cimarron UK Ltd* [2017] EWHC 3872 (Ch), and *Williams* v *Russell Price Farm Services Ltd* [2020] EWHC 1088 (Ch), [2020] BCC 636. In similar circumstances the court was prepared to order rectification prior to probate under and in terms of section 125 of the Companies Act 2006. However, it was influential in those cases that, unlike in Scotland, in England and Wales title to a deceased's property, including shares, vests in the executors on death.

[5] The petitioners recognise that there is authority that in Scotland executors can do certain things in advance of confirmation, for example vote in a sequestration, see *Chalmers' Trs* v *Watson* (1860) 22D 1060. However, in the absence of an active title there are

limitations, for example prior to confirmation executors cannot intromit with and administer the estate, see *Mackay* v *Mackay* 1914 SC 200, Lord President Strathclyde at 203, nor enforce a decree, *Chalmers' Trs*, Lord Ivory at 1064. A discharge cannot be granted prior to confirmation, *McLaren on Wills and Succession*, 3rd ed. 1616. Part of the reasoning in the cases is that the executors' acts are validated retrospectively by the grant of confirmation. None of this is of practical assistance in present circumstances. Any lender would wish assurance that matters were authorised and in order before advancing funds.

[6] If the court is satisfied that the section 125 route is available in Scotland there would be no need to invoke the *nobile officium*. If that mechanism cannot be used, the court is being asked to fill what is described as a gap in our law. The petitioners submit that the possible alternative of appointing a judicial factor to the company or the shares would be an excessive and unwieldy procedure, and is in any event also an exercise of the same jurisdiction.

[7] After hearing counsel, and on the tendering of an undertaking that the petitioners (a) would not resign office before the grant of confirmation, (b) would apply for such as soon as possible, and (c) would pay all taxes necessary for the grant of confirmation, the court granted the prayer of the petition. We now give our reasons for that decision.

[8] Section 125 has been amended since the English decisions, but not in a manner which renders consideration of them redundant. It is apparent that the judges were not convinced that section 125 was designed for what were described in *Lancashire Cleaning Services Ltd* as "quite exceptional" circumstances (paragraph 15). However it might well have been too late for that company if nothing was done prior to the grant of probate. The

judge stressed that the decision was not a precedent to be used for:

> "the ordinary run of the mill type of case where the company still has shareholders and directors able to act and where, in normal course, they would be fully entitled to await the grant of probate as constituting sufficient title to executors named in a will" (paragraph 19).

[9] Heavy reliance was placed on observations of Newey J in *In re Goodman, (decd)* [2014] Ch 186 to the effect that an executor derives his title from the will and the property vests from the moment of death. In *Ellott* Barling J did likewise, declaring that the circumstances before him were exceptional. He considered that there was an inherent power necessarily encompassed within the statutory provision to make the requested order (paragraph 17). Earlier in the judgment he noted that, in terms of the company's articles of association, on death the deceased's shares devolved upon the executor as the personal representative named in the will, and that he had elected to be registered as a shareholder. Counsel for the petitioners informed the court that C's articles have no equivalent provisions.

[10] In *Williams* HH Judge Paul Williams doubted that the framers of section 125 had in mind the problem facing him and the judges in the earlier cases (paragraph 12). Nonetheless he was able to interpret the statutory provisions as covering cases of exceptional urgency where matters could not wait for probate. His order was conditional on an undertaking similar to the one required here and mentioned earlier. It serves to prevent a scenario where the petitioners resign office as executors but retain membership of the company.

[11] As amended by section 47 of the Economic Crime and Corporate TransparencyAct 2023, section 125(1) allows rectification of a company's register of members if (a) it does not include information it is required to include, or (b) includes information that it is not

required to include. Subsection (3) provides that the court may decide any question as to the title of a party to the application to have his name entered in or omitted from the register, and generally address any question necessary or expedient to be decided for rectification of the register.

[12] The immediate issue with applying this provision is that it is difficult to say that the petitioners' names require to be on the register. It must include the members' names and addresses (section 113(2)). However, the petitioners do not have title to the deceased's shares till confirmation is granted. And in these circumstances the subsection (3) power to decide any question as to title does not arise; or if it does, the answer would be in the negative. The reference to necessary or expedient decisions can hardly be used to create a title to shares which does not exist.

[13] The court has no difficulty in concluding that the urgency of the situation demands that in the absence of a good reason to the contrary, if practicable the court should assist with a solution. The possibility of appointing a judicial factor might suggest that there is no gap in the law requiring to be filled, but that would do less than justice to the scope of the court's inherent equitable jurisdiction. In *Royal Bank of Scotland plc* v *Gillies* 1987 SLT 54 Lord Justice Clerk Ross said:

> "The *nobile officium* has been defined as an extraordinary equitable jurisdiction of the Court of Session inherent in it as a supreme court; it enables it to exercise jurisdiction in certain circumstances which would not be justified except by the necessity of intervening in the interests of justice" (page 55).

The jurisdiction has been used to alleviate and ameliorate procedural burdens where these were unduly onerous or obstructive for the achievement of just solutions, see the cases cited by Stephen Thomson, *The Nobile Officium in Civil Jurisdiction*: *Equitable Gap-Filling in Scotland* [2014] vol 24 Tulane European & Civil Law Forum 125 at 135. To insist on a

judicial factor would be the proverbial hammer to crack a nut. In *Murray's Trs, Petitioners* (1869) 7M 670 Lord Justice Clerk Patton explained that an exercise of the *nobile officium* can be "rested upon alleged necessity, or such strong and clear expediency as to call for the special intervention of the Court to meet a case of exigency" (page 671). We take the view that this is such a case.