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Appeal court in Scotland agrees that WeRe Bank cheques are worthless and businesses cannot be made to accept them

Steward McLeod v. Prestige Finance Limited
[2016] ScotCS CSIH_87

Article by David Bowden

BAR STANDARDS BOARD
REGULATING BARRISTERS

Executive speed read summary

A lender assigned its loan. That loan was secured on residential property in Scotland. There were substantial arrears and the lender called in the loan whose balance was over £75,000. The debtor sought to defend possession proceedings in the Sheriff court but his counterclaim was dismissed. The debtor tried to pay off his balance using a worthless cheque issued by WeRe Bank. The FCA has issued a warning notice about this company warning consumers not to have anything to do with it. The debtor brought an action in the Inner House for '*reduction*' claiming that his loan or mortgage was wrong, fraudulent or forged. Lord Tyre in the Outer House dismissed that action. Lord Tyre ruled that a lender was '*entitled to refuse to accept payment otherwise than in legal tender*'. An appeal to the Inner House was refused with the Lord President giving the unanimous judgment. He ruled that the WeRe Bank is not a regulated bank or a participant in the interbank clearing system and that the lender was not obliged to accept the payment tendered by a WeRe bank cheque.

Steward McLeod v. Prestige Finance Limited
[2016] ScotCS CSIH_8724 November 2016
Inner House of the Court of Session (Lord Carloway the Lord President, Lady Clarke of Calton and Lord Glennie)

What are the facts?

Mr McLeod (the debtor) had a secured loan on his house in Stewarton with Morgan Stanley Bank International Limited taken out on 18 April 2007. The loan was assigned to Prestige Finance (the lender) on 9 July 2009. The debtor failed to make loan repayments. The lender served a calling up notice and complied with the pre-action debtor protection requirements. The lender sought possession of the property. By May 2015 the debtor owed more than £75,000.

What happened in the first instance Sheriff Court?

The case came before Sheriff Foran in Kilmarnock Sheriff Court on 15 May 2014. The debtor had a lay supporter who made notes. The debtor requested the case be transferred to the Court of Session which the Sheriff refused. The debtor produced a document which he called a 'counterclaim' which contained these 3 points:

- He objected to the jurisdiction of the sheriff court on the ground that '*the Sovereign Man bares [sic] the right and privilege to be heard in a court of Common Law",*
- He asserted that the lender had presented no evidence to the court or himself of '*Proof of Claim to a Valid Cause of Action'*, and
- He claimed that the lender was hiding or unable to supply the '*Original Instrument of Indebtedness'*.

The Sheriff refused to allow this document to be lodged because '*it did not contain any counterclaim'*.
The debtor left the hearing. The Sheriff granted the lender the possession order it sought.

What happened on the first appeal to the Sheriff Principal?

On 11 June 2014 the debtor lodged an application for permission to appeal this order out of time to the Sheriff Principal (being the 1st appeal route in Scotland). On 3 July 2014 the Sheriff Principal refused the debtor's application saying it had '*no comprehensible grounds or basis of appeal'*. In making a rod for the Court of Session's back, the Sheriff Principal merely invited further vexatious litigation by stating that the debtor's only remedy was '*an action for reduction raised in the Court of Session'*. As sure as night follows day, that is what happened next.

On what basis did Mr McLeod get an injunction against the lender?

On 12 June 2015, a Lord Ordinary, Lord Doherty, enjoined the lender from either enforcing the sheriff's possession order or even from advertising the debtor's property for sale. The court file record that the Lord Ordinary '*expressed very real doubt as to whether it could be said that there was an arguable case for reduction of the sheriff court decree*' but that he had decided '*with considerable hesitation, and making allowance for Mr McLeod's status as a litigant in person*' that it would not be appropriate to conclude at that stage that there was no arguable case.

What else is known about WeRe Bank?

WeRe Bank is a UK-based venture which purports to be a people's or community bank, and appears to have created its own currency, the RE. Members of the Re-Movement are required to issue a Promissory Note (a legal instrument in which one party agrees in writing to pay a sum of money to the other party) to WeRe Bank to the sum of £150,000, which is payable '*within a ten-year anniversary'* from the time of

joining. However, WeRe Bank states that it will not need to call in the Promissory Note. Members are then able to buy RE cheque books.

WeRe Bank states that its cheques can be used to pay all public liabilities such as council tax demands, utility payments, tax and private payments between consenting parties including mortgages. Its website claims that, under sections 42 and 43 of the Bills of Exchange Act 1882, if payment is refused the payee is acting in dishonour and liability for the payment ceases. The sort code and account number on the cheque book is invalid and is the same number that WeRe Bank issues to everyone who signs up.

When is the dodgy cheque first sent?
On 19 May 2015 the debtor sent the lender a cheque for £75,501.66 drawn on the 'WeRe Bank' with an address ostensibly in Manchester.

What arguments did Mr McLeod make in the Outer House of the Court of Session?
Where someone in Scotland wished to challenge the existence of a legal document because it is wrong, fraudulent or even forged then they need to bring an action of reduction. The debtor duly brought his claim for reduction in June 2015. He advanced these grounds for this:

- His consent to the assignment by Morgan Stanley to the lender was not sought or obtained,
- He had no knowledge of the calling-up notice,
- His requests to the lender for the original documents, including the '*original instrument of indebtedness*' and the assignment, had been refused,
- The sheriff had no jurisdiction to hear the case in the absence of '*verified*' documents and witnesses to their authenticity,
- He was not in default believing the lender's calculations to be incorrect, and
- The lender was not entitled to refuse to accept the WeRe cheque.

What judgement did Lord Tyre give in the Outer House?
All these arguments were rejected by Lord Tyre in his judgement dated 20 May 2016 **[2016] ScotCS CSOH_69.** He said it was unnecessary for either the lender or Morgan Stanley to seek to obtain his consent to the assignment of his debt. He ruled also that the debtor had '*no right to demand that the case be heard in the Court of Session*'. As to the dodgy WeRe Bank cheque he ruled that he did not '*regard his attempt to persuade Prestige to accept payment in the form of a WeRe cheque as in any way assisting him*' and the lender was '*entitled to refuse to accept payment otherwise than in legal tender*'.

The debtor's claim for reductions was dismissed. In the ordinary course of events, that would have been the end of the matter. However a determined debtor sought permission to appeal this ruling to the Inner House of the Court of Session which has broadly equivalent status to the Court of Appeal in London.

What grounds did Mr McLeod advance for making his appeal to the Inner House?
This is not entirely clear with the Lord President caustically observing that the debtor's '*grounds of appeal, and indeed the averments in the summons, are largely incomprehensible in so far as they might be read as legal propositions directed towards faults in the Lord Ordinary's reasoning*'. The Inner House thought only that there was a complaint '*which is capable of being understood, about a failure to produce original documents in the summary application process'*.

What did the Inner House rule?
Not surprisingly the debtor's appeal was dismissed in a short judgment in which all 3 appeal court judges agreed with. The Lord President noted that the debtor '*did not present any argument based upon a lack of principal documents*' but that he had '*he left the hearing, having been warned of the consequences of doing so and, in particular, that decree may follow'*. He did not appeal the possession order '*until it was too late to do so'*.

The Lord President said the '*court is satisfied that principals of the documents, the absence of which the pursuer now complains, do in fact exist'*. He ruled that '*the remedy of reduction, being an equitable one, is only available in circumstances where it is necessary to ensure that substantial justice is done'* but that he was '*unable to identify any error in the Lord Ordinary's approach*'. He ruled there were '*no exceptional circumstances requiring the court to intervene in order to ensure substantial justice in this case'*.

As to the dodgy WeRe Bank cheques the Lord President said that this '*institution is not a regulated bank or a participant in the interbank clearing system*' and that the lender '*had not been obliged to accept the payment tendered by cheque*'.

What status does the Inner House ruling have in courts in England and Wales?
This is a ruling from the Inner House of the Court of Session so judges in Scotland in the Outer House or in Sheriff Courts must follow it. However, the Court of Appeal in London is not strictly bound to follow it. Judges sitting in England and Wales in either the High Court or County Court must follow decisions of the Court of Appeal and Supreme Court. In *Marshalls Clay Products v Caulfield* **[2004] EWCA Civ 422, [2004] ICR 1502,** Laws LJ said (in relation to Employment Tribunals) *'as a matter of pragmatic good sense'* that lower courts in *'either jurisdiction will ordinarily expect to follow decisions of the higher appeal court in the other jurisdiction (whether the Court of Session or the Court of Appeal) where the point confronting them is indistinguishable from what was there decided'.*

What decisions have English courts made so far on WeRe Bank cheques?
There is an unreported first instance decision in Central London County Court. This is the case of *Ewan v. Santander UK* plc handed down on 6 April 2016. Mr Ewen issued 3 cheques totaling £640,000 payable to Santander UK to discharge his liability under 'buy to let' mortgages he had with the lender. The lender refused to present the WeRe bank cheques. Mr Ewen brought a claim for a declaration that his liability had been discharged. The lender applied for summary judgement.

After a 4 hour hearing at which Mr Ewen had the assistance of 2 McKenzie friends, a Recorder dismissed Mr Ewen's claim. The Recorder ruled the lender was under no obligation to accept the worthless cheques issued by WeRe Bank. Mr Ewen claimed that 1 bank had accepted 1 of the WeRe Bank cheques but he was unable to direct the Recorder to where this was evidenced in the bundle of documents produced for the hearing.

What decisions have courts in other countries given about WeRe Bank cheques?
Lord Tyre in his judgment notes the Canadian case of *Servus Credit Union Ltd* v. *Parlee* **[2015] ABQB 700**. He says that the Canadian court has described WeRe Bank at paragraph 61 of its judgement '*as a fraud'*

What action have regulators taken about WeRe Bank?
On 17 September the FCA has issued a consumer warning notice warning about WeRe Bank. This notice is here: www.fca.org.uk/news/consumer-notice-were-bank. The FCA says that it '*has received many reports from consumers, public bodies and commercial organisations about an entity styling itself as WeRe Bank'*.

The FCA says that '*although WeRe Bank refers to itself as a bank, based on the information currently available to us, it does not appear to be carrying on any activities that would require it to be authorised by the FCA*.' The FCA says that it is '*concerned that vulnerable consumers may be attracted to WeRe Bank's claim that they will be able to pay off their debts* 'for free' *using RE cheques, even though they have not had to pay any money into an account'*.

Cheque and Credit Clearing Company Limited operates the payment system in England, Scotland and Wales. It states that '*cheques are not legal tender and never have been'* and that '*a creditor is entitled to be paid in legal tender and can refuse payment in any other form*'.

The FCA says it has '*received numerous reports from financial institutions, councils, utility companies and other businesses that have been presented with WeRe cheques by consumers attempting to pay off their debts. None of these institutions has accepted the cheques as legitimate payment*.'

Rather limply the FCA says that '*WeRe Bank does not appear to be carrying on any activities which require FCA authorisation'* and as such it is not taking any action. The FCA's pathetic response is merely to say that it advises '*any consumers considering dealing with WeRe Bank to exercise caution'* and that it believes that consumers '*are unlikely to be able to pay any of your debts using a cheque from WeRe Bank*' but rather that they '*may end up with additional charges from your creditors for late payment*.'

6 December 2016

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