SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY

A2012/05

JUDGMENT OF
TEMPORARY SHERIFF PRINCIPAL B KEARNEY

in the cause

NORTH LANARKSHIRE COUNCIL
Pursuers and Respondents

against

SHIRLEY CROSSAN
Common Debtor and Appellant

and
AIRDRIE SAVINGS BANK
Arrestees

Act: Mrs Thornton, Advocate, instructed by The MFY Partnership, Solicitors, Airdrie
Alt: Mr Blair, Advocate, instructed by North Lanarkshire Council

AIRDRIE: 2 May 2008

The Sheriff Principal, having resumed consideration of the appeal, ALLOWS same, RECALLS the interlocutor of the Sheriff dated 3 July 2007; SUSTAINS the pleas in law for the common debtor and REPELS the plea in law for the pursuers; FINDS the pursuers liable to the common debtor in the expenses of the proceedings before the Sheriff and in the expenses of the appeal; CERTIFIES the cause as suitable for the employment of counsel at the appeal and in the court below; ALLOWS accounts of expenses to be given in and REMITS same to the Auditor of Court to tax and to report; remits the cause to the Sheriff to proceed as accords; and decerns.

Brian Kearney

NOTE:

Background

1. This appeal arises out of an action of furthcoming raised by the pursuers and respondents (hereinafter "the Council") against Shirley Crossan the common debtor and appellant (hereinafter "the common debtor") and Airdrie Savings Bank who are the arrestees. It is averred by the Council and admitted by the common debtor that the sum sued for arises out of summary warrants granted by the Sheriff at Airdrie in respect of Council Tax for the years between 1993/1994 and 1997/1998 together with relevant statutory additions. It is also averred by the Council and admitted by the common debtor that arrestments were laid on in the hands of Airdrie Savings Bank, the arrestees, and that said arrestment secured the sum of £2,244.91 which is the sum sued for. As well as admitting this the common debtor avers that "the funds attached by the said arrestment are state benefits and therefore protected from attachment by arrestment". The pleas in law for the common debtor reflect this stance and are summed up in the third of these pleas in law which is in these terms: "The arrestments of state benefits not being lawful, the Pursuers' crave is not competent and the action should be dismissed".

The proceedings before the Sheriff

2. It was submitted to the Sheriff that it was well established law that payments such as those arrested, namely, state benefits, were alimentary in nature and were therefore, at common law not lawful subjects of arrestment. It was further argued that the provisions of section 187(1) of the Social Security Administration Act 1992 and section 45(1) of the Tax Credits Act 2002 reinforced this by providing statutory protection for such amounts against arrestment. The common debtor's counsel recognised that the arrestment had not been laid on in the hands of the Department of Work and Pensions, which is the Government authority responsible for delivering such benefits: the arrestments had been laid on in the hands of the Airdrie Savings Bank with whom the common debtor had an account. This, however, submitted counsel, was immaterial. She submitted that when alimentary funds were paid into a bank and not in-mixed with other funds then their alimentary character persisted and therefore the purported arrestment were illegal. In support of this she referred to *Woods v The Royal Bank of Scotland* 1913 1 SLT 499 which is a decision of Sheriff-Substitute Welsh sitting in Greenock. In this case arrestments had been laid on in respect of on a sum paid to the common

4. The learned Sheriff took the view that the case of *Woods*, which was decided in relation to other statutory provisions, namely, the said section 19 of the First Schedule of the Workmen's Compensation Act 1906, was not in point. She took the view that the case of *Royal Bank of Scotland v Skinner* made it clear that once monies had been paid into a bank the funds were simply consumed by the banker who gave an obligation to account therefore to the customer. The Sheriff was fortified in her view by the Scottish Law Commission's conclusions.

Grounds of appeal

5. The common debtor appealed to the Sheriff Principal on the following grounds:

"1. The learned Sheriff erred in law in finding that the funds in question lost their alimentary character when paid into the common debtor's bank.

2. In relation to section 187(1) of the Social Security Administration Act 1992 and section 45(1) of the Tax Credits Act 2002, the learned Sheriff erred in law in finding that intention of Parliament was to protect the initial relationship which existed between payer and payee.

3. The learned Sheriff erred in law in attaching significance to the phrase 'shall not pass to any other person by operation of law'.

4. The learned Sheriff misdirected herself in relation to Paragraph 6.285 of Law Commission Report number 95. Said paragraph is concerned with earnings, which are subject to limited arrestment. The Commission refers to the 'prevailing view' being that exception from arrestment applies only to earnings in the employer's hands, but immediately recognise that a statutory provision had been held to protect a sum lodged in a bank account – a sum which was identifiable and not mixed with other funds. Paragraph 6.286 refers to the difficulty in framing the rules on tracing earnings where they had become mixed with other funds.

5. The learned Sheriff misdirected herself in failing to take account of references in Commission Reports to the statutory exemption from arrestment of Social Security Benefits."

Submissions for appellant

6. The appeal first called before me on 8 January 2008 when Mrs Thornton, Advocate, represented the appellant. She said that the appellant was a single parent with two dependent children. She referred to the common debtor's first inventory of productions items no 1 to 9 of which showed that the common debtor had received sundry payments of income support, child benefit and tax credits and a budgeting loan all which had been paid into the Airdrie Savings Bank, the arrestees in the present action. On 31 March 2005 the balance was £2,244.91. On that date arrestments had been laid on which had attached this amount. These amounts consisted entirely of state benefits

which were protected from arrestment by statute. Section 187(1) of the Social Security Administration Act 1992 as amended provided as follows:

"**Certain benefit to be inalienable.**

187. - (1) Subject to the provisions of this Act, every assignment of or charge on -

(a) benefit as defined in section 122 of the Contributions and Benefits Act;

(aa) a job seekers allowance;

(ab) state pension credits;

(b) any income-related benefit; or

(c) child benefit,

and every agreement to assign or charge such benefits shall be void; and, on the bankruptcy of a beneficiary, such benefit shall not pass to any trustee or other person acting on behalf of his creditors."

Section 45(1) of the Tax Credits Act 2002 contained similar provisions. It was a matter of agreement that the reference to "assignment and charge" embraced arrestments and that the funds concerned were covered by these provisions. In effect these provisions enacted that every arrestment of or charge on the said benefits was void.

7. Mrs Thornton said that for a long time now state benefits have been paid by direct payment into the bank account of the beneficiary. She submitted that, provided the funds concerned could be identified, then the protection from diligence which attached to this funds by virtue of the provisions of the 1992 and 2002 Acts already referred to also extended to the funds when they were in bank; the case of *Woods, cit supra,* was an example of this.

8. The learned Sheriff had distinguished the case of *Woods* on the basis that the statutory scheme in the instant case was different from the scheme under the Workmen's Compensation Act 1906 which was concerned in *Woods*. In this scheme the relevant provision was: "a weekly payment, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached and shall not pass to any other person by operation of law, nor shall any claim be set off against the same.". In relation to this the Sheriff had noted that the phrase, "shall not pass to any other person by operation of law" did not appear either in section 187(1) of the 1992 or section 45(1) of the 2002 Act and had commented that this omission was "not insignificant". In Mrs Thornton's submission, however, the omission of these words was not significant; what had weighed with the Sheriff-Substitute was the identifiability of the funds. This was clear from the Sheriff's words starting at the bottom of page 499:

"The pursuer maintained that whenever the sum by way of redemption was paid over in this case it lost its peculiar character and became part of the common debtor's moveable estate which could be arrested. I do not agree. I think that so long as the sum can be identified as 'paid by way of redemption' it remains under the protection of the section, and I cannot hold that the mere fact that it has been placed on deposit receipt has in any way changed its character."

It was clear from the bank statements produced by the common debtor that the payments could be identified and therefore the case of *Woods* was well in point. State benefits, like the benefits under the Workmen's Compensation Act of 1906, where creations of statute and were, so long as identifiable as such, entitled to the protection of the statute.

9. Mrs Thornton then mentioned the references to the deliberations of the Scottish Law Commission, including Memorandum No. 49, *Third Memorandum on Diligence: Arrestment and Judicial Transfer of Earnings*, published in October 1980. Paragraphs 4.11 to 4.13 touched upon these matters under the heading, "'Tracing' exempt earnings paid into bank account etc.". In Mrs Thornton's submission, however, the Law Commission here was, as this heading indicates, principally concerned with addressing the issue of "tracing" funds in bank accounts and the like and this was not a problem in the instant case.

10. Mrs Thornton also referred to paragraph 2.20 of the same memorandum of the Scottish Law Commission which is in these terms:

"Social security Benefits: the wide range of social security benefits, pensions and allowances payable by the Department of Health and Social Security and unemployment benefit payable by the Department of Employment are exempt by statute and perhaps also at common law. In our First Memorandum on Diligence, we concluded that the case for rendering supplementary benefit and other social security benefits attachable for debt could only be adequately considered by an advisory body with United Kingdom terms of reference and that, as at present advised, we do not consider that social security benefits should be attachable for debt."

11. Mrs Thornton then referred to the Scottish Law Commission's *Report on Diligence and Debtor Protection* which was published in 1985. In particular she referred to paragraphs 6.285 and 6.286 and it is convenient to reproduce these here:

"Tracing earnings paid into bank or other accounts

6.285 Increasingly, employers pay their employees by cheque or by direct transfer to the employee's bank account. The enactments limiting wages arrestable in execution of a decree, and prohibiting the arrestment of earnings on the dependence of an action, do not expressly protect the earnings when they are deposited in a bank or savings account or otherwise invested. Likewise, there seems no authority for the view that alimentary income payments (which at common law include personal earnings) retain their alimentary character once they have been

paid. The prevailing view is therefore that the exception only applies to earnings in the employer's hands. In one sheriff court case [here a footnote refers to *Woods v Royal Bank of Scotland* (1913) 1 SLT 499], however, it was held that a statutory provision that certain sums due to injured employees under the Workmen's Compensation legislation 'shall not be capable of being attached', protected the sum not merely in the employer's hands but also where it had been lodged in the employee's bank account, provided the sum was identifiable and not mixed with other funds.

6.286 In Consultative Memorandum No. 49, we invited views on the question whether the exceptions of earnings from arrestment should be extended to earnings paid in to a bank or savings account or converted to some other form into which they might be traceable. Those who commented on this proposal unanimously rejected it. Several commentators thought it would be difficult to frame effective and fair rules on tracing earnings, where for example they had become mixed with other funds. In view of this response, we make no recommendations to change the law."

It was significant, said Mrs Thornton, that the Commission recognised the decision in *Woods* without adverse comment. It was also significant that the Commission reported commentators as thinking that it would be "difficult to frame effective and fair rules on tracing earnings" and that the only example of such difficulty was where the earnings "had become mixed with other funds". This, of course, was the very difficulty which did not exist in the case of *Woods*, or, indeed, in the instant case.

12. Mrs Thornton then referred to Scottish Law Commission document No. 164, *Report on Diligence on the Dependence and Admiralty Arrestments*, which was published in 1998. In particular she referred to paragraphs 9.109 to 9.111 of this report. These paragraphs substantially hark back to the discussion of this matter in the Memorandum number 49, referred to above, and state at paragraph 9.110:

"The prevailing view is therefore that an arrestment of a bank account into which earnings have been paid attaches the whole of the credit balance at the time of the arrestment."

In the next sentence, like the Memorandum No. 49, it mentions without demur the case of *Woods*, and, in paragraph 9.111 concludes:

"it would not be sensible to prohibit arrestment of any bank account into which earnings were paid, because a large part of the credit balance could well consist of other sums that should not be protected for attachment by creditors. If this was the basis for the "prevailing view" then there must be doubt as to whether that view embraced cases wherein this difficulty did not exist."

13. It was common ground that alimentary provisions were protected from diligence. If authority were needed for this it could be found in *Graham Stewart on Diligence* at page 93 in the first section

of paragraph "7" on that page. Mrs Thornton also referred to *Allan's Trustees v Allan & Others* (1872) 11 M 216.

14. Mrs Thornton concluded by emphasising that her primary submission was that the payments to the common debtor were made in consequence of a statutory scheme the aim of which was to provide a minimum standard of living for the common debtor and her family. The payments were clearly identified in the account. The bank had an obligation to account to its customer for funds which were received. These funds consisted entirely of monies which enjoyed the relevant statutory protections. To hold that because these monies had been conveyed to the beneficiary by way of her bank account would be to defeat the purposes of the Act.

Submissions for the respondents

15. Mr Blair, Advocate, for the respondents, drew my attention to the discussion of arrestment in the *Scottish Law of Debt* by Professor W A Wilson at paragraphs 17.1 to 17.3 which includes, at 17.3, a quotation from Bell's *Commentaries*, II, 71: "It is the obligation to account which is the proper subject of attachment" Counsel also referred to the word of Lord Dunedin in *Caldwell v Hamilton* 1919 SC (HL) 100 at 109: "Arrestment can never be of anything but something of which there is a present liability to account."

16. It was clear from the words of section 187(1) of the 1992 Act that protection had been conferred on the amounts payable by virtue of any of the categories mentioned in that section but the amounts had now been paid and therefore the statutory protection disappeared. The obligation imposed upon the Department of Work and Pensions had been discharged. If the arrestment had been laid on in the hands of the Department then that would have been cut down but this was not the position here.

17. The fundamental and pivotal issue was the relationship between banker and customer. This had been clearly stated by Lord Mackay in *Royal Bank of Scotland v Skinner, cit supra,* as follows: "The banker is not, in the general case, the custodian of money. When money is paid in, despite the popular belief, it is simply consumed by the banker, who gives an obligation of an equivalent amount. When money is drawn from a fund which no longer exists it simply creates a loan by the

banker, having all the incidents of a loan except, perhaps, that the form of a writ instructing it is reduced to stereotype shape – namely drafts, passbooks, and accounts."

18. Mrs Thornton had suggested that to treat the bank account in this way would be equivalent to defeating the purpose of the statute but this was not so: the purpose of the statute was to protect the fund until paid over. This fund had been paid over and had been converted into an obligation by the bank to account to the beneficiary, the common debtor in the instant case.

19. Mr Blair then referred to the Bankruptcy and Diligence etc (Scotland) Act 2007. In particular he mentioned section 73F of this Act (which is to be found within section 206 of the Act) which provides *inter alia* that arrestments of bank accounts shall be subject to certain limitations – in effect prescribing that only arrestments over a certain amount should be valid. It would have been open for the legislature to have made specific provision to cover the situation wherein benefit had been paid into a current account as in the present situation.

20. In Mr Blair's submission the case of *Woods* should not be followed. In that case the Sheriff - Substitute had given no authority for the view that "identifiability" should be the criterion for deciding on whether protection from arrestment persisted. He had simply asserted this. Moreover *Woods* had been decided before *Royal Bank of Scotland v Skinner* which had finally settled the nature of the banker/customer relationship. In any event *Woods* was concerned with a different statutory scheme. This was the same statutory scheme which had been interpreted in *Rosewell Gas Coal Co Ltd v M'Vicar* (1904) 7 F 290 which contained the provision that the fund concerned "shall not pass to any other person by operation of law". It was in this context that the Lord Justice-Clerk Macdonald had stated: "The object of the Act is to secure that an injured workman shall have for his subsistence the sum awarded to him, and that it is not to be trenched upon in any way. This is made perfectly clear by section 14 of the First Schedule."

21. Mr Blair then referred to *Mulvey v Secretary of State fro Social Security* 1997 (SC) (HL) 105 and in particular to the passage in the speech of Lord Jauncey of Tullichettle at page 108 in the paragraph commencing, "My Lords, the appellant's entitlement to income support benefit is rendered inalienable by statute ...". The effect of this passage was, in Mr Blair's submission, that once the benefit was paid to the beneficiary then the protections provided under section 187 of the Act of 1992 did not apply.

Discussion as to further procedure

22. It seemed to me, having heard both counsel, that this case raised important issues involving the relationship between bank and customer. The principle applied by Lord Mackay in *Royal Bank of Scotland v Skinner* was that where a customer's funds are deposited in the bank they lose their characteristic of an incorporeal moveable and are converted into a liability on the part of the bank to account to its customer – and accordingly the relationship of customer and banker was not a relationship of principal and agent nor a relation of a fiduciary character, trust, or the like but a simple relationship of creditor and debtor. His Lordship cited the early English case of *Foley v Hill* 1848, 2 HL Ca, and *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 in support of this proposition which he described as "now well settled".

23. The issue arising in the instant case was whether or not the funds supplied to a beneficiary under modern social security legislation and consigned to bank by the Department of Work and Pensions was covered by this proposition. The matter had received the attention of the Scottish Law Commission and there were decisions such as *Rosewell Gas Company v M'Vicar* and *Woods v Royal Bank of Scotland*, both *cit supra*, which dealt with potentially analogous matters but under the Workmen's Compensation statutes of 1897 and 1906. There was, however, a dearth of judicial decision on this matter in the relation to modern social security legislation and in the context whereby benefits are now generally paid directly into the bank account of the beneficiary. Lord Mackay in *Royal Bank of Scotland v Skinner* had observed that banking was a branch of the law mercantile and that as such the court was wont to take account of its knowledge of the practice of bankers. I suggested, and parties agreed with alacrity, that since I was being asked to determine judicially a matter which had not been judicially considered and which might have wider implications, it would be appropriate for me to be addressed more fully on the detailed arrangements which are in force in relation to the payment of benefits through banks. Was there, for example, any provision from which it might be inferred that a bank which received payments under the modern Acts might, in contrast with the Royal Bank of Scotland in 1931, be regarded as the agent of the Department? I also, having noted the reliance placed by Lord Mackay on textbooks expounding banking procedure, suggested that parties might care to research whether the case of *Woods* had been made the subject of any comment. Parties' counsel agreed to look into these matters and to lodge written submissions prior to a continued appeal hearing. These submissions were lodged and I heard parties' counsel further on 25 March 2008.

The statutory provisions

24. The provisions in relation to direct payment into bank by agencies such as the Department of Work and Pensions were addressed mainly in the submissions for the respondents and it is convenient to set these out at this point. The regulations concerned are the Child Benefit and Guardian's Allowance (Administration) Regulations 2003/492, Regulations 16 and 17, and the Social Security (Claims and Payments) Regulations 1987/1968, Regulation 21. The said Regulation 21 provides:

> **"Direct Credit Transfer**
>
> 21.-(1) Subject to the provisions of this regulation, any benefit may, on the application of the person claiming, or entitled to it, and with the consent of the Secretary of State be paid by way of automated or other direct credit transfer into a bank or other account-
>
> (a) in the name of the person entitled to benefit, or his spouse or a person acting on his behalf, or
>
> (b) in the joint names of the person entitled to benefit and his spouse, or the person entitled to benefit and a person acting on his behalf.
>
> (2) An application for the benefit to be paid in accordance with paragraph (1) -
>
> (a) shall be in writing on a form approved for the purpose by the Secretary of State or in such other manner, being in writing, as he may accept as sufficient in the circumstances, and
>
> (b) shall contain a statement to be accompanied by a written statement made by the applicant declaring that he has read and understood the conditions applicable to payment of benefit in accordance with this regulation.
>
> (3) Benefit shall be paid in accordance with paragraph (1) within seven days of the last day of each successive period of entitlement as may be provided in the application.
>
> (4) In respect of benefit which is the subject of an arrangement for payment under this regulation, the Secretary of State may make a particular payment by credit transfer otherwise than is provided in paragraph (3) if it appears to him appropriate to do so for the purpose of:
>
> (a) paying any arrears of benefit or
>
> (b) making a payment in respect of a terminal period of an award or for any similar purpose.
>
> (5) The arrangement for benefit to be payable in accordance with this regulation may be terminated-
>
> (a) by the person entitled to benefit or a person acting on his behalf by notice in writing delivered or sent to an appropriate office or
>
> (b) by the Secretary of State if the arrangement seems to him to be no longer appropriate in the circumstances of the particular case."

25. Regulations 16 and 17 of the 2003 Regulations deal with payment of Child Benefit. They provide:

"Manner of payment

16.-(1) Subject to regulation 17, child benefit or guardian's allowance shall be paid by means of an instrument of payment or by such other means as appears to the Board to be appropriate in the circumstances of the particular case.

(2) If a person entitled to child benefit is also entitled to guardian's allowance, the allowance shall be paid in the same manner as that in which child benefit is paid under this regulation.

(3) Instruments of payment which have been issued by the Board remain their property.

(4) A person who has an instrument of payment must on ceasing to be entitled to the benefit or allowance to which the instrument relates, or when required to do so by the Board, deliver it to the Board or such person as the Board may direct.

Direct credit transfers

17.-(1) The Board may make an arrangement with a person claiming, or entitled to, child benefit or guardian's allowance for the payment of the benefit or allowance by way of direct credit transfer in accordance with paragraphs (2) and (4).

(2) The direct credit transfer shall be into a bank account or other account -

(a) in the name of -

(i) the person entitled to the benefit or allowance,

(ii) that person's partner, or

(iii) a person acting on behalf of that person; or

(b) in the joint names of the person entitled to benefit and -

(i) that person's partner, or

(ii) a person acting on that person's behalf.

(3) Subject to paragraph (4) the benefit or allowance shall be paid within seven days of the last day of each successive period of entitlement.

(4) The Board may make a particular payment by direct credit transfer otherwise than is provided by paragraph (3) if it appears to them appropriate to do so for the purpose of -

(a) paying any arrears of benefit or allowance, or

(b) making a payment in respect of a terminal period of an award or for any similar purpose.

(5) Where an arrangements is made under paragraph (1) -

(a) in relation to child benefit, any guardian's allowance to which the person entitled to the child benefit is entitled shall be paid in the same manner as the child benefit;

(b) in relation to guardian's allowance, the child benefit to which the person entitled to the guardian's allowance is entitled shall be paid in the same manner as the guardian's allowance.

(6) An arrangement under paragraph (1) may be terminated -

(a) by the person entitled to benefit, or by a person acting on behalf of that person, giving notice in writing to the Board; or

(b) by the Board if the arrangements seems to them to be no longer appropriate to the circumstances of the particular case.

(7) A person giving a notice under paragraph (6)(a) must deliver or send it to an appropriate office as regards the Board."

Further submissions for the appellant

26. Against this background Mrs Thornton accepted that her client had signed the appropriate papers authorising Direct Credit Transfer and identifying the Airdrie Savings Bank as the receiving bank. She drew my attention to the provisions of Regulation 21, mentioned *supra*, whereby the Secretary of State may, for the purpose of paying any arrears of benefit or making a payment for a terminal period of an award of for any other purpose make a particular payment "otherwise than as provided in paragraph (3)". She also mentioned Regulation 21(5) which is in similar terms. However she submitted that no clear method appeared to be prescribed as an alternative mode of payment for the various benefits in the first place. While, as I understood her submissions, she did not contest that the compliance with the Direct Credit Transfer scheme was voluntary, she submitted that in practice beneficiaries such as the appellant felt under pressure to comply with the Direct Credit Transfer scheme. This was, she said, supported by the written submissions of the respondents who had quoted an extract from Hansard containing the written response from the Secretary of State for Work and Pensions in reply to a question from by Mr Alan Reid MP as to what his Department's policy was regarding payments of benefits to claimants of working age who fail to supply account details to his Department. The Secretary of State's reply, which is stated to appear in the Hansard of 7 February 2005 at Column 1343W states that direct payment into an account is "the normal method of payment for benefits". The Secretary of State also says: "The Department has always recognised that some customers will be unable to be paid in this way and the cheque payment was developed for the small minority of customers who cannot manage Direct Payment". But in Mrs Thornton's submission the pressure was towards encouraging Direct Payment as illustrated by the last passage quoted from the Secretary to State's reply: "We are continuing to contact existing customers to invite them to provide account details. However at the end of this process customers, including those of working age, who have not provided account details, will be paid by cheque if possible after we have verified their address and confirm there is no doubt about ongoing entitlement".

27. In Mrs Thornton's the case of *Woods* was the only reported wherein the question of the status of "protected" funds being paid into bank in identifiable form had been addressed. The only

reference to *Woods* in banking textbooks appeared to be that in the second edition of Laing D Clerar's *Law of Banking in Scotland* at page 304 wherein the learned author states:

> "In the Scottish Executive's consultation document *Enforcement of Civil Obligations in Scotland*, the Scottish Law Commission take a different view to *Woods*. It is accepted that most social security benefits are themselves exempt from arrestment, however it is stated that the statutory protection afforded by s. 187 of the Social Security Administration Act 1987 is lost once benefit is paid into a bank account."

In Mrs Thornton's submission the foregoing was an inexact paraphrase of the Law Commission's document which stated at paragraph 5.245:

> "It is generally considered, although not formally determined, that exempt payments including earnings and social security benefits, lose their exempt status once they are paid into a bank account."

Mrs Thornton emphasised that these words made clear that the position "had not been formally determined". In any event, she commented, the document concerned was a consultation document which did not enjoy the status of a judicial determination. Mrs Thornton submitted that the authority of *Woods* had been enhanced by the article by Professor G L Gretton in volume 8 of the Stair Memorial Encyclopaedia at paragraph 280 wherein the learned author, under heading "Alimentary Funds and Social Security" states:

> "Funds destined to the aliment of the common debtor can be arrested by his creditors. The most important class of alimentary funds is that of wages, salaries and pensions, but to these the common law doctrine is no longer relevant, since they are now by statute not subject to ordinary arrestment. The chief example in modern law is therefore that of trust funds destined for the support of the common debtor. A sum which is alimentary remains so for as long as identifiable [the footnote here is: "*Woods v Royal Bank of Scotland* 1913 1 SLT 499, (Sh Ct); *William Baird & Co Ltd v Campbell* 1928 SC 314, 1928 SLT 201.]. Alimentary funds are arrestable *quoad excessum*, that is to say, insofar as they exceed the amount required by the common debtor for his aliment."

28. It had been said, Mrs Thornton mentioned, that the case of *Woods* had been decided before the relationship between banker and customer had been clarified in the law of Scotland by the 1931 case of *Royal Bank of Scotland v Skinner*, with the implication that if the Sheriff-Substitute in 1913 had been aware of the law as defined by Lord Mackay in the 1931 case, he might not have come to the same decision. Mrs Thornton emphasised that Lord Mackay in the 1931 case described the principle that the relationship of customer and banker is that of creditor and debtor as "now well settled" and cited in support of this the case of *Foley v Hill, cit supra,* which predated the decision in *Woods* by over sixty years. Mrs Thornton submitted, however, that the case of *M'Adam v Martin's Trustees* (1872) 11 M 33 illustrated that there could be a situation wherein monies placed in a bank account were not "consumed" by the bank but remained identifiable, retaining the quality which had attached to them when in the custody of the payer, that is to say, in *M'Adam's* case, for the purpose of being

invested in a heritable security on behalf of the *M'Adam* sisters. The case of *M'Adam* was discussed by Lord Mackay and I note that he deals with it thus at 1931 SLT 386, second column:

> "On the other hand, when one takes the Scottish case of *M'Adam,* one finds indeed a case of what may be called ear-marking having a certain effect, but the effect assigned to it is remarkable in view of the argument; for in the sequestration in bankruptcy of the law agent a fund of £1,000 sent to him for a specific purpose and lodged, *not* in a separate bank account in that name, but in his own general bank account, was held to be distinguishable, and the pursuers who had entrusted it to him were held entitled to take it out of the sequestration of the estate. That appears to rest, not on a question of preference in the bankruptcy as certain English cases appear to do, but upon the ownership of the distinguishable fund, and, while cited for the pursuers, it seems *a fortiori* of the case for the defender. The safest exposition that could be made of the bearing of special headings is that they all depend on circumstances ...".

In Mrs Thornton's submission the sums paid into the common debtor's bank account were paid for a specific purpose, namely, the maintenance of herself and her children. They were "distinguishable" in the account and their "identity" or nature or character, had not been "consumed" by the bank.

29. Mrs Thornton went on to submit that Child Benefit and Child Tax Credits were not arrestable. They were not, in the words of *Graham Stewart on Diligence* at page 44, "personal debts due to the common debtor or moveable property belonging to [her] in the hands of an independent third party". She quoted the words in paragraph 6.38 at page 139 of *Grier on Banking Law in Scotland*: "However it is important that the funds arrested do actual belong to the debtor" and maintained that benefits which were due to or which belonged to the common debtor were hers in a fiduciary capacity only. They had been paid by the state for the maintenance and support of her children. In relation to this she cited section 141 of the Social Security Contributions and Benefits Act 1992 which enacts: "A person who is responsible for one or more children in any week shall be entitled, subject to the provisions of this part of the Act, to a benefit (to be known as child benefit) for that week in respect of each of the children for whom he is responsible." She also quoted section 8 (1) of the Tax Credits Act 2002 which provides: "The entitlement of the person or persons by whom a claim for child tax credit has been made is dependent on him, or either or both of them, being responsible for one or more children or qualifying young persons." She maintained that consequently the sums paid into the common debtor's bank account were paid into that account for the specific purpose of maintaining her and her children just as, in the words of the Sheriff-Substitute in *Woods,* the object of the section was "to provide that a weekly payment, or a sum paid way of redemption, shall be secured to the injured workman for his maintenance [my emphasis]".

30. Mrs Thornton informed me that the only mention of *Woods* in a banking textbook which she had been able to discover was that already referred to in my paragraph 27 *supra* namely at page 304 of the second edition of *Crerar on the Law of Banking in Scotland.* She moreover rejected the contention that it must be assumed that the principle that the relationship between banker and customer was generally that of debtor and creditor was not recognised in 1913 when *Woods* was decided. She referred in this connexion to *Joachimson v Swiss Bank Corporation* [1921] 3KB 110 wherein it was clear from, for example, the judgment of Bankes LJ that this proposition, as at 1921, was well recognised: at page 118 Bankes LJ quoted with approval the decision of the House of Lords in the old case of *Foley v Hill, cit supra,* as summarised in the head note to that case: "The relationship between a banker and customer, who pays money into the bank, is the ordinary relation of debtor and creditor, with a super added obligation arising out of the customer of bankers to honour the customer's drafts; and that relation is not altered by an agreement by the banker to allow the interest on the balances in the bank.". In any event Lord Mackay in *Royal Bank of Scotland v Skinner* at 1931 SLT, page 384 second column, described this principle as "now well settled".

31. In relation to the case of *William Baird & Co v Campbell, cit supra,* Mrs Thornton, while accepting that there were differences between the circumstances in *Baird* and the circumstances in the instant case, emphasises that there was an important similarity in that the prohibition on diligence was a creation of statute.

32. In relation to the Child Benefit and Child Tax Credits Mrs Thornton submitted that these were paid to the parent owing to the parent's responsibility for the maintenance of the child. This created a position of trust. The situation had some affinity with the facts in *M'Adam v Martin's Trustee, cit supra.*

33. In relation to *Mulvey v Secretary of State for Social Security, cit supra,* Mrs Thornton also referred to the passage in the speech of Lord Jauncey of Tullichettle at page 108 C commencing, "My Lords, the appellant's entitlement to income support is rendered inalienable by statute ...". Mrs Thornton drew my attention to the sentences, beginning at the letter G, at the end of this paragraph:-

> "I therefore conclude that the purpose of that part of sec 187(1) [of the Social Security Administration Act 1992] above set out was to make clear beyond peradventure that the permanent trustee could have no interest in any entitlement of a debtor to receive any of the Social Security Benefits to which it applied. I should add further that

> while the theoretical possibility of a permanent trustee invoking sec 32(2) [of the Bankruptcy (Scotland) Act 1995] in relation to a debtor whose sole income consisted of such benefits remains, the probability of any such invocation being successful must, at least in the case of those benefits such as income support benefit which are income-related, be virtually nil. In short, it can never have been contemplated in Social Security legislation that any part of the income-related benefits to which sec 187(1) applied would find their way into the hands of the permanent trustee of a bankrupt beneficiary and, indeed, the trustee has no right to proceed against the respondent for payment of any part of the benefit to which a debtor may be entitled."

In Mrs Thornton's submission this passage was, on balance, in favour of the present appellant's position.

34. Mrs Thornton rejected the suggestion that the respondents could obtain any assistance from section 73 of the Bankruptcy and Diligence (Scotland) Act 2007 which of course was not yet in force. This section was aimed at preventing creditors attaching more than they were entitled to and to guard against a situation where a debtor was unable to meet his day to day commitments and nothing more.

35. In conclusion Mrs Thornton maintained that we were concerned here with a statutory scheme the provisions of which made it clear that the amounts paid to the beneficiary in that scheme were immune from diligence and that if the purpose of the statute were to be fulfilled then that immunity must persist so long as the funds paid to the beneficiary remained identifiable.

Submissions for respondents

36. Mr Blair referred to the Direct Credit Transfer arrangements set out in the Social Security (Claims and Payments) Regulations set out *supra* in paragraph 24. These Regulations made it clear that payment into a bank account was not obligatory and that payment by cheque remained an option. The words of the Secretary of State on 7 February 2005 as reported in Hansard (reproduced *supra* in paragraph 26) confirmed this. There was therefore no question of any arrangement being in force whereby the bank could be regarded as the agent of the Department of Work and Pensions. The bank had no say in the matter.

37. The situation might have been different if the beneficiary had indeed had no choice but to receive payment through the bank. This had been the position in the Canadian case *Holy Spirit Parish Credit Union Society v Kwiatkowski* (1969) 68 WWR 684 (Manitoba Queen's Bench). In that case it was clear, as narrated in paragraph 4 of the opinion of Wilson J. that the "employee is offered

no option either as to the method of payment or even as to which bank or branch of a bank his wages are to be paid". Accordingly the learned Judge concludes:

> "9. But where, as here, the only credits to the account are by way of wages deposited by the employer pursuant to an arrangement which the employee has no option to vary, the entire sum so credited being withdrawn immediately afterwards by the employee and used for his personal needs, then the amount paid into the concerned bank account is, for the purpose of this application, to be viewed as a payment of wages, and so subject to the exemption claimed."

38. The Law Commission, at paragraph 4.11 of memorandum No. 49 had stated in this regard:

> "The enactments inhibiting arrestment of earnings on the dependence of an action and limiting the amount arrestable in execution of a decree do not, however, protect the earnings when they deposited in a bank account or invested in some non-except assets. Creditors could frustrate the statutory exceptions by arresting the employee's bank account. In some other jurisdictions, this practice has been stopped by judicial decisions construing a statutory exception of an income payment as applicable to the bank account in which the income payment was lodged. [A footnote here refers *inter alia* to the said Canadian case]. We do not think, however, that the Scottish legislation could be construed in this way."

This, submitted Mr Blair, provided significant support for his stance.

39. In Mr Blair's submission the case of *M'Adam v Martin's Trustees, cit supra,* was an exampie of monies held by a lawyer acting in a fiduciary capacity for the person sending him the money for a specific purpose. It was well recognised that a law agent stood in a fiduciary capacity to his client and in *M'Adam* this capacity had been held to have persisted in relation to the bank. In the instant case, however, neither the Department of Work and Pensions nor the bank could be said to have stood in any fiduciary capacity to the beneficiary. It was wrong to say that the scheme of the Act dictated that the protected status of the payments of benefit persisted after the benefits had been paid. In counsel's submission the statutory purpose was fulfilled once the payment was made.

40. Turning to *William Baird & Co Ltd v Campbell, cit supra,* counsel recognised that, as narrated *supra* in paragraph 28, Professor Gretton in his article on "Diligence" cited this case as authority for the proposition that "a sum which is alimentary remains so for as long it is identifiable." Counsel contended that *Baird* was not authority for that proposition. It turned on the provisions of a particular statutory scheme which was quite different from the present statutory scheme: as in *Woods* the scheme included the words "and shall not pass by operation of law" which provided a stronger protection than was provided by the wording of the statutes relevant to the instant case. *Baird* did not deal with the situation where funds were paid into a bank account but they were paid into a special

fund administered by the court and the case turned upon the consideration that if the fund were to be arrestable then this would frustrate the exercise of the discretion by the court.

41. Counsel directed my attention to that passage in the opinion of the Lord Ordinary, Lord Constable, in Baird at 1928 SC at 317 where His Lordship states:

> "But the essential feature of the statutory provisions is that the money is to be dealt with by the court according to its discretion for the benefit of the persons entitled thereto under the Act. It seems to me that this language is quite inconsistent either with a right to assign on the part of the beneficiary or a right to use diligence on the part of creditors. It specifically appropriates the money for statutory purposes; and these purposes are not fulfilled so long as the administration of the court continues, *i.e.* until the money in the hands of the court is exhausted."

Lord Justice Clerk Alness at page 323 was to the same effect, saying:

> "I am of opinion that the combined effect of section 26 of the Act [the Workmen's Compensation Act 1925] and paragraph 1 of the Second Schedule to the Act is to ring-fence a fund paid into Court, to earmark it for the benefit of the dependants of a dead workman, and to protect it, subject to the discretion of the Sheriff-substitute, against external attack ..."

Counsel also mentioned the observations of Lord Anderson at page 326:

> "The pursuers appealed to their common law right to arrest. There is no place for such a right in connexion with a fund which is the creature of a statute, and the disposal of which is regulated by statute."

Counsel emphasised that once the payment had been made the statutory purpose had been met. The case of *M'Adam* was perhaps distinguishable in that it was decided under the common law. There was no mention in the 1992 Act or the 2002 Act of any fiduciary capacity being enjoyed either by the Department of Work and Pensions or anyone else. In the absence of such provision it should not be implied. If it had been the intention of either of these Acts to "ring-fence" the funds then this would have been explicitly provided for. The case *Mulvey* was relevant in that if a benefit once paid was outwith the reach of creditors because of section 187 alone then Lord Jauncey could not have considered that section 32(2) of the Bankruptcy (Scotland) Act 1995 had any potential application to benefit payments. Consequently Lord Jauncey had indicated that such benefits were not in principle beyond the reach of creditors.

42. Counsel mentioned the provisions of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 section 1 of which provided:

> "Wages, pensions etc., to be exempt from arrestment on the dependence of an action.
>
> (1) After the passing of this Act it shall not be competent to arrest on the dependence of an action any earnings or any pension"

It was interesting, counsel suggested, to note that in this Act it had not been seen necessary to make a provision that this protection extended to monies once in the hands of the bank. The Law Commission had decided that in the absence of a specific prohibition of such arrestment that it did not exist. Similarly Graham Stewart, writing in 1898, had not detected any such prohibition. The learned Sheriff had been correct in being guided by the approach of the Scottish Law Commission and in distinguishing the case of *Woods* on the basis that the words "shall not pass to any other person by operation of law" appeared in the Workmen's Compensation statutes but did not appear in the statutes with which the instant case was concerned. Moreover if the case of *Woods* could not be distinguished in that basis then I should hold that it was wrongly decided. In summary, the learned Sheriff was correct in her decision and the appeal should be refused.

Discussion and decision

43. I respectfully agree with the submission, which obtained some support from the observation of Lord Anderson in *Baird*, quoted *supra* in paragraph 41, that since the funds concerned were the product of statutory provision then the question of whether or not they are arrestable when in bank must be determined principally by consideration of the statutes concerned. It was conceded by counsel for the respondents that the purpose of this appeal was to decide the matter on principle the principle being whether an exemption from diligence which attached to a fund in the hands of a person having a duty to pay that fund to a beneficiary remains so attached when the fund is paid into the beneficiary's bank.

44. The principal statutory provision is section 187(1) of the Social Security Administration Act 1992 which I have reproduced *supra* in paragraph 6. This subsection, read short, provides that every assignment of or charge on the various benefits and every agreement to assign or charge such benefits shall be void. It was accepted that arrestment was included in the concept of a "charge" in this context. In the case of *Woods* the wording of the statute bearing upon the fund therein contained, in addition to a reference to charging the provision "shall not pass to any other person by operation of law". However in my view these words add nothing to the content. If reference to "charge" includes reference to arrestment then that is the end of the matter. The learned Sheriff said that the omission of these words was "not without significance" but she does not state what that significance might be. Both counsel suggested that it might have some reference to bankruptcy and that may be so but I do see how the lack of these words takes away from the substantive meaning of the subsection which is

that these funds shall be immune from arrestment. It follows that I must revert to counsel for the respondents' supplementary submission namely that *Woods* was wrongly decided.

45. This brings us into the substantial issue of whether or not the statute can be construed as extending its protection to the funds concerned once they are lodged in bank and this, as I have indicated, the matter which was identified by respondents' counsel as the principal matter for my decision. As mentioned *supra* in paragraph 38 the Scottish Law Commission in its Memorandum No. 49 concludes in this respect: "We do not think, however, that the Scottish legislation could be construed in this way."

46. I was not addressed on the weight to be accorded to an opinion of the Scottish Law Commission. I do not think it was contended that the expression of such an opinion was in any way equivalent to, say, a decision of the Inner House of the Court of Session but it clearly is highly persuasive and must be accorded great respect. In order to assess how persuasive that expression of opinion should be it is in my view appropriate to examine the arguments deployed.

47. As submitted by Mrs Thornton the Commission seems to have been principally affected by the difficulty of identifying funds once they have been transferred to bank. I revert to the passage in the Scottish Law Commission's *Report on Diligence and Debtor Protection*, referred to *supra* in paragraph 11, which, after mentioning that the views on the question whether exemptions of earnings from arrestment should be extended to earnings paid into bank stated:

> "Those who commented on this proposal unanimously rejected it. Several commentators thought it would be difficult to frame effective and fair rules on tracing earnings, where for example they had become mixed with other funds."

This line of argument is returned to in Scottish Law Commission document No 164 at paragraph 9.111 which includes the passage:

> "It would not be sensible to prohibit arrestment of any bank account into which earnings were paid <u>because</u> [my emphasis] a large part of the credit balance could well consist of other sums that could not be protected from attachment by creditors."

If indeed the danger of in-mixing with other funds is the "cause" of the problem then it would seem to follow that when this cause, as here, is removed then the problem is removed.

48. Of course the Scottish Law Commission was considering if the law should be changed. It decided that, substantially because of the usually surrounding identification of funds in bank, that the law should not be changed. It also opined that the legislation should not be construed to the effect

that a statutory exemption of an income payment remained in being once the amount had been paid into bank.

49. It seems to me that the main support for this opinion must be the contention, which was the main plank of the respondents' counsel's stance, that funds once consigned in bank become, in the words of Lord Mackay in *Skinner*, "consumed" by the bank. That was not the view taken by the Sheriff-Substitute in *Woods*. It was said that the law of banker and customer had not been fully decided in Scotland in 1913 when *Woods* was decided. I was not convinced of this proposition. Lord Mackay himself referred to the matter as being "well settled" in 1931 which is of course only 18 years after 1913 and the authority is the early case of *Foley* which was decided in the first half of the nineteenth century. I see no reason to hold that this principle was not well accepted in 1913. Indeed the Sheriff Substitute at the bottom of page 499 says:

> "The pursuer maintained that whenever the sum by way of redemption was paid over in this case it lost its peculiar character and became part of the common debtor's moveable estate which could be arrested."

This is exactly the contention of the present respondents and I see no reason to believe that the Sheriff-Substitute did not regard this to be the norm in that the whole tenor of his judgment is that the provisions of the Workmen's Compensation Act 1906 created an exception to that norm.

50. It is said that the Sheriff Substitute had no reason for erecting identifiability as a touchstone. Lord Mackay himself, when discussing the case of *McAdam* states at 1931 SLT page 386, second column:

> "On the other hand, when one takes the Scottish case of *M'Adam*, one finds indeed a case of what maybe called earmarking having a certain effect, but the effect assigned to it is remarkable in view of the argument; for in the sequestration in bankruptcy of the law agent a fund of £1,000 sent to him for a specific purpose and lodged, *not* in a separate bank account in that name, but in his own general bank account, was held to be distinguishable and the pursuers who had entrusted it to him were held entitled to take it out of the sequestration of the estate."

It seems to me that in this passage his Lordship is at least countenancing the importance of the fund being "distinguishable" as an element which might take a fund out of the general rule that all funds are necessarily "consumed" by the bank. This seems to me to be an inevitable conclusion from the case of *M'Adam* since, as Mrs Thornton pointed out, if the rule about the bank "consuming" fund irremediably were universal then it would have been impossible for the court to decide *McAdam* in the way which it did.

51. I thought the different circumstances of the case of *Mulvey* were such as to render it of limited usefulness to the present argument. However even in the paragraph founded upon by respondents' counsel Lord Jauncey of Tullichettle accepts that in general Social Security Benefits should not find their way into the hands of the permanent trustee in bankruptcy. The cases of *Rosewell Gas Co Ltd* and *William Baird & Co Ltd,* in their different ways, sustained the approach that the fundamental purpose of the awarding of benefits should be attended to. Counsel for the respondents emphasised that the function of the Department of Work and Pensions had been exhausted once the payments had been made and I think this is plainly correct. However I do not think it affects the issue of whether the immunity possessed by these funds persists after lodgement in bank and cases such as *Baird* and *Caldwell* as well as the case of *Woods* suggests that this should be the approach of the court. I think it is legitimate to consider the underlying purpose of the Social Security legislation and that Mrs Thornton was correct in saying that this is to provide the beneficiary and her dependents with the necessities of life. That being so, I consider that an interpretation of the provisions relating to immunity from diligence conferred by the Acts which allows that immunity to persist where the funds are held by bank in identifiable form is to be preferred. I am fortified in this view by the opinion of Professor Gretton in his article in the *Stair Memorial Encyclopaedia*.

52. Counsel for the respondents suggested that the omission of any provision protecting bank funds from diligence in the Bankruptcy and Diligence etc (Scotland) Act 2007 indicated that the legislature considered that no such provision was appropriate. That may be so but my attention was not directed to any of the *travaux préparatoires* in respect of this Act. The Scottish Parliament may well have had before it the deliberations of the Scottish Law Commission which, as pointed out by Mrs Thornton, mentioned *Woods* without indicating in terms that they thought it was wrongly decided, with the result that it might have been thought that the situation where the protected funds were clearly identifiable did not require legislation.

53. For the reasons stated I have allowed the appeal. Parties were agreed that expenses should follow success and that the case merited the employment of junior counsel. I thought this was a case wherein the issues were important and the arguments finely balanced. I accordingly had no hesitation in sanctioning the employment of counsel.