SHERIFF APPEAL COURT

[2019] SAC (Civ) 36
FFR-A24-18 & ABE-A46-19

Sheriff Principal M W Lewis
Appeal Sheriff N C Stewart
Appeal Sheriff P J Braid

OPINION OF THE COURT

delivered by APPEAL SHERIFF PETER JOHN BRAID

in the appeals

SANTANDER CONSUMER (UK) PLC, a company incorporated under the Companies Act (company number 02248870) having its registered office at Santander House, 86 Station Road, Redhill, Surrey, RH1 1SR

Pursuer and Appellant

against

ALAN CREIGHTON

Defender and Respondent

and

SANTANDER CONSUMER (UK) PLC, a company incorporated under the Companies Act (company number 02248870) having its registered office at Santander House, 86 Station Road, Redhill, Surrey, RH1 1SR

Pursuer and Appellant

against

WILLIAM SIMPSON

Defender and Respondent

Act: McClymont; DWF LLP
Alt:

6 November 2019

Introduction

[1] The appeals in these two actions were heard together, since they both raise the question of the extent to which a sheriff, in considering a minute for decree in absence, is entitled to refuse to grant decree. Both cases also bring into sharp focus the remedies to which the owner of goods subject to a conditional sale agreement is entitled, where an agreement regulated by the Consumer Credit Act 1974 has been breached.

Appellants v Alan Creighton

[2] The appellants aver that on or around 3 September 2015 they entered into a conditional sale agreement with the defender, regulated by the Consumer Credit Act 1974 ("the 1974 Act"), in terms of which the defender agreed to purchase a motor vehicle for a total price of £16,107.60 payable in instalments. It was a term of the agreement that title to the vehicle would pass to the defender only after all sums due to the appellants in terms of the agreement had been paid. The defender having fallen into arrears, thereby breaching the agreement, the appellants served a default notice on or around 12 July 2018 and, on or around 15 January 2019, they subsequently terminated the agreement. It is averred that following termination, a total sum of £7,286.88 remains due and outstanding to the appellants.

[3] Against that factual background, the appellants' writ contains the following craves (read short):-

1. for payment of the sum of £7,286.88 with interest thereon at the rate of 8 per cent per annum from the date of citation until payment;
2. for declarator that the appellants are entitled to recover the motor vehicle in terms of section 90(1) of the 1974 Act and that the appellants are entitled to

enter into any premises in the occupation of the defender in order to recover the vehicle;

3. to ordain the defender to deliver the vehicle within 5 days of intimation of the court's interlocutor;

4. to grant warrant to officers of court to search premises in the occupation of the defender and to take possession of the vehicle and to deliver it to the appellants and to that end to open shut and lockfast places;

5. for the expenses incurred by the appellants to officers of court and vehicle recovery agents instructed by those officers of court and/or the pursuer to assist in recovering or attempting to recover the motor vehicle.

6. for the expenses of the action.

[4] The action was not defended and the appellants duly minuted for decree. On considering that minute, the sheriff refused *in hoc statu* to grant decree for payment in terms of crave 1; but did grant decree in absence in terms of craves 2, 3 and 4, and continued craves 5 and 6. In reaching his decision to refuse to grant crave 1 *in hoc statu* the sheriff embarked upon an examination of the terms of the agreement and formed the view that, properly construed, the termination clause did not entitle the appellants to recover any sums from the defender until the vehicle had been recovered and sold, and the sale proceeds applied to the account balance. He did not consider what the mechanism would be for dealing with any dispute as to the amount of sale proceeds applied to the account, nor whether the defender would require to receive further intimation following the sale, nor whether the writ would require to be amended (in the event, say, of non-sale).

Appellants against William Simpson

[5] The appellants averred that on 17 July 2013, they entered into a conditional sale agreement with the defender, regulated by the Consumer Credit Act 1974, whereby the defender agreed to purchase the vehicle from the appellants for a total price of £12,650 (the duration of the agreement was not averred but we were told at the appeal hearing that it was for a period of five years). The defender took possession of the vehicle. He subsequently fell into arrears. The appellants served a default notice and thereafter terminated the agreement on or about 26 January 2018. As at the date of termination the defender is averred to have owed the appellants £3,021.62 in respect of arrears of instalment payments and the balance of instalments due under the contract. That sum remained unpaid.

[6] The appellants' writ contained the following craves (again reading short):-

1. for payment of the sum of £3,021.62 with interest thereon at the rate of 8 per cent per annum from the date of citation until payment;
2. to ordain the defender to deliver to the appellants the vehicle within 5 days of intimation of the court's interlocutor;
3. for declarator that the appellants are entitled to recover possession of the vehicle for the purposes of sections 90 and 92 of the 1974 Act with assistance from vehicle recovery agents instructed by the pursuer;
4. to grant warrant to officers of court to search premises in the occupation and tenancy of the defender and to take possession of the vehicle and to deliver it to the pursuers and to that end to open shut and lockfast places;
5. failing delivery in terms of crave 2 for the expenses incurred by the pursuer to officers of court, including vehicle recovery agents instructed by officers of

court to assist in recover and attempting to recover the vehicle and delivering it to the appellants;

6. for the expenses of the action.

[7] Like the sheriff in the Creighton case, the sheriff declined to grant decree for payment *in hoc statu*. However he also refused to grant decree in terms of crave 3 *in hoc statu* and refused outright to grant a warrant in terms of crave 4.

[8] In relation to the crave for payment, the sheriff's reasoning was that only a relatively small part of the original loan was outstanding and, in the sheriff's view, it was likely that the proceeds of sale may exceed that amount or, at least, a lesser sum would ultimately be due. It is unclear on what basis he formed a view as to the likely sale proceeds of the vehicle. He considered that the existence of a decree for payment could cause double jeopardy where the appellants could simultaneously enforce a decree for payment and sell the car which, at least in theory, could leave the pursuers holding a credit balance. The sheriff did not appear to entertain the possibility that, in that event, the appellants would refund any balance to the defender, nor did he consider what the procedural mechanism in the current action would be in the event a dispute arose as to the amount of any sale proceeds credited to the account, or in the event the car was not recovered and sold.

[9] As regards the remaining craves, the sheriff considered whether it was competent simultaneously to grant a decree for delivery and a warrant to search the defender's premises. He had regard to the authorities to which he had been referred including *Merchants Facilities (Glasgow) Ltd* v *Keenan* (1967) SLT Sh Ct (65). In that case it was held that the simultaneous granting of a decree for delivery and a warrant to search had been legitimate for many years. However the sheriff distinguished that decision, first, because the crave in the present case was not simply a crave for delivery, but a crave for delivery

within 5 days of intimation of the court's interlocutor; and, second, because *Merchants Facilities* only stated the common law. The basis of the parties' contract in the present case, said the sheriff, was statutory, and its express terms were subject to other statutory provisions in particular sections 90 and 92 of the 1974 Act. The sheriff concluded that a common law warrant to search for the goods in the fourth crave was inapt. If the defender refused or delayed returning the car to the pursuers within the relevant period, the appellants' remedy was to seek orders under sections 90 and 92. Consequently, the sheriff did not simply refuse the warrant *in hoc statu* but he refused it outright, so that, whatever happens in future, the appellants will never find themselves entitled to instruct officers of court to open shut and lockfast places in order to recover the vehicle which belongs to them but which remains in the defender's possession. The sheriff did not state what powers he considered a so-called section 90 or 92 order could confer upon the appellants, nor apply his mind to the fact that neither of those sections makes mention of a warrant to search for goods, whether by opening lockfast places or otherwise.

The appeal hearing

[10] At the appeal hearing, the appellant's solicitor moved that both appeals should be allowed; that the sheriffs' respective interlocutors should be recalled insofar as they refused decree; and that decree in respect of all the remaining craves in both actions should thereafter be granted. He made reference to *Macphail*, *Sheriff Court Practice (3rd edition)* paras 2.09 to 2.17 and 7.14, *Cabot Financial UK Ltd* v *McGregor* 2018 SC (SAC) 47 at para [33], *Terry* v *Murray* 1947 SC 10 per Lord Justice Clark Cooper at 12, Lord Mackay at 15 and Lord Jamieson at 16; *The Royal Bank of Scotland Ltd* v *Briggs* 1982 SLT Sh Ct 46 at 48 and *Clydesdale Financial Services Ltd trading as Barclays Partner Finance* v *Lawrence* [2019] SC KIR 63

at [7]. It was submitted that the principles were well established and while a sheriff had the power to refuse to grant decree in an undefended action, that power may be exercised only in exceptional cases, namely, either (1) where there is a very apparent want of jurisdiction or (2) where there is a very apparent incompetency (in the restrictive sense of that word) in the remedy sought. Both sheriffs had erred in refusing decree on the grounds on which they did, which involved neither jurisdiction nor competency.

Discussion

[11] Before considering a sheriff's entitlement to refuse to grant decree in absence, it is worth restating the underlying legal principles which apply to these actions. Both actions are undefended. Both are founded upon a conditional sale agreement. The appellants sue, in each case, as owner of the vehicle which is the subject of the agreement. In each case, they are looking to assert their right of ownership by repossessing their vehicle, and, moreover, to recover the sums which, they aver, are contractually due to them under the agreement. It is important to bear in mind in each case that, at least if the appellant's averments that the agreement has been terminated due to the defender's breach are true, the defender has ceased to be entitled to possession of the goods, on any terms. At common law, provided no other right of the defender is infringed, there would be nothing to prevent the appellants from resorting to self-help, for example, by retrieving a vehicle parked in the street.

[12] That common law position is innovated upon by statute in relation to agreements regulated by the 1974 Act, as the agreements in these cases are. In particular, there are restrictions upon the appellant's right to terminate the agreements, and thereafter to retake possession. However, once an agreement has been terminated (following service of a

default notice) a debtor in a regulated agreement has no greater right to retain or use a vehicle subject to an agreement than he would have at common law.

[13] Nonetheless, if a debtor fails to return the vehicle, there are further restrictions upon the owner, contained in sections 90 and 92 of the 1974 Act, the terms of which are as follows:

> "**90.— Retaking of protected hire-purchase etc. goods.**
> (1) At any time when—
> (a) the debtor is in breach of a regulated hire-purchase or a regulated conditional sale agreement relating to goods, and
> (b) the debtor has paid to the creditor one-third or more of the total price of the goods, and
> (c) the property in the goods remains in the creditor,
> the creditor is not entitled to recover possession of the goods from the debtor except on an order of the court."
>
> "**92.— Recovery of possession of goods or land.**
> (1) Except under an order of the court, the creditor or owner shall not be entitled to enter any premises to take possession of goods subject to a regulated hire-purchase agreement, regulated conditional sale agreement or regulated consumer hire agreement.
> (2) At any time when the debtor is in breach of a regulated conditional sale agreement relating to land, the creditor is entitled to recover possession of the land from the debtor, or any person claiming under him, on an order of the court only.
> (3) An entry in contravention of subsection (1) or (2) is actionable as a breach of statutory duty."

The combined effect of these provisions is that the owner can neither repossess goods which are the subject of a regulated agreement, nor enter any premises to do so, without an order of the court. However, both provisions are silent as to the form that order requires to take, and we do not read either section as creating a new form of order, which either supplants, or is in addition to, existing remedies, nor does it create any new statutory remedies. In other words, in our view it is misconceived both to refer to orders "under" section 90 or section 92, and to assume, as did the sheriff in the William Simpson case, that, in some way, they exclude the remedies which exist at common law. All that those sections mean is that a creditor who recovers protected goods, or enters the debtor's land to do so, without a court

order, will be acting unlawfully. Conversely, if a court order is obtained, there is nothing to prevent a creditor from exercising his right to repossess his goods from the debtor, as he would be entitled to do under an agreement which is not regulated. That right is to be contrasted with any obligation on the part of the defender to deliver the goods conform to a decree of delivery granted by the court. That being so, not only do craves for delivery (and concomitant warrants) remain competent, but we do not see any fundamental contradiction between a crave for delivery (whether or not it contains a reference to a five day period for doing so) on the one hand, coupled with a warrant to open and shut lockfast places; and a declarator that the pursuers are entitled to recover possession of the vehicle, on the other, although whether a mere declarator is the sort of order contemplated by either section 90 or section 92 is perhaps a question for another day[1]. Putting that to one side, in stating that "the basis of the parties' contract is statutory", and reaching the conclusion that, somehow, that excluded the ordinary remedies open to one party upon breach by the other, the sheriff in the William Simpson case, in our view, erred. The contract is regulated by statute, but that is all. As we have said, there is nothing in the Act which prevents common law orders from being obtained. The sheriff therefore erred in holding that there was no basis for a common law warrant to search for the vehicle, and in refusing to grant that warrant.

[14] Further, both sheriffs erred in enquiring into whether the sum ultimately due might be less than the sum sued for. The sheriff's role in undefended actions was authoritatively

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[1] Cf the view taken by Sheriff Foulis in *Clydesdale Financial Services Ltd* v *Wojcik* [2019] SC PER 29. Standing the fact that the effect of sections 90 and 92 is that an owner does *not* have the right to repossess goods nor enter on to premises, and bearing in mind that a declarator, as the name suggests, simply declares existing rights as opposed to conferring new ones, we can see that there may be room for an argument that owners are not entitled to declarators in the terms sought in the present cases. Although the tension in the foregoing issues was not explored during the appeal hearing, the question tends more towards the merits of the claim rather than competency.

and recently restated by this court in *Cabot Financial UK Ltd* v *McGregor*. In short, the appellant's submission, that the sheriff may refuse to grant decree only if there is a lack of jurisdiction, or the remedy sought is incompetent, is well founded. So, the approach of both sheriffs involved delving into the merits in a manner inconsistent with the authorities. To take an extreme example, even had the clause been penal (for example, by not providing for the sale of proceeds to be taken into account at all) it would not have been open to the sheriff to refuse to grant decree. As it was, there was no basis for either sheriff assuming that the appellants in each case would not comply with their obligation to refund any surplus to the defender in each case (and, even if they did, the defenders would require to enforce that obligation in separate proceedings, having failed to defend the present actions). In essence the defenders here are in no different position from any defender who fails to defend an action but who might have had a complete, or partial, defence had he chosen to do so.

[15] The sheriffs having erred, the matter is therefore at large for us to deal with. For the reasons given above, we do not consider that it is appropriate for us to explore whether or not the appellants are strictly entitled to the sums sued for, and in particular we express no view on whether the sheriff in the Creighton case was correct in his construction of the agreement. We have also already explained why we consider that the sheriff in the Simpson case was wrong not to grant decree for delivery and for a warrant to open shut and lockfast places. We will also grant the declarator sought, but refused, in the Simpson case. However, there were two aspects of the craves which troubled us, and which we did consider we were entitled to take notice of *pars judicis* since they do relate to the competency of the remedies sought. The first of those is interest. Since (a) judicial, rather than contractual, interest, is sought from the date of citation, (b) it would not be competent to award judicial interest in addition to contractual interest which has already been applied

and (c) an award of judicial interest is a matter for the discretion of the court (*cf Walker, Civil Remedies,* p 370-371), we considered that it was open to us to explore with the appellants the basis upon which interest is craved. In any event, the appellants' solicitor accepted during the course of the appeal hearings that the principal sum sued for, in each case, includes contractual interest to the date upon which the agreements would have expired but for the termination. Indeed that is implicit in the appellants' concession (in line with the terms of the agreements) that in the event of payment being made before that date, the appellants are not only not entitled to more interest but are entitled to a rebate of interest. That being so (following the case of *Forward Trust Ltd* v *Whymark* [1990] 2 QB 670 it seems to us that interest at the judicial rate may only competently run, not from the date of citation, but from the date upon which each agreement would have terminated. In the Creighton case that is 3 September 2020 and in the Simpson case 17 July 2018.

[16] We also raised with the solicitor for the appellants the references in the craves to recovery agents, and to the appellants' entitlement to recover the expenses of such agents. We are unaware of any rule of common law, or under the 1974 Act, which confers any special status upon recovery agents. The appellants' solicitor suggested that this was to give fair notice to the defender; but we do not see that is an answer. If the appellants are entitled to recover possession, then equally they are entitled to instruct agents to act on their behalf. It is unlikely to matter to the defenders whether the person recovering their vehicle is employed by the appellants, or is a mere agent instructed by them. If it is necessary to open and shut lockfast places, that would require to be done not by a vehicle recovery agent but by officers of court. If, in performing that task, they require to instruct agents, for example to remove a vehicle on a low loader, then it is for the auditor to determine whether or not those expenses are recoverable as an outlay. We understood the agent for the appellants

ultimately to agree that the references to vehicle recovery agents ought properly to be deleted, on the basis that they either add nothing to the craves, or, they seek that which is incompetent for the court to grant.

[17] In the event we shall, in each case, grant decree as craved, with interest from the respective dates specified above, under deletion of all references to vehicle recovery agents.

[18] We shall find no expenses due to or by any party in relation to the appeals.

Postscript

[19] Although we were not referred to it, we have noted the case of *Clydesdale Financial Services Ltd* v *Wojcik* [2019] SC PER 29, in which Sheriff Foulis *ex proprio motu* dismissed an action containing virtually identical craves to those in the cases before us, where the sum sued for was less than £5,000, on the basis that the action ought to have been brought as a simple procedure application. He rejected the argument that the crave for declarator properly elevated the action into one governed by the ordinary cause rules. We observe that the sum sued for in the Simpson case is likewise less than £5,000, and if Sheriff Foulis is correct, that does call into question the competency of that action. Having given the matter some thought, and recognising that authority on the point is divided, for present purposes we incline to the view that even if Sheriff Foulis is correct (about which we express no view), the action as raised is not a fundamental nullity, and absent any prejudice to the defender we see no point in raising the point at this late stage, whether by dismissing the action, requiring the action to be converted into a simple procedure application, or otherwise.