SHERIFFDOM OF GRAMPIAN HIGHLANDS AND ISLANDS AT ABERDEEN

[2021] SC ABE 6

JUDGMENT OF SHERIFF GRAEME NAPIER ESQ

in the cause

CABOT FINANCIAL UK LIMITED, Marlin House, 16 – 22 Grafton Road, Worthing, West Sussex, BN11 1QP

Pursuers

against

SYLVIA CATHERINE MACLENNAN

Defender

and

MORNA GRANDISON, having a place of employment formerly at Drumsheugh Gardens, Edinburgh and now at Atria One, 144 Morrison Street, Edinburgh, EH3 8EX

Third Party

Pursuers: Gardiner of counsel
Defender: Sloane, solicitor, Glasgow
Third Party: personally present with MacLeod of counsel

Aberdeen, 18 September 2018.

The sheriff, having resumed consideration of the cause, Repels the defender's pleas-in-law; Repels the Third party's first plea-in-law directed against the pursuers as unnecessary and not being supported by her Rule 22 Note; Sustains the pursuers' first and the Third party's second pleas-in-law; Dismisses the action so far as directed by the defender against the Third party; Finds the defender liable to the third party in her expenses as taxed; Grants decree against the defender for payment to the pursuers of the sum of **EIGHT THOUSAND**

SIX HUNDRED AND SIXTY TWO POUNDS AND TWENTY TWO PENCE STERLING (£8,662.22); Finds the defender liable to the pursuers in their expenses as taxed; Grants sanction in terms of section 108 of the Courts Reform (Scotland) Act 2014 for the employment of counsel by both the defender and the Third party; Allows accounts of expenses to be made up; remits same, when lodged, to the auditor of court to tax and report thereon; and decerns.

NOTE

[1] This case called before me for debate according to the interlocutor allowing the debate on "parties' Rule 22 notes, the defender having offered a proof before answer" but in substance on the Third party's plea to the relevancy of the defender's case against her and on the pursuers' plea to the relevancy of the defender's answer to their case against her.

[2] Mr Gardiner, Advocate appeared on behalf of the pursuer company; Mr Sloane, solicitor appeared for the defender; and Mr MacLeod, Advocate appeared for the Third party (who was also personally present throughout the debate).

[3] Having heard agents in debate I was invited to deal with the question of expenses, including the question of sanction for counsel, without any further hearing if possible except in the case of significant mixed success. Given my decision I do not consider that it is necessary to fix a separate hearing on expenses.

History of Case

[4] The pursuer company raised this action for payment of £8,662.22 against the defender Sylvia MacLennan in Wick Sheriff Court in April 2016. A notice of intention to defend was lodged and a preliminary timetable issued identifying 26 August 2016 as the

date for the options hearing. In her defences, which I understand were drafted by the defender personally, she denied liability but set out an *esto* argument to the effect that if any sums were due then the Third party as Judicial Factor was liable to make payment thereof. A third party notice was served by the defender and the Third party was convened as a party to the action as of 16 December 2016. The Third party was ordered to lodge defences with an options hearing fixed for 10 March 2017 on which date the court ex proprio motu remitted the cause to Inverness Sheriff Court. Although the justification for that remit was not specified in the interlocutor I understand it may have been because the defender had practised in the jurisdiction of Wick Sheriff Court. After miscellaneous procedure in Inverness Sheriff Court a debate was fixed to be held on 18 August 2017, on which date the debate was discharged and the case transferred to Aberdeen Sheriff Court on the basis that "All the resident sheriffs at Inverness knowledge of the parties personally". I suspect that this was intended as a reference to knowledge of the defender rather than the pursuer or Third party.

[5] On 28 September 2017, a debate was assigned for 19 December 2017 in Aberdeen Sheriff Court, the defender having offered a proof before answer.

Outline of Case

[6] The record upon which the debate proceeded is No 17 of process.

[7] The pursuer seeks decree for payment against the defender in the sum of £8,662.22, which sum is said to be due to the pursuers by the defender in relation to a credit card debt. The pursuers' crave makes no reference to interest but does seek expenses.

[8] It appears that the defender had entered into a credit card agreement (with an account reference number of [redacted]) regulated under the Consumer Credit Act 1974,

with Lloyds TSB Bank Plc (hereafter 'TSB') as "supplier" for the purposes of the agreement and the Act. It is averred (Article 2 of condescendence) that the defender last made payment under that agreement on 12 January 2012 and that the sum sued for is the balance due under that agreement. It is averred that TSB assigned its rights, as creditor under that agreement, to the pursuers on 27 June 2014.

[9] The defender was a solicitor practising in and around Wick as a partner in the firm of …….. The Third party is an employee of the Law Society of Scotland and was appointed as Interim Judicial Factor and then Judicial Factor to the estate of the defender by virtue of interlocutors of the Inner House of the Court of Session dated 15 February and 15 March 2012 following the lodging of a Petition at the instance of The Law Society of Scotland.

[10] The defender does not dispute being party to the credit card agreement but says that she does not know when the last payment to the account was made by her as "payments were taken by Lloyds TSB Bank Plc to this account by direct debit; the defender having no access to bank records for that time". She denies knowledge of the assignation of the debt saying that she has no knowledge that a debt under that agreement was assigned to them and denies having been advised by the pursuers of any such assignation "prior to the raising of the present action". In essence, the defender's position is that the pursuers have no title to sue although the plea in law is not so directed.

[11] Further, and in any event, the defender argues that even if such assignation is effective against her she is not liable to make payment as the judicial factor (the Third party) was appointed "to the personal estate of the Defender" as at 15 February 2012 with a duty to preserve her estate and pay debts, including any due to the pursuers, from the estate. She avers that the estate was sufficiently large to allow payment of the sum sued for.

[12] The pursuers have no pleas-in-law directed against the Third party whose involvement in the case is the sole responsibility of the defender. The Third party's first plea in law is directed to the pursuer's case against her but was not supported by a rule 22 note and is unnecessary.

[13] The debate focussed on the pursuers' plea to the relevancy of the defence, the defender's first plea in law as to the relevancy of the defender's case (their preliminary plea in law seeks decree *de plano*) and the Third party's preliminary pleas seeking dismissal of the defender's case against her or the restriction of probation.

Preliminary Pleas

[14] The pursuer company's first plea-in-law is a general plea to the relevancy *et separatim* specification of the defender's averments and seeks decree *de plano* with expenses. Their supporting Rule 22 Note (12 of process) identifies the following issues for debate:

a. The pursuers' averment that on 8 April 2005 "the defender entered into an agreement with Lloyds TSB…. under Agreement number for Lloyds Bank Credit Card which (sic) the defender borrowed from them a sum of money repayable on demand ... the last payment by the defender was made to account on 12 [January} 2012" is met by the defender's answer "*quoad ultra* not known and not admitted". This, the pursuers argue is not appropriate for matters within the defender's knowledge. That being the case it is argued that she is under a duty to admit or deny the existence of the agreement and the last payment. Standing a lack of denial the terms of agreement and date of last payment should be treated as being admitted.

b. Letters to the defender intimating the assignation were said to be lodged in process and are certainly referred to in the pleadings. It is argued in the Rule 22

Note that the defender has not denied the existence of the letters and therefore should be held to have admitted that the assignation had been intimated. The pursuer also criticised the defender's calls upon the pursuer to show that they intimated the assignation on the Third party and their pleas-in-law (7 and 8) attempting to associate assignation with prescription but did not pursue this line at debate.

c. Further, the pursuers argue that they are entitled to notice of the defender's case which appears to be that she has a right of relief against a Third party. The pursuers argue that on the face of the interlocutors appointing the defender's Judicial Factor and the terms of Schedule 2 to the Insolvency Act 1986 and section 42 of the Solicitors (Scotland) Act 1980 that proposition is not supported and they have not been provided with adequate specification of the defender's position. The rule 22 note invites the court to refuse to remit those averments to probation.

[15] The defender's first plea-in-law is a general attack on the relevance *et separatim* specification of the pursuers' case and seeks dismissal. The defender's seventh plea-in-law attacks the relevance *et separatim* the specification of the Third party's pleadings and seeks exclusion of these from probation. The defender's eighth plea-in-law is one of prescription on the basis that the debt not having been assigned and no enforcement action having been raised by the actual creditor (i.e. TSB, not the pursuer) within 5 years of their last acknowledgement of the debt (the final payment), the action falls to be dismissed.

[16] The Third party's first plea-in-law consists of an attack on the relevance *et separatim* specification of the pursuers' case against the Third party and seeks dismissal of the case against her. But as I understand it the pursuers do not seek to set out a case against the Third party. As noted already this plea is not, in any event, supported by the note lodged in

terms of Rule 22. It had not previously been repelled. I propose to do so now. The further preliminary pleas (2 and 3) are directed against the defender's case against the Third party and seek dismissal (plea-in-law 2) or exclusion of the case from probation (plea-in-law 3) on the grounds of lack of relevancy *et separatim* lack of specification.

[17] The Third party's Rule 22 Note supporting her second and Third pleas-in-law identifies the following issues:

a. In Answer 2, the defender avers that the Third party "was appointed interim judicial factor to the personal estate of the defender on or around 15 February 2012". This is admitted by the Third party (and indeed the pursuer). The defender then makes further averments to the effect that the judicial factor's duties included preserving the defender's personal estate and paying debts duly constituted and owing from the assets of the estate. The Third party's position is that the defender's case misconstrues the duties and powers of a Judicial Factor. She argues that she does not have inherent power to settle liabilities such as that involved in this case without the consent of the defender or express authorisation of the court (Inner House). Further, the Third party quarrels with the defender's assertion that she (the Third party) breached her duties as judicial factor thus: "Believed and averred such action by the Third party is a breach of her duty as judicial factor". Not only are those averments denied by the Third party but it is said that the defender does not have pleas-in-law which directly support those averments, albeit she has a preliminary plea (plea-in-law 6) directed against the Third party's averments generally.

b. The Rule 22 Note sets out the Third party's position as to the legal position of a judicial factor referring to the cases of *Macadam* v *Grandison* and *Council for the Law*

Society v *McKinnie* (No 2) (both referred to infra). The Third party's position is that the defender is misguided as to the nature, powers and consequences of judicial factory appointed over the partnership of the …… Law Practice and the partners thereof. Her averments are said to be wholly irrelevant and it is argued that the action, as framed against the Third party, ought to be dismissed.

c. Separately, the Rule 22 Note records that in Answer 2 the defender calls upon the Third party to lodge an account of her intromissions and avers that the judicial factor is bound to seek discharge of her appointment. The Third party's position is that the purported challenge to the judicial factor's administration is irrelevant as any such challenge is not competent in the Sheriff Court. Again, reference is made to the cases of *Macadam* and *Council for the Law Society* previously referred to as authority for the proposition that a challenge by the Ward to the judicial factor's possession of estate must be taken in the appointing court (in this case the Court of Session).

d. The Third party also attacks the defender's *esto* case that if the sum sued for is due by the defender, the pursuers are entitled to seek payment from the judicial factor. This averment is attacked on the basis that there is no liability between the judicial factor and the pursuer and in any event as the pursuer has not adopted a case or framed pleas-in-law against the Third party this claim "ought to be dismissed".

e. Further, and in any event, it is argued that the defender's pleadings in Answer 2 are predicated on a 'believed and averred' basis without any positive advancement of the basis upon which those statements are believed and with no notice of the facts upon which such belief relies. Accordingly these pleadings not

only lack specification they lack candour. Although the arguments in the pursuers' and Third party's notes were developed in debate, the defender did not seek to support her own preliminary pleas. Rather her solicitor simply responded to the attacks made on the defender's own pleadings. I have accordingly repelled her preliminary pleas for want of insistence.

[18] Helpfully counsel for the pursuer company and counsel for the Third party had prepared written outlines of their submissions (respectfully 21 and 22 of process) which written submissions were expanded upon in oral submissions.

[19] At the outset of the debate it was agreed that I should deal with the Third party's preliminary pleas first; then the pursuers' preliminary pleas; and finally the defender's preliminary pleas, although in the event the defender's agent restricted himself to responding to the attacks on the defender's pleadings.

[20] As the discussion developed two issues became the foci of submissions: whether there was any merit in the defender's contention that the Third party as judicial factor could have liability for what were personal debts of the defender; and whether there was any basis for the defender's argument that there had been no effective intimation to her of the assignation of the debt owed by her to TSB. It was common ground that:

a. If I accept the Third party's argument, the case against her should be dismissed and she should be entitled to expenses against the defender who convened her to the action; and

b. If I accept the pursuers' argument then at worst the initiation of these proceedings is sufficient intimation of the assignation to the defender, the defender's pleas must fail and decree *de plano* should be granted against her with expenses.

[21] Parties had lodged lists of authorities (nos. 18 – 20 of process) although not all were referred to during submissions. Those of significance are:

Cases

Council of the Law Society of Scotland v *McKinnie*, 1991 SC 355;

Council of the Law Society of Scotland v *McKinnie* (No 2), 1995 SC 94;

Ross v *Gordon's Judicial Factor*, 1973 SLT (Notes) 91;

Macadam v *Grandison*, [2008] CSOH 53;

McCrone v *MacBeth Currie & Co*, 1968 SLT (Notes) 24;

Christie Owen and Davies Plc t/a Christie & Co v *Campbell*, 2009 S.C. 436;

Promantoria (Ram) Ltd v *John Moore*, 2017 CSOH 88; and

Cumming v *SSE Plc* SAC (Civ.) 17.

Textbooks and Institutional Writers

J. Erskine, *An Institute of the Laws of Scotland*,

N.M.L.Walker, *Judicial Factors*; and

MacPhail, *Sheriff Court Practice*, 3rd edn.

Statutes and Subordinate Legislation

Solicitors (Scotland) Act 1980;

Judicial Factors Act 1849;

Judicial Factors (Scotland) Act 1889; and

Act of Sederunt (Rules of the Court of Session 1994).

The Third Party's pleas

[22] As I have said the pursuer does not plead a case against the Third party. Her involvement rests solely upon the pleadings of the defender who convened her as a Third party to the action. The Third party's position is relatively straightforward. It is that the defender's case against her is fundamentally misconceived. No matter the outcome of the pursuer's claim against the defender, the Third party has no liability.

[23] Before dealing with the detail of counsel's submissions it is helpful to note that there are no averments on record that the credit card debt which the pursuers seek payment of relates to the ……..Law Practice. It is accepted to be a personal debt and it was not disputed that I should proceed on that basis. Both the application for the credit card and the relative account are recorded in the defender's name (production in 5/3/4 of process refers). It is not disputed that the Third party was appointed to be Judicial Factor on the estates of the law practice and the partners thereof (therefor of the defender) on 15 February 2012 by the Inner House of the Court of Session following presentation of a petition by the council of the Law Society of Scotland. The terms of appointment are clear from the Court of Session interlocutors (productions 5/1/1 and 5/1/2). There is nothing on record to suggest that the Judicial Factory powers in this case were in any way unusual for such a case and in any way restricted by the appointing court. Nor does it appear to be in dispute that debts accrued on the credit card account over the period May 2005 to July 2009 (production 5/2/3 is a comprehensive account statement sent to the defender at her home address but the last entry is in September 2011). The card does not appear to have been debited July 2009 the only entries being interest charges and credits towards the debit balance. Accordingly it seems clear that the debt sought to be recovered is a personal debt incurred by the defender prior to the appointment of the Judicial Factor.

[24] The case pled against the Third party introduced by the defender is found in Answer 2 and her fifth and sixth pleas-in-law. Answer 2 is long and somewhat convoluted but the defender avers (commencing on page 4 at line 33) that:

> "The Judicial Factor has a duty to preserve the defenders (sic) personal estate and to pay the debts duly constituted and owing from the assets of the estate on the at the date of appointment". Still in Answer 2 but now on page 6 at line 34 it is further averred "Believed and averred that the Third party acting as Judicial Factor to the Defenders (sic) estate had a duty to preserve the Defenders (sic) estate and has no authority to dispose of assets of that estate except to meet liabilities forming part of the estate at or prior to the appointment or as specifically ordered by the court. "

[25] In her *esto* case the defender also argues that the Third party has breached her duties as Judicial Factor thus:

> "*Esto* the debt ..... is due, and the Third Party has exhausted the Defenders (sic) estate without settling such debts due on or prior to her appointment ……believed and averred such action by the Third Party is a breach of her duty as Judicial Factor making her personally liable for all losses resulting from such a breach of duty. Believed and averred that if the third party acting as Judicial Factor has exhausted the Defenders (sic) estate the purpose of said Judicial Factory have (sic) been completed or frustrated and the Third Party is bound to seek discharge of that appointment." (Page 7, commencing at line 28).

[26] Counsel for the Third party argued that the case pled by the defender against his client is irrelevant. The Third party argues that the defender's case against her is simply wrong in law, no examination of the facts can correct that and the case falls to be dismissed. It is argued that the defender simply misunderstands the nature and extent of the Judicial Factory involved the defender's case and therefore misunderstands the extent to which the Judicial Factor has any liability to the ward's (the defender's) creditors.

[27] The Third party's position is that the powers of a Judicial Factor are defined in *Council of the Law Society* v *McKinnie* (No 2) which decision make clear that sequestration and Judicial Factory are distinct processes and that the trustee in a sequestration and a Judicial Factor are not only distinct officers of court but enjoy different rights. As is clear from the

interlocutors produced by the pursuer (with which the defender takes no issue) the Third party was appointed as Judicial Factor following a petition by the Law Society of Scotland in terms of section 41 of the Solicitors (Scotland) Act 1980. In terms of her appointment the Judicial Factor was provided with the "usual powers". The Judicial Factor is thus empowered to take control of the solicitor's estate, that is the estate of [the firm], and personal estates of the partners thereof (including the defender). The powers of the Judicial Factor are not simply to manage and conserve the ward's estate as might be the position in other Judicial Factories or as a Trustee in a sequestration is required to do. The 'usual powers' of a Judicial Factor appointed under the Solicitors (Scotland) Act include the power to settle the liabilities of the solicitor's estate and include the power to realise the personal assets of the solicitor but only to meet liabilities attributed to the solicitor's estate. Personal liabilities of the partners as individuals do not fall into the scope of the Judicial Factory: the Judicial Factor's duties relate to the taking of title to and accounting for assets and property of the estate with a view to settling liabilities of the Solicitors' firm, while sequestration may be a diligence which is open to the creditors of the solicitor qua individual and the ward's interest (or if the ward is sequestrated her trustee's interest) is to an accounting from the Judicial Factor in respect of the ward's estate.

[28] The point essentially is this: if the debt at the centre of this action is a personal debt of the defender and not a business debt then settling it cannot be the responsibility of the Judicial Factor. As the Lord President said in *McKinnie (No 2)* (at page 115, letters F to I) adopting the reasoning of Lord Penrose in the same case, "the effect of the appointment of a Judicial Factor on the estate of a solicitor under section 41 of the is that he is entitled to ingather and administer the solicitor's estate, including funds held for clients, with a view to settlement of the solicitor's liabilities. ….. He acts under the superintendence of the

Accountant of Court." The effects of, and procedures relating to, a sequestration do not follow on his appointment. His function is not limited to conserving the estate. He is required by his appointment to administer it in order to deal, as best he can, with the circumstances which give rise to his/her appointments. As the Lord President makes clear "the duties of his appointment will include the realisation and distribution of assets **to meet the liabilities of the solicitor arising from his practice as a solicitor** ".

[29] The solicitor, or if he/ she has been sequestrated, the trustee has effectively been superseded in the administration of his estate by the Judicial Factor's appointment. What remains is a right to an accounting only. The solicitor or trustee cannot, while the appointment subsists, require the Judicial Factor to hand over the estate. The right is to payment of such assets as remain in the hands of the factor once the duties of appointment have been satisfied. If the solicitor is sequestrated the right to an accounting passes to the trustee.

[30] Counsel for the Third party suggested that the defender, in her averments, appears to treat the Judicial Factory as akin to sequestration of the solicitor's personal estate. As is clear from the Lord President's opinion in *McKinnie (No 2)* that proposition is wrong in law. That it is, is also clear from a passage in *Ross* v *Gordon's Judicial Factor* (approved of in *McKinnie*) where Lord Avonside (at page 92) says that the Judicial Factor "is not a trustee in bankruptcy, has not the powers and duties of a trustee and the effects and procedures relating to sequestration do not follow on the appointment of a Judicial Factor"

[31] Counsel also drew my attention to the opinion of Lord Hodge in *MacAdam* v *Grandison* as a succinct summary of the differing roles of a Judicial Factor and a Trustee in Sequestration. In *MacAdam* the ward of a Judicial Factory challenged the exercise of the Judicial Factor's powers to intromit with personal estates. At paragraph 16, Lord Hodge

helpfully summarises the functions of a Judicial Factor based on the decision in *McKimmie (No 2)* as follows:

[32] "First, the appointment of a Judicial Factor on the estate of a solicitor under section 41 of the 1980 Act gives him control over two distinct estates namely the client account which the solicitor holds in a fiduciary capacity and the solicitor's personal estate ... secondly, the Judicial Factor can use the solicitor's personal estate to settle liabilities **of the solicitor arising from his practice** [emphasis added] .... thirdly, the Judicial Factor does not have the powers and duties of a trustee and sequestration to receive and adjudicate upon creditor's claims….. ."

[33] The defender's case against the Third party can be analysed not only on the basis of these general observations but also by considering the specific powers of the Judicial Factor arising in this case. These derive from the interlocutor appointing the Third party as Judicial Factor and are regulated by, inter alia, the Judicial Factors Act 1849 and the Judicial Factors (Scotland) Act 1889. The defender does not aver that the credit card debt is one owed by the partnership (rather than being a personal debt) and she does not set out on what basis the Judicial Factor has any liability to "pay debts duly constituted and owing from the assets of the estate at the date of appointment" as pleads in the fourth paragraph of Answer 2. These averments are, in the Third party's submission, irrelevant.

[34] Whilst counsel accepted that Walker, *Judicial Factors*, at page 95 states that a Factor has power to compromise or submit all claims connected with the estate incurred to a Third party, that power is said to apply only in so far as it is "not at variance with the terms or purposes of his appointment". In this case it is argued that such a power would be at variance with the terms and purposes of the factory as the powers of a Judicial Factor appointed under the Solicitors (Scotland) Act 1980 relate only to the business debts of the

solicitor not his personal debts. Further, and in any event, Walker's reference is to Third party claims against the estate in the hands of the Factor. In this case there are no such claims against the Judicial Factor. Even if there was such a claim and it was not rejected as being incompetent, following *MacIntosh's Trustees* v *McQueen's Trustees* (referred to at page 90 of Walker) the Judicial Factor has discretion to but is not obliged to enter such proceedings.

[35] I accept counsel's argument. It seems to me that the case introduced by the defender against the Third party is wholly irrelevant and falls to be dismissed.

[36] The defender does also seeks to argue an *esto* case on the basis that the Third party is in breach of her duties as factor and has a duty to seek her discharge. The legal basis for this argument is difficult to discern from the pleadings. There is certainly no clear exposition of the legal basis upon which such duties are said to arise. As I understand the third party's position is that this *esto* case against her is also misconceived as it proceeds on the basis of a misconception as to the process for supervision of the Judicial Factor. Any challenge which a ward seeks to make to the exercise of the Judicial Factor's powers is a matter for the appointing court. In this case that is a matter for the Inner House of the Court of Session, not for Aberdeen Sheriff Court.

[37] The issue has previously received judicial consideration in *MacAdam* v *Grandison* where it arose in the context of an action in the Outer House of the Court of Session for declarator by one partner in a Solicitor's firm that he was not liable for a shortfall on the firm's client account when a Judicial Factor (appointed, in similar circumstances to the instant case, both to the estates of the firm and the partners thereof) had been authorised to make payments out of sums held in the name of the firm and partners and to divide the sum at credit of the client account amongst the firm's clients. The question for Lord Hodge was

whether he had jurisdiction to deal with the matter during the currency of the administration of a factory estate where the factor had been appointed on the authority of the Inner House. Following upon an analysis of historical authorities, Lord Hodge concluded (at paragraph 18) that where the substance of a challenge is to the entitlement of the Judicial Factor to administer and distribute a significant part of the ward's personal estate in accordance with the court's interlocutor it is the appointing court which that has jurisdiction to determines a challenge by the ward to a Judicial Factor's administration. It is the appointing court which has jurisdiction to recall an appointment (per *Borthwick, petitioner*). It is not reported how that case resolved but the suggestion was that the Inner House if so minded could authorise an Outer Court judge to deal with the matter.

[38] As has already been noted in this case the appointment of the Third party as Judicial Factor was by way of petition in the Inner House as provided for by Rule 14.3 of the Rules of the Court of Session. Although I recognise that a sheriff has power to appoint a Judicial Factor in certain circumstances that does not extend to appointment of a factor to the estate of Solicitor qua his or her business. The appointment in this case was made pursuant to section 41 of the Solicitors (Scotland) Act 1980 and in terms of section 65 of that Act the court which has jurisdiction is the Court of Session. The Rules of the Court of Session make it clear that for accounting purposes, the Judicial Factor is subject to the ongoing supervision and superintendence of the Accountant of Court. Under Rule 61 of the Rules of the Court of Session the administration of the Judicial Factor is supervised by the Accountant of Court on behalf of the Inner House. That responsibility extends to superintending: the actings of the Judicial Factor; the distribution of the ward's estate; and the factor's discharge. Any consequential or incidental applications following the appointment of a Judicial Factor should be by Note in the petition process (Rule 61.4).

[39] Given that background there can be no jurisdiction for the sheriff quoad enforcement of the Judicial Factor's responsibilities. There is no basis on which any alleged breach of a Judicial Factor's duties is judiciable in the Sheriff Court. This court does not have authority to interpret, restrict or extend the scope of the powers granted by the Inner House.

[40] Counsel invited me to determine that the defender's *esto* argument is also irrelevantly pled in this court. He suggested that if I do not accept his primary submission that the defender's case against the Third party is fundamentally misconstrued at least I should sustain the Third party's Third plea-in-law to the extent of deletion of the defender's averments in the paragraph starting with the word "*Esto*" on line 28 of the seventh page of the Record.

[41] The Third party's further ground of challenge (see paragraph 5 of the Rule 22 Note) is that insofar as the defender directs averments against the Judicial Factor based on purported belief they lack specification and they are accordingly irrelevant. In making this argument counsel reminded me of the dictum of Lord Johnson in *McCrone* v *MacBeth, Curry and Co* that:

> "Where a definite averment of facts which a party must establish is necessary, the formula is quite inappropriate".

[42] In answer 2, the defender makes various averments as to the duties of the Judicial Factor prefaced by the precise phrase ("believed and averred") criticised by Lord Johnson. Accordingly, counsel argued that any such averments of essential facts to found the defender's case against the Third party lack specification thus rendering the defender's case irrelevant.

[43] A broad examination of the defender's case (per MacPhail, *Sheriff Court Practice* at paragraphs 9.27 to 9.41) indicates no basis for establishing liability on the Judicial Factor to

the pursuer in place of the defender or direct to the defender. On this basis the defender's case against the Third party also fails and should therefore be dismissed.

[44] Counsel also dealt with the defender's Rule 22 Note although ultimately the defender's preliminary pleas were not pressed. Insofar as the defender seeks to characterise the nature of the estate over which the Judicial Factor has power and the nature of those powers, for the reasons previously given she fails to understand the nature of the Judicial Factory in this case in so far as she seeks to attack the Third party's pleadings as irrelevant. The pleadings which she seeks to attack are simply answers to the defender's averments about the nature of the Judicial Factor's duties.

[45] In inviting me to sustain the Third party's second plea in law and to dismiss the action in so far as directed against her, which failing to sustain her third plea-in-law and not admit the defenders averments to probation I was invited to find the defender liable to the Third Party in expenses and to certify the cause as suitable for the employment of counsel in terms of section 108 of the Courts Reform (Scotland) Act 2014.

[46] The Third party's Rule 22 Note relates only to the averments of the defender. There is no case pled against the Third party by the pursuer and the pursuer's counsel was not called upon to respond to the Third party's submission. The solicitor for the defender had not provided a written note of arguments but his submissions were succinct. He relied upon the description of the powers, duties and liabilities of a Judicial Factor as set out in Walker, *Judicial Factors* at pages 75 to 82, 90, 91 and 95 and also to the opinion of Lord Avonside in *Ross* v *Gordon's Judicial Factor and others*.

[47] The starting point for the defender's case against the Third party seems to be the assertion in Walker at page 90 that: "A factor has power and duty to enforce a claim on behalf of the estate by action and diligence and to defend a claim against it but notably he

has no title to claim or retain property which does not fall within the terms of his appointment". Walker relies upon the case of *MacIntosh's Trustees* v *McQueen's Trustees* as authority for the proposition that the Judicial Factor has title to defend a claim against him. But, of course, in the case I am considering there is no claim against the Judicial Factor by the pursuer. The defender's argument is that the Judicial Factor has not only power to enter proceedings but he has a duty to do so (Walker, page 90). I was referred to Lord Avonside's opinion in *Ross* v *Gordon's Judicial Factor* but that was a case relating to a plea to the competency of an attempt by a Third party to enforce a claim on a debt owed by a solicitor against the Judicial Factor and does not seem to me to be of any assistance to the defender.

[48] As counsel for the Third Party did, the defender's Solicitor referred to the opinion of Lord Hodge in *MacAdam* v *Grandison.* Whilst counsel for the Third party relied upon this decision as support for his position that even if the defender is entitled to relief against the Third party this court does not have jurisdiction to deal with that matter, the defender's solicitor relied upon the decision as support for his proposition that this court can competently deal with the matter. At paragraph 13 of his analysis, Lord Hodge points out that there are actions which can competently be raised against Judicial Factor in courts other than the one which appointed him. Examples suggested by Lord Hodge are actions relating to contracts entered into by the Factor but his Lordship recognised (in paragraph 15) that the extent to which such actions are competent may depend upon the specific purposes for which the court has appointed the Judicial Factor. Lord Hodge does, however, note that it is not clear that creditors of a solicitor can recover debts due by him in his private capacity by suing the Judicial Factor appointed under section 41 of the 1980 Act because the role of such a Judicial Factor "is to settle the solicitor's liability to clients and others connected with his practice". Such creditors, Lord Hodge suggests, may sue the Ward and, if their debts are not

paid, seek sequestration of his estates under the Bankruptcy (Scotland) Acts. Mr Sloane pointed out that in *Ross* v *Gordon's Judicial Factor* which had been referred to by counsel for the Third party, Lord Avonside differentiates the position of a trustee in sequestration from that of a Judicial Factor and goes on (at page 92) to say "In all the authorities cited to me it is plain that a Judicial Factor is an officer of the court who acts under the superintendence of the Accountant of Court as a trustee, charged with the duty of safeguarding and properly administering the estate given into his hands. But this in no way prevents creditors raising actions for payment against him in respect of debts due from that estate".

[49] It seems to me to be clear from the authorities referred to by counsel that the defender's case against the Judicial Factor is fundamentally misconceived.

[50] It is quite clear that the purpose of the Judicial Factory under section 41 is to deal with the liabilities arising from the solicitor's business not to deal with personal debts. There is nothing on Record or even said in submissions to suggest that this debt is anything other than a personal debt. Although the defender's agent suggested the contrary when relying upon the decision of Lord Hodge in *MacAdam*, it seems quite clear to me that Lord Hodge, following his analysis of various authorities, was clear that creditors of a solicitor could not recover debts due by him in his private capacity by suing the Judicial Factor appointed under section 41 of the 1980 Act because the role of such a Judicial Factor is to settle the solicitor's liability to clients and others incurred in connection with the legal practice. Creditors may, Lord Hodge suggested, sue the ward and if such debts are not paid seek sequestration of the ward's personal estates under the Bankruptcy Acts. Be that as it may even if the creditors were entitled to sue the Judicial Factor in this case they have chosen not to. They have chosen to sue the ward and as Lord Hodge pointed out may seek sequestration of her estates if that liability is not settled.

[51] Further, and in any event, I have come to the conclusion that this court has no jurisdiction to deal with the issues raised by the defender. These seem to me to be matters which fall within the exclusive jurisdiction of the Inner House of the Court of Session and the Accountant of Court. They relate essentially to the questions of the supervision of the actions of the Judicial Factor appointed by the Inner House.

[52] For these reasons, I propose to sustain the Third Party's preliminary plea. I consider that it is only necessary to sustain the second plea-in-law as that leads to dismissal of the case against the Third party introduced by the defender. There is no case against the Third party pled by the pursuer. Any remedy which the defender thinks she has against the Judicial Factor for the conduct of the factory of her estate should be pursued with the Accountant of Court or by way of action of count reckoning and payment in the Inner House.

The pursuer's case against the defender

[53] Having dealt with the case introduced by the defender against the Third party I now turn to consider the pursuers' case against the defender. Both the pursuer and defender have preliminary pleas directed to each other's case. The pursuer's first plea-in-law is a general plea attacking the relevance *et seperatim* specification of the defender's case and seeks decree *de plano.* This case is supported by the Rule 22 Note (No. 12 of process) but which was departed from to some extent at debate at least in respect of the emphasis placed on the issues raised. There is no separate plea in law seeking to restrict the averments remitted to probation.

[54] The defender's first plea-in-law attacks the relevance and specification of the pursuers' case and seeks dismissal. This was not argued at debate. It appeared to be agreed

between the pursuer and defender that what I had to decide was whether the question of intimation of the assignation in favour of the pursuers should remain live for proof.

[55] The pursuers' case is that the defender entered into a credit card agreement which is in arrears. The creditor in that agreement assigned the debt to the pursuers and the pursuers are entitled to seek payment against the defender. The defender essentially says she knows nothing about the pursuers' entitlement to claim on this agreement. She does not dispute the agreement or the balance outstanding. She says that if there was an assignation of the debt to the pursuers she it has never been lawfully intimated to her and therefore she argues the pursuers are not entitled to seek decree against her (in reality have neither title nor interest to sue).

[56] Counsel for the pursuers had prepared a detailed 11 page submission which now forms No. 21 of process. I am invited to sustain the pursuers' preliminary plea (plea-in-law 1) and grant decree against the defender as the original credit agreement is admitted (Answer 2 at page 3); failure to pay on demand is admitted (the pursuers' averment to this effect being unanswered); and judicial intimation of the assignation has been admitted (Answer 2 at page 4). That being the position, counsel argued that there was nothing left for enquiry either at proof or a proof before answer.

[57] In substance, counsel's position is that the only defence argued by the defender against the pursuers' claim for payment is that: 1) The debt upon which the action proceeds has not been lawfully assigned to the pursuers who have therefore no right, title and interest in any such debt and the action should therefore be dismissed (that is in terms of the defender's second and third pleas-in-law); and 2) That as no action has been raised by the 'original' creditor (as opposed to the current pursuers) within 5 years of the last acknowledgement of the subsistence of the debt, the right to recover payment has prescribed

(eighth plea-in-law). These essentially turn on the issue of whether there is an enforceable assignation and the agent for the defender conceded that the issue essentially is whether there has been lawful intimation of the assignation.

[58] The pursuers' position is that there had been effective intimation before the initiation of proceedings. There is no specific averment that the pursuers intimated the assignation to the defender. There is reference to 3 letters dated 19 February 2016, 14 March 2016 and 29 March 2016 from the pursuers' agents to the defender. The assignation itself, although referred to in the pursuers' averments, has not been lodged in process even in a redacted form. There is no specific reference in the letters to the defender to an assignation. The first letter refers to the pursuers as clients of the solicitors whose letter it is and includes details of the credit card agreement referring to the "original creditor" as Lloyds TSB; containing the agreement number; and including the amount outstanding. In the body of the letter it is made clear that the pursuers' "request payment" of the sum outstanding and ask that all future correspondence be with the solicitor. The follow-up letter simply indicates that the pursuers are prepared to consider instalment payments. The final letter is a pro-forma pre-action notice.

[59] The defender's response to these averments is that she does not know and does not admit that the debt was assigned. She denies having been advised of any such assignation "prior to the raising of the present action" going on to assert that "assignation of a debt, as an incorporeal moveable asset, takes effect on the date of intimation of such debt on the person or persons liable to pay same". The defender's agent did not expand upon this assertion at debate.

[60] As I understand it Counsel sought to argue that these letters were sufficient to amount to intimation but in any event judicial intimation in the form of the initiation of

these proceedings rendered any argument as to lack of intimation of the assignation irrelevant; and in any event the defender's averments lacks specification. The defender's averments that the lack of effective intimation means that no claim has been intimated by an entitled party within the prescriptive period is premised on the lack of intimation of any assignation and is bound to fail if I accept the contention that intimation on the defender was effective at least by the date of intimation of these proceedings. The issue does not require proof as the defender can be taken as admitting the date of the last payment which falls within the prescriptive period counting back from the date of institution of these proceedings.

[61] The defender admits that the credit card agreement was entered into around March 2005. The pursuers' position is that the credit card debt to TSB incurred by the defender, which was subsequently assigned to the pursuers, was acknowledged by the defender by virtue of her last payment made on 12 January 2012. The defender neither acknowledges nor denies the averment as to this payment in Article 2 of condescendence. Her response is "not known and not admitted that the last (sic) payment to account was made on 12 January 2012". Her explanation for this averment is that "payments were taken by Lloyds TSB Bank plc to this account by direct debit the defender having no access to bank records from that time accordingly has no personal knowledge of this".

[62] Counsel referred to the well-known passage in Macphail, *Sheriff Court Practice*, at paragraph 9.22 (b) where the learned authors note that if a statement made by one party to an action which is within the knowledge of the other, is not denied by the other, the latter is held as admitting the fact so stated; and the phrases "not admitted" and "no admission made" are not an equivalent of a denial of fact. Counsel suggested that the defender's response lacks candour. She clearly had access to bank records for the relevant time as she

admits that the interim Judicial Factor was appointed only on 15 February 2012, that is more than one month after the date payment is said to have been made (she appears to have been able to provide an inventory of assets and liabilities to the Third party around the time of the Third party's appointment). Counsel's position is that by her response to the positive averments by the pursuers, the defender should be held as admitting that the last payment to account was made on 12 January 2012 or at least that a payment was made then. If I accept that proposition then the prescriptive period only begins to run from then and, as the action was warranted in April 2016, served in May 2016 and with a Notice of Intention to defend being lodged on the 26 of May 2016, action was clearly commenced within the prescriptive period and the claim cannot be said to have prescribed.

[63] The defender's agent did not address this proposition in any detail. I accept counsel's argument. The defender must be held to be aware of her own bank account. She simply cannot say "I don't have copies of the statements now or I cannot remember". Accordingly I accept that the date of payment is admitted and that date forms the starting point for the calculation of the 5 year prescriptive period.

[64] The defender argues that the pursuer's case fails because any intimation that there has been does not meet the requirements of the Moveable Property (Scotland) Act 1862. Normally whether intimation is sufficient for these purposes is simply a matter of proof. Counsel argued that was not necessary given the admissions and implied admissions here.

[65] The 1862 Act is described as a measure to facilitate the transmission of moveable property in Scotland. Section 1 provides that: "It shall be competent to any party, in right of a personal bond or of a conveyance of moveable estate, to assign such bond or conveyance by assignation in or as nearly as may be in the form set forth in schedule A hereto annexed; and it shall be competent to write the assignation or assignations on the bond or conveyance

itself in or as nearly as may be in the form set forth in schedule B hereto annexed; which assignation shall be registrable in the books of any court, in terms of any clause of registration contained in the bond or conveyance so assigned; and such assignation, upon being duly stamped and duly intimated, shall have the same force and effect as a duly stamped and duly intimated assignation according to the forms at present in use."

[66] By virtue of Section 2 of the Act, "an assignation shall be validly intimated (1) by a notary public delivering a copy thereof, certified as correct, to the person or persons to whom intimation may in any case be requisite, or (2) by the holder of such assignation, or any person authorized by him, transmitting a copy thereof certified as correct by post to such person; and (in the first case) a certificate by such notary public in or as nearly as may be in the form set forth in schedule C hereto annexed, and (in the second case) a written acknowledgment by the person to whom such copy may have been transmitted by post as aforesaid of the receipt of the copy, shall be sufficient evidence of such intimation having been duly made: Provided always, that if the deed or instrument containing such assignation shall likewise contain other conveyances or declarations of trust purposes, it shall not be necessary to deliver or transmit a full copy thereof, but only a copy of such part thereof as respects the subject matter of such assignation."

[67] However in terms of section 3 of the Act nothing in the Act is to "prevent the transmission of any personal bond or conveyance of moveable estate, or the intimation of any assignation according to the forms at present in use."

[68] Counsel for the pursuers accepts that intimation of the assignation is essential but argued that no particular formalities required to be followed. The 3 letters were in his view sufficient but the issue was put beyond doubt by the initiation of this court action in which the assignation is clearly averred. He argues that the defender fundamentally

misunderstands the law when suggesting that only an intimation which complied with the Moveable Property (Scotland) Act 1862 is sufficient to satisfy the requirement for intimation of an assignation.

[69] In *Christie, Owen and Davies* selling agents of licensed premises had raised an action for payment against solicitors seeking recovery of agency fees related to the sale. This payment was said to be due under a 'sole selling rights agreement' with the tenant of a public house who had also instructed the defender's solicitors who held monies due to the tenant by the purchaser. The pursuers' position was that the agreement authorised the solicitors to make payment to them of the fees out of these monies held by them and the pursuers agreed that the agreement incorporating that mandate was effectively intimated to the solicitors by recorded delivery post accompanied by an invoice and letter. The solicitors accepted that they had received the letter, invoice and copy agreement but nonetheless they argued the pursuers had failed to meet the requirements of intimation setting out clearly the nature and effect of the assignation and an assertion that the assignee claimed rights under the deed of assignation (that is the original agreement). That matter came before the Inner House on appeal from the Sheriff Principal and it was held that the appellants had done all that was required to bring to the attention of the solicitors the existence of the assignation and its terms and that they were seeking payment of the assigned debt. The combined effect of the sending of the agreement and the covering letter and invoice meant that the fact of the assignation was made known to the defender.

[70] The Inner House held that "apart from the means of intimation provided for by the 1862 Act the law regarding intimation is correctly stated in *Wilson on Debt* (2nd edition) at para. 27.3, in the following terms: "Generally, however, intimation can be proved *rebus ipsis et factis*. The terms must be such as to convey to the debtor that the debt has been

transferred and that the transferee is asserting his claim to the debt from the debtor; the amount of the debt being assigned must be stated; general statements may not suffice; letters from the debtor to the intimator can be looked at". There are, their Lordships agreed, no prescribed formalities beyond what is set out in that statement of principle. The word "intimate" simply means to "make known". The means of making known can take different forms. It is not therefore necessary that the requirements of the 1862 Act are complied with. That Act simply sets out an additional mechanism whereby lawful intimation could be made and established.

[71] The pursuer says that intimation was made by way of the letters. The defender does not deny that letters were sent to her. The defender's position in relation to the three solicitor's letters is at best ambiguous. The pursuers' position is set out in Article 2 of condescendence where the pursuers say "assigned all rights in the said debt to on 27 June 2014 and the pursuers have advised the defenders of same". The word intimate is not used on record but it does not seem to me that it is necessary standing the decision in Christie, Owen and Davies that that specific word is used. What is necessary is that the debtor is made aware of the assignation and that depends on the circumstances of the case and, if necessary, is a matter for proof. On the face of it the three letters referred to for the solicitors make the position clear by reference to the agreement, the current outstanding balance and the fact that the pursuers seek payment.

[72] The defender denies that the letters from the pursuers' agent referred to (that is the letters dated 19 February 2016, 29 February 2016 and 14 March 2016 (or 29 March 2016) were received at the defender's address in …….. If that was the only issue in the case it seems to me that it would be a matter of proof whether the letters sent were received by the defender. The danger of making use of a form of intimation other than that described in the

1862 Act is one of proof of delivery. However, it seems to me clear from the Record that it is accepted that judicial intimation as contemplated in the authorities referred to by counsel has been made. The initial writ here was warranted on 29 April 2016. The execution of service (post) is dated 4 May 2016. The notice of intention to defender was received by the sheriff clerk in Wick on 26 May 2016. That seems to me to be sufficient to deal with the defender's argument that there has been no intimation. Indeed, it seems to be accepted that such judicial intimation has been made.

[73] The defender accepts in her answers that she received intimation by service of the writ upon her as of the date of service "to the extent that details of the same are accurately contained within such writ" (see Answer 2 on page 4). The pursuers argue that this puts intimation beyond doubt and proof is not required. On the authority of Christie, Owen and Davies all that is necessary is that the assignation is "made known".

[74] An example of service of a writ constituting sufficient intimation is found in Promontoria (Ram) Limited v John Moore, 2017 CSOH 88. In that case Lord Bannatyne rejected various arguments for a defender including one directed to a lack of intimation of an assignation. The circumstances of that case are somewhat different. It related to enforcement of a cautionary obligation. The defender had signed a guarantee address to a bank irrevocably guaranteeing payment and discharge of all sums due or to become due by a company (the debtor) in terms of banking facilities extended to the debtor. It appears a default occurred resulting in the defender agreeing to pay a specified sum to the bank which 8 months later entered into an agreement with the pursuers Promontoria by which it intended to assign inter alia several debts including the bank rights under the agreement between them and the debtor and under the guarantee. Whether the debtor had assigned its rights under the guarantee and had properly intimated assignation to the defender was in

contention at debate. In repelling the defender's pleas to the relevancy of the pursuers' case, Lord Bannatyne accepted the pursuers' arguments that intimation had taken place and was effective for practical purposes to identify the date of transfer and to identify to whom the debtor must make payment as cautionary obligations follow the principal debt. But further and in any event it was no answer that an assignee in an un-intimated assignation had no title to sue. It was, Lord Bannatyne held, settled law that the holder of an un-intimated assignation has title to sue: the raising of the action is itself intimation referring to Lord Justice Clerk Inglis' description of this as "the best of all intimations" (Carter v McIntosh, 1862) 24D 925 at page 934).

[75] The defender had argued that there was no effective intimation. The pursuer had argued that the defender's criticism of that lack of intimation had no merit for three reasons: firstly, formal intimation of a cautionary obligation is not required; secondly, to the extent that intimation was required, the assignation had been intimated; and thirdly, in any event it is settled that the holder of an unintimated assignation has title to sue and the raising of the action is in itself intimation. So that to the extent that an assignee's title to sue was incomplete on raising an action that defect could be remedied in the course of the action.

[76] Judicial intimation may be, as the Lord Justice Clerk (Inglis) put it (in *Carter* v *McIntosh* 1862 24 D 925 at page 934, case referred to in Promontoria at paragraph 43) the "best of all intimations". Intimation is done for practical reasons to identify the date of transfer and to identify to whom the debtor must make payment. It seems to me that the argument advanced with respect to judicial intimation is clearly correct.

[77] Mr Sloane referred to Erskine, an Institute of the Laws of Scotland, iii, v, iii where the learned author deals with Intimation. It does not appear to me that anything said by Erskine

causes me to adopt a position different to that adopted by the courts in *Promontoria, Carter* v *McIntosh and Christie Owen*.

[78] The argument put forward by the defender as to the requirements of the Moveable Property (Scotland) Act 1862 falls to be rejected. The terms of the Act are permissive not prescriptive.

[79] The solicitor for the defender argued that the matters in dispute between the pursuer and defender required to be addressed in a proof before answer as evidence requires to be led to resolve the legal issues. He argued that I should not grant decree *de plano.* He argued that it was necessary for the pursuer to prove that the assignation in their favour had been granted even if I accept that judicial intimation is all that is required by way of intimation. It was, he argued, necessary for a copy of the assignation to be produced. If that is not produced it was, he argued, impossible for a court to determine if there had been an assignation. The pursuer avers that there was an assignation. The defender, he argued, entitled to say that it is not known and not admitted that there was an assignation. That cannot be something within her knowledge. Averments are, after all, facts which a party is offering to prove. That is not admitted and therefore requires to be proved.

[80] The defender's position is that in all the authorities referred to by the pursuer a copy of the assignation had been available. The assignation has not been lodged in this case but his position is that it requires to be, so that evidence can be led that it was effective. This he argues is a matter which requires to be established by evidence. This would allow the pursuers to establish a title to sue. There is no plea attacking the pursuers' title to sue. It may be sufficient to say that this is an aspect of the more general plea to the relevancy but it is not an issue covered by the rule 22 note and in any event the defender's agent did not press her preliminary pleas at debate.

[81] Counsel sought to rebut the defender's arguments. The pursuers' position is that much of the section quoted from Erskine relates to the operation of section 2 of the Transmission of Moveable Property (Scotland) Act. As noted above this makes reference to an intimation under the Act being sufficiently established by the completion of certain formalities including the forwarding a copy of the assignation or relevant part. However as Lord Bannatyne pointed out that statutory provision is not prescriptive. It is permissive only.

[82] The defender referred me to no authority for the proposition that a copy of the assignation must be transmitted to the debtor to make good the assignation. In counsel's submission it is clear from the decision of the Inner House in Christie, Owen and Davies (at paragraph 14) that there are no prescribed formalities beyond what is set out in the statement of principle in Wilson which I have previously referred to. The fact of the assignation is, counsel argued, clear on the face of the pleadings and as Lord Bannatyne made clear in Promantoria the institution of judicial proceedings is sufficient intimation so that even if there are issues about prior intimation then there has been judicial intimation. He queried what notice the defender thought was necessary where, as happens in commercial debt purchase transaction there is a lengthy assignation of a large number of different debts.

[83] The pursuer invites me to repel the defender's preliminary pleas and grant decree de plano or at least to allow a restricted proof before answer. The defender argues that an unrestricted proof before answer should be allowed. It is not clear to me on the basis of the pleas in law on what basis I would be entitled to restrict a proof.

[84] The position of the pursuers and the defender as at debate was that the issue for determination was whether or not there had been effective lawful intimation of an

assignation in the pursuers favour. I am satisfied that even if the 3 letters were not effective intimation there has been intimation by virtue of the institution of these proceedings which clearly draw the fact of the assignation to the attention of the defender. That is all that is necessary on the authorities. I do not accept that it is necessary for the defender to be provided with the assignation or a copy of it. The pursuers' agent suggested that that might pose practical difficulties where debt purchase agreements may involve the assignation of a creditor's rights to hundreds or thousands of individual debts. I am not sure that this would pose as significant a problem as counsel suggested given the proviso in section 2 of the act that if the deed or instrument containing such assignation contains other assignations it is not necessary "to deliver or transmit a full copy thereof, but only a copy of such part thereof as respects the subject matter of such assignation." The position was clarified in *Liberatas-Kommerz Gmbh* v *Johnson*, 1977 SC 191 (a case referred to in Promontoria) where Lord Kincraig (at page 206) says: "It seems to me that show that if there has been a written intimation to the debtor of the fact that an assignation has been granted, the terms of that intimation must be considered, and if they are such, on a reasonable interpretation, as to convey to the debtor that the debt has been transferred, and that the transferee is asserting his claim to the debt from the debtor, intimation will be held to be effectual. I do not think it is necessary to refer to the details of the assignation, if otherwise the intention is clear."

[85] It seems to me that the law in this respect is quite clear and that the defender's is not arguable. The raising of the action puts the question of title to sue beyond doubt.

Expenses and Certification

[86] Both counsel invited me to find their respective clients entitled to expenses and to certify the cause as suitable for the employment of counsel in terms of section 108 of The

Courts Reform (Scotland) Act 2014. This provides that the court must sanction the employment of counsel if the court considers in all the circumstances of the case that it is reasonable to do so and in considering that matter must have regard to the difficulty or complexity or likely difficulty or complexity of the proceedings and the importance or value of any claim in the proceedings and the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel. Counsel for the Third party referred me to the decision of the Sheriff Appeal Court on this point in *Cumming* v *SSE Plc* SAC (Civ. 17) so that when considering the matter set out in section 108 I must consider the terms of subsection (3). I was invited to hold that the issue between the defender and Third party was one of some novelty. Cases involving Judicial Factors are uncommon even in the Court of Session, let alone in the Sheriff Court. I was invited to accept that the issues were more complex than might normally be expected in the Sheriff Court and although the value of the claim was not significant, nonetheless, it raised matters of significant importance for the Judicial Factor, an officer of the Court of Session. The defender's averments are that essentially she has breached the duties incumbent upon her and owed to the Court of Session. Additionally, in terms of subsection 4, I was invited to consider that normally challenges such as this to the actions of the Judicial Factory appointed under the terms of the Solicitors (Scotland) Acts proceed before the Inner House only and that therefore an advocate or solicitor advocate would normally be expected to appear.

[87] For the pursuers I was invited to accept that because of the issues raised by the defender the action raised difficult and complex issues and that the matter was of importance to the pursuer. What he described as very 'technical' points were being argued on behalf of the defender in relation to intimation and time bar. There was, he suggested, some ambiguity in the defender's Rule 22 Note and it was not clear, until the debate, what

position the defender proposed to take in relation to these pleas. As to the question of importance, I should not consider only the value of the claim but also the impact that an adverse decision may have upon the pursuer and the pursuer's business model if it becomes necessary to provide debtors with a 'full copy' of assignations when being intimated to them.

[88] The defender's agent chose to remain neutral as to whether or not certification was appropriate taking the view that it was a matter for the court to be satisfied on.

[89] It seems to me that the submissions made by both counsel have merit. As far as both the pursuer and the Third party are concerned, although the sum at issue is not significant, the issues raised are of considerable significance to both. In relation to the pursuer because of the impact that certain decisions might have upon the way it operates after buying up debts with a possible need to change its business model if it is decided that intimation of a copy of the assignation (which may cover many hundreds or thousands of debts) is necessary to complete intimation. Even if this is not a factor I require to take into account in terms of Section 108 (3) it is a factor I can take into account in terms of Section 108 (4). In relation to the Judicial Factor the importance of a case based on averments of a breach of her duties as Judicial Factor appointed by the Inner House are self-evidently significant. Challenges should ordinarily proceed in the Inner House or, as suggested by Lord Hodge in *MacAdam* v *Grandison* by authority of the Inner House. There arguments would be pursued by counsel or a solicitor advocate.

[90] Parties were agreed that I should deal with expenses without a separate hearing if possible and should only fix one if there was mixed success. They were otherwise satisfied that expenses should follow success. In respect of both the pursuer and Third party it seems to me that matters are sufficiently significant that the employment of junior counsel.