SHERIFF APPEAL COURT

[2018] SAC (Civ) 12
[HAM-SG857-17]
[HAM-SG1061-17]
[HAM-SG436-17]

Sheriff Principal M M Stephen QC
Sheriff Principal I R Abercrombie QC
Sheriff Principal D L Murray

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

IN APPEALS

CABOT FINANCIAL UK LIMITED

Claimant and Appellant;

against

ROBERT McGREGOR

Respondent;

CABOT FINANCIAL UK LIMITED

Claimant and Appellant;

against

LIAM GARDNER

Respondent;

CABOT FINANCIAL UK LIMITED

Claimant and Appellant;

against

KIRSTY BROWN

Respondent;

Appellant: Davie, Advocate; Nolans, solicitors
Respondents: Not represented
Amicus Curiae: **D Thomson, QC**

16 May 2018

[1] The appellants, Cabot Financial UK Limited, ("Cabot") raised separate proceedings against the respondents McGregor, Gardner and Brown for payment of various sums due under a mail order credit agreement which each of the individuals entered into with another company (JD Williams and Company Limited). Cabot state that each agreement is regulated under the Consumer Credit Act 1974 by which the respondent borrowed a sum of money repayable on demand. They also state that the original supplier (JD Williams) assigned all rights in the debt to Cabot on particular dates and that the respondents had been advised of that. The basis upon which various sums are now due and payable is because the respondents are each in breach of the original contract having failed to pay, as agreed, on demand. The respondents all live in Lanarkshire and the "proceedings" are simple procedure claims lodged and registered at Hamilton Sheriff Court in compliance with schedule 8 to the Civil Jurisdiction and Judgments Act 1982.

[2] Simple procedure is a new procedure in the Sheriff Court for determining claims with a value of £5,000 or less. The procedure was introduced by section 72 of the Courts Reform (Scotland) Act 2014 ("the 2014 Act"). The simple procedure rules (SPR) are made by Act of Sederunt (2016 No 200) and came into force on 28 November 2016. Schedule 1 contains the rules for simple procedure cases and schedule 2 the forms to be used by parties and the court. The rules have been amended by Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (No 4) (Simple Procedure) 2016/315.

[3] The three appeals calling before us had been informally conjoined and are test appeals. Another seventeen appeals involving similar grounds of appeal are pending and sisted – or in simple procedure parlance "*paused*". All three appeals involve undefended proceedings either where no form of response (or defence) had been lodged or, as in

Mr McGregor's case, a time to pay application has been lodged (which is an admission that the debt is due whilst at the same time seeking an order allowing payment by instalments rather than by lump sum). Before turning to the grounds of appeal we propose to set out briefly the background to each of the cases and the procedure adopted. In each case Cabot's claim was dismissed by the sheriff or summary sheriff.

Cabot Financial UK Limited v Robert McGregor

[4] Cabot lodged a claim against Robert McGregor in Form 3A which was registered at Hamilton Sheriff Court on 25 May 2017. The sum claimed is £2,199.87. The factual basis for making the claim is set out at D1 in the following terms:

> *"On **19/06/2014** the Respondent entered a Mail Order Agreement with **JD WILLIAMS & COMPANY LIMITED** under which the Respondent borrowed from them a sum of money repayable on demand. The said agreement was an agreement regulated under the Consumer Credit Act 1974. The Respondent failed to pay as agreed on demand and is in breach of contract with the said **JD WILLIAMS & COMPANY LIMITED**. The said supplier assigned all rights in the said debt to **CABOT FINANCIAL UK LIMITED** on **12/10/2016** and the Claimants have advised the Respondent of same. The last payment was made to account on **02/02/2016**. The said sum of **£2199.87** is the sum sued for. The Claimants have made frequent requests to the Respondent to make payment of the said sum but the Respondent has refused or delayed to do so*."

[5] At D3 Cabot confirm the claim relates to a consumer credit agreement and at D4 give details of the consumer credit agreement by providing the date of the agreement and its reference number together with the unpaid balance which is stated to be the sum claimed. This information is given by Cabot in support of the claim and responds to two of the four prompts printed on Form 3A at D4 which is in the following terms:

> <u>D4 What are the details of the consumer credit agreement</u>
> Set out the following information:
> - the date of the agreement and its reference number
> - the name and address of any person who acted as guarantor
> - the details of the agreed repayment arrangements
> - the unpaid balance or amount of arrears

Date of Agreement: – 19/06/2014 Reference Number: – L7182518 Unpaid balance: - £2199.87

[6] At D5 the claimant is asked what he wants from the respondent and is invited to select the option that best describes the type of order the claimant would like the court to make if the claim is successful. Unsurprisingly, Cabot's agent has checked the box for the option "*I want the respondent to be ordered to pay me a sum of money*" and then specifies "*The Claimants request that the court order the respondent to pay to them the sum of £2199.87*". The claimant's solicitors also checked the box at D6 to claim the expense of making the claim.

[7] At D7 the claimant is asked to explain why the claim should be successful (the legal basis for seeking the amount claimed) to which the response is: "*The Respondent is in breach of contract in failing to make payment and is due and resting owing to the Claimants in the sum sued for.*" At D8 of the form the claimant is invited to elaborate on the steps taken to try to settle the dispute and Cabot restate what they have already said at D1 to the effect that they have made repeated applications to the respondent for payment but the respondent refuses to make payment rendering the claim necessary. For the sake of completeness Section E deals with Witnesses, Documents and Evidence which the claimant might bring to any hearing in support of the claim. They offer no list of witnesses at this stage stating that matters within the knowledge of the respondent should be admitted. At E2 they indicate that the agreement dated 19 June 2014 is a document they would bring to any hearing and finally at E3 which refers to any other pieces of evidence which the claimant intends to bring to a hearing to support the claim Cabot rather pre-emptively state: "*No defence, so no evidence required*".

[8] Following service of the claim on 24 August 2017 the court received from Mr McGregor Form 5A, which is a time to pay application admitting the claim but asking to pay the sum claimed by instalments. Cabot consented to the time to pay application on 28 August 2017 whereupon the sheriff clerk placed the time to pay application before the sheriff. On 30 August the sheriff made an "*unless order*" in terms of SPR 8.4 in the following terms:

> The "*unless order*" required the appellant to lodge the following documentation within 28 days failing which the claim would be dismissed:
>
> > "The agreement between the original lender and the respondent.
> > The assignation of the debt.
> > Proof of intimation of the assignation upon the respondent.
> > Default notice.
> > Proof of intimation of the default notice."

The 28 day period expired on 27 September however before then the agent for the appellant contacted the sheriff clerk by email indicating that the documentation referred to in the "*unless order*" would not be produced as the action is undefended and therefore it is unnecessary to lodge the documentation. On 15 September 2017 the sheriff dismissed the claim.

[9] The sheriff, in the stated case, gives a number of reasons for dismissing the claim. Firstly, it was not clear to the sheriff whether Cabot had title to sue as there was no specification in D1 of how the respondent had been advised of the assignation of the debt. The sheriff goes on to observe at para [29] of the stated case:-

> "There was no statement of intimation or how it had been intimated. As a result of the numerous similar actions raised in this court I was aware that the appellant and other companies had purchased multiple distressed debts from a variety of financial service companies but had not had access to the original contracts or assignations of the debts or intimation of the assignation. When asked to provide the relevant documentation this had not been forthcoming. As a result these claims had been dismissed."

He observes that in some jurisdictions this type of case has not been registered. The sheriff considered it to be *pars judicis* to make enquiries of the claimant of the type specified in the "*unless order*" even though the case was undefended. Further, the sheriff was not satisfied that the claim form had been fully completed at part D4 in respect of the details of the Consumer Credit Agreement nor had the appellant provided details of any guarantor or specified the agreed payment arrangements. The sheriff was not satisfied as to the specification provided by Cabot as to when and in what manner the demands for payment had been made. The sheriff noted that the agreement was signed at the respondent's address (per D2) and was concerned lest the requirements for the proper execution of 'regulated credit agreements signed at a consumer's home' may not have been complied with. The "*unless order*" not having been obtempered the sheriff required to make a decision in terms of SPR 8.4(2). At paragraph [37] the sheriff explains his reasoning in dismissing the claim:-

> "[37] I decided to dismiss the case. I considered that a decision could not be made on the basis of the information supplied in the claim form that the respondent was responsible to pay the sum sought and no information was forthcoming to warrant the award of a lesser sum."

Further explanation is provided in para [38] where the sheriff states:-

> "[38] In my judgement the fact that the respondent had lodged a time to pay application did not exclude me from making this decision. Rule 1.4(2) states that the sheriff must ensure that parties who are not represented or parties who do not have legal representation are not unfairly disadvantaged. It was in my opinion *pars judicis* to dismiss the case in the knowledge that the appellants in this type of case have been unable to lodge with the court documentation which would prove that the appellants were entitled to the debt and to raise the action. Furthermore, simple procedure is a new type of procedure which can be seen most obviously in its format. It does not follow the position in ordinary or summary cause procedure where failure to lodge a notice of intention to defend or a form of response will be met with a minute to grant decree in absence, which will almost always be granted. I did not consider that where a time to pay application has been lodged and accepted that I was obliged to grant the claim. If that was the case then, in

> my opinion, this would have been included in the Act. On the contrary rule 5.5(2) expressly awards the sheriff a discretion. Where the appellant is content with the proposal contained within a time to pay application,
>
> > 'The sheriff may then grant the time to pay application and decide the case.' "

The sheriff at para [41] adverts to another matter of general concern with regard to the possibility of court procedure being exploited by unscrupulous individuals or companies who could dishonestly misappropriate data and falsely claim title to sue as a creditor.

[10] The sheriff poses four questions for the opinion of this court:

(1) Did I err in making an unless order in terms of rule 8.4(1)(a)?
(2) Did I err in dismissing the claim in terms of rule 8.4(2)?
(3) Did I err in dismissing the claim where a time to pay application was lodged?
(4) Did I err in dismissing the claim where the appellant was content with the proposal contained within the time to pay application?

Cabot Financial UK Limited v Liam Gardner

[11] This claim proceeds on a similar basis to the first case. It was registered in Hamilton Sheriff Court on 15 June 2017. Cabot claim the sum of £1,626.91 from the respondent. The factual basis as set out at D1 is as follows:-

> *"On **12/05/2014** the Respondent entered a Mail Order Agreement with **JD WILLIAMS & COMPANY LIMITED** under which the Respondent borrowed from them a sum of money repayable on demand. The said agreement was an agreement regulated under the Consumer Credit Act 1974. The Respondent failed to pay as agreed on demand and is in breach of contract with the said **JD WILLIAMS & COMPANY LIMITED**. The said supplier assigned all rights in the said debt to **CABOT FINANCIAL UK LIMITED** and the Claimants have advised the Respondent of same. The last payment was made to account on **13/06/2015**. The said sum of **£1626.91** is the sum sued for. The Claimants have made frequent requests to the Respondent to make payment of the said sum but the Respondent has refused or delayed to do so."*

[12] At D3 Cabot confirm the claim relates to a consumer credit agreement and at D4 give details of the consumer credit agreement by providing the date of the agreement and its

reference number together with the unpaid balance which is stated to be the sum claimed. The information provided at D3 and D4 relates to the original consumer credit agreement as follows:-

> D4 What are the details of the consumer credit agreement
> Set out the following information:
> - the date of the agreement and its reference number
> - the name and address of any person who acted as guarantor
> - the details of the agreed repayment arrangements
> - the unpaid balance or amount of arrears
>
> Date of Agreement: – 12/05/2014
> Reference Number: – L32307771
> Unpaid balance: - £1626.91

Otherwise the claim is in identical terms to the claim against R McGregor save that at D5 payment is sought of £1,626.91 and at E2 the document which Cabot propose to lodge and rely on in the event a hearing is required is the agreement of 12/05/14.

[13] Mr Gardner did not respond to the claim by the last day which was 2 August 2017. On 15 August Cabot applied for a decision in terms of SPR 7.4(2) seeking an order that Mr Gardner pay £1,629.91 to them. The sheriff on 30 August 2017 made an "*unless order*" under rule 8.4 in the same terms as in the previous case requiring that the same documentation as set out in para [8] above be lodged within 28 days.

[14] No documentation was lodged timeously. Again, the appellant's solicitors wrote to the court explaining that the documentation would not be produced as the action was undefended and therefore it was not necessary to produce them. On 15 September the same sheriff who made the "*unless order*" dismissed both this claim and the claim against R McGregor (*supra*).

[15] The sheriff in his stated case gives similar reasons for dismissing this claim and poses three questions for the opinion of this court as follows:-

(1) Did I err in making an order in terms of rule 8.4(1)(a)?
(2) Did I err in dismissing the claim in terms of rule 8.4(2)?
(3) Did I err in dismissing the claim when no response was registered?

Cabot Financial UK Limited v Kirsty Brown

[16] This claim also proceeds on the same basis as the other two appeals. The claim was registered in Hamilton Sheriff Court on 27 March 2017. Cabot claim the sum of £1,465.71. The factual basis as set out at D1 is as follows:-

> *"On **02/03/2015** the Respondent entered a Mail Order Agreement with **J D WILLIAMS & COMPANY LIMITED** under which the Respondent borrowed from them a sum of money repayable on demand. The said agreement was an agreement regulated under the Consumer Credit Act 1974. The Respondent failed to pay as agreed on demand and is in breach of contract with the said **J D WILLIAMS & COMPANY LIMITED.** The said supplier assigned all rights in the said debt to **CABOT FINANCIAL UK LIMITED** on **31/08/2016** and the Claimants have advised the Respondent of same. The last payment was made to account on **10/01/2016**. The said sum of **£1465.71** is the sum sued for. The Claimants have made frequent requests to the Respondent to make payment of the said sum but the Respondent has refused or delayed to do so."*

[17] At D3 Cabot confirm the claim relates to a consumer credit agreement and at D4 give details of the consumer credit agreement by providing the date of the agreement and its reference number together with the unpaid balance which is stated to be the sum claimed as set out below:

<u>D4 What are the details of the consumer credit agreement</u>
Set out the following information:
- the date of the agreement and its reference number
- the name and address of any person who acted as guarantor
- the details of the agreed repayment arrangements
- the unpaid balance or amount of arrears

Date of Agreement: – 02/03/2015 Reference Number: – F0547409 Unpaid balance: - £1465.71

The appellant indicates at D5 payment is sought of £1,465.71 and at E2 that in the event that a hearing is required they propose to lodge and rely on the agreement of 2 March 2015.

[18] The sheriff in the appeal report indicates that the appeal was properly served and no response was lodged. Cabot applied for a decision in terms of the order sought namely an order that the respondent, Kirsty Brown, pay them £1,465.71. Before making a decision in terms of rule 7.4 the sheriff required sight of certain documents and made an "*unless order*" in terms of SPR 8.4 requiring that the appellant lodge the following documents within 28 days:-

(a) the agreement between the original lender and the respondent;
(b) the assignation of the debt;
(c) proof of intimation of the assignation upon the respondent.

Cabot's agents did not comply with the order but explained their reasons in writing. The sheriff fixed a discussion (hearing) to take place in court on 21 September 2017.

[19] At the hearing the sheriff considered oral and written submissions on behalf of Cabot. The sheriff had provisionally formed a view that the order sought by Cabot could not be made due to the following issues (1) Whether the appellant had title to sue. He required clarification of the assignation and how the assignation had been intimated to the respondent; (2) The claim form was incomplete. At part D4 the form requires claimants to set out details of the Consumer Credit Agreement and further the appellant had failed to provide details of any guarantor and the agreed payment arrangements; (3) If, as Cabot stated, the agreement had been signed at the respondent's home address had the requirements of the Cancellation of Contracts made in a Consumer's Home or Place of Work, etc Regulations 2008 been complied with?; (4) Whether the requirements of the consumer credit legislation had been complied with? If there had been a failure to comply with the requirements for the proper execution of regulated credit agreements the court

would be prohibited from making an enforcement order by virtue of section 127(3) & (4) of the Consumer Credit Act 1974.

[20] Following submissions the sheriff was persuaded that he did not require to see either the assignation or proof of intimation of the assignation. However due to the appellant's failure to obtemper the "*unless order*" by refusing to produce the original agreement the sheriff declined to make the order sought by the appellant and as the claim had no real prospect of success he dismissed the claim both in terms of rule 1.8(11) and also due to the claimant's failure to comply with the "*unless order*" in terms of rule 8.5(1)(a). In determining the cause in this manner the sheriff considered case law advanced on behalf of the appellant with regard to the court's inherent jurisdiction in undefended cases – *Cadbury Brothers Limited* v *Thomas Mabon Limited* 1962 SLT (Sh Ct) 28; *British Railways Board* v *Strathclyde Regional Council* 1982 SLT 55; and *United Dominions Trust Limited* v *McDowell* 1984 SLT (Sh Ct) 10. The sheriff distinguished these authorities as they relate to ordinary cause procedure in the sheriff court rather than the simple procedure rules which he required to apply in coming to a decision. In any event he considered that they were not binding on him and the sheriff's dicta in Cadbury to be *obiter.*

[21] The sheriff poses the following questions for this court:-

(1) Did the sheriff err in law by considering that a decision could not be made awarding the claimant what was asked for in the claim form?
(2) Did the sheriff err in law by making an "*unless order*"?
(3) Did I err in law in dismissing the claim because the claimant failed to follow the "*unless order*"?
(4) Did I err in law in dismissing the claim because there was no real prospect of success?

SUBMISSIONS

[22] We heard oral submissions by Cabot's counsel which supplemented a written note of argument.

[23] As these appeals relate to undefended proceedings there was no contradictor. That factor, taken along with the novelty of the simple procedure rules, led the procedural appeal sheriff to recommend that an *amicus curiae* be appointed to advise the court on points of law arising from these appeals. It is of some importance that we restate the role and function of the *amicus* which is to assist the court by presenting a neutral appraisal of the issues which require to be decided and by raising for consideration matters which might not otherwise come to the court's attention. The *amicus* does not represent the interests of any defender and does not represent the view of the appellant. The *amicus* does not represent either the public interest or public policy on any aspect of these cases. However, the *amicus curiae* has very properly alerted the court to issues in these appeals where there may be a public interest aspect. The *amicus curiae* also lodged a comprehensive note of argument which he adopted during his oral submissions at the appeal hearing.

[24] We mean no disrespect whatsoever to counsel for the appellant or to the *amicus curiae* by summarising briefly the points raised in their arguments. We found both the written and oral argument to be of considerable assistance to the court.

[25] Counsel for the appellant proposed that the questions posed by the sheriffs in the three appeals should be answered in the affirmative. The sheriffs had erred in dismissing the claims both on the basis of the court's inherent jurisdiction (*pars judicis*) and in failing to adhere to well established principles. The court's application of *pars judicis* was flawed. It is necessary to construe the simple procedure rules in accordance with established principles of interpretation. In the absence of clear and unambiguous language rules do not alter the

existing common law or extend the court's powers in undefended cases. The appeal should be allowed and decree in absence granted for the various sums claimed by Cabot.

[26] Counsel addressed the court on the definition and extent of *pars judicis* in undefended cases referring to well-known authorities which had previously been cited to the sheriff in the appeal involving Kirsty Brown. In the exercise of its inherent jurisdiction the court is constrained mainly to matters of competency and jurisdiction. Questions of relevancy and specification are not grounds for the court dismissing an undefended action *ex proprio motu*.

[27] Counsel for the appellant and the *amicus* agreed that it was necessary that we analyse the simple procedure rules and decide whether it was the intention of the legislature that the sheriff's powers in undefended cases under simple procedure be any different to those enjoyed by the sheriff in ordinary and summary cause proceedings. It was the appellant's position that the simple procedure rules had not effected any change. Differences in language and the approach of the court in disputed claims were noted but it was submitted that construing the SPR in conjunction with the established legal principles allowed the court more effective procedures and powers in defended cases but no greater powers in undefended claims. Counsel for the appellant accepted that the Human Rights dimension highlighted by the *amicus* required the court as a public authority to ensure that its processes by which civil rights and obligations are determined are compatible with the European Convention on Human Rights and in particular Article 6(1). Construction of the simple procedure rules is a matter for the court however the appellant argues that they essentially accord with the well-established rules of court and legal principles. The sheriff's limited discretion in undefended cases complied with the obligations on the court in terms of the Human Rights Act 1998.

[28] Otherwise, counsel for Cabot addressed us on the specific issues raised in each appeal. She drew our attention to the effect of the Act of Sederunt (Sheriff Court Rules) (Miscellaneous and Amendments) 2009 and the subsequent Act of Sederunt (Amendment of the Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) 2009) 2009 noting that whilst the original or first Act of Sederunt of 2009 proposed that contract documentation evidencing a regulated consumer credit contract should be produced at the commencement of the action that statutory instrument did not come into force before the subsequent Act of Sederunt removed the requirement explicitly. There is no requirement that such documentation be produced at the commencement of a debt recovery action.

[29] The *amicus curiae* addressed the court on the nature and scope of the powers conferred on the court in relation to simple procedure cases which are either undefended or in respect of which a time to pay application has been lodged by a respondent. In his note of argument and oral submissions the *amicus* gave a careful appraisal of the issues advanced on behalf of Cabot namely, the court's inherent jurisdiction and secondly, the nature and scope of the jurisdiction conferred on the sheriff in undefended simple procedure cases. This exercise involves statutory construction. The *amicus* provided a very helpful way marking of the legislative journey from the Courts Reform (Scotland) Act 2014 to the introduction of simple procedure rules. The *amicus* considered the court's duty as a public authority in terms of section 6 of the Human Rights Act 1998 not to act in a way which is incompatible with "Convention Rights". We are grateful to the *amicus* for providing advice on the correct approach to statutory construction, an exercise which is essential when construing the simple procedure rules. The *amicus* considered both the meaning and extent of *par judicis* together with more recent case law (*McLeod* v *Prestige Credit Limited* [2016] CSOH 69). We require to consider whether the ambit of *pars judicis* has been extended. The

amicus considered the issues which may be thought to arise due to the claims being in respect of regulated consumer credit agreements in terms of the Consumer Credit Act 1974. The *amicus* gave advice on the applicability of certain regulations and the import of section 127(3) and (4) of the 1974 Act. The *amicus* considered the court's powers under the Ordinary Cause Rules; Summary Cause Rules and Rules of the Court of Session in analysing the powers vested in the court in simple procedure. In the Sheriff Court Ordinary and Summary Cause Rules the sheriff is not bound to grant decree in absence. However the mere existence of discretion on the part of the sheriff has not generally been seen to confer a wholly unfettered discretion as to the grounds on which the court might properly decline to grant decree in absence.

[30] We are obliged to counsel for the appellant and the *amicus curiae* for their careful consideration of the issues which arise in these appeals which are thought to be the first appeals which have required to consider the ambit of the court's power in undefended claims under the simple procedure rules.

DISCUSSION

[31] These appeals all raise similar questions. The first involves the meaning of '*pars judicis*'. We propose to consider the meaning of *pars judicis* and the principles and propositions which arise from case law as to the extent of the court's inherent jurisdiction in undefended proceedings. The next and fundamentally important question in these appeals is the meaning of *pars judicis* in the context of undefended simple procedure applications. We require to consider whether there was an intention on the part of the legislature to confer the same or similar powers which the sheriff enjoys in other forms of undefended proceedings or whether it was the intention of Parliament to confer new and more extensive

powers when the court is dealing with simple procedure cases. Thus the core question is one of statutory construction namely – what is the extent of the jurisdiction conferred on the sheriff in undefended simple procedure cases?

[32] The sheriff (in the case of McGregor and Gardner) and the summary sheriff (in the case of Brown) provide similar reasons for refusing the appellant decree in absence or decree by instalments. These reasons relate to it being *pars judicis* to notice any deficiencies in the application and to order that better specification be provided to the court by making "*unless orders*" in terms of SPR 8.4. The "*unless orders*" require that Cabot lodge various documents relating to the original contract; its assignation; and intimation of both the assignation and default notice.

Pars Judicis

[33] *Pars judicis* essentially means what a judge has a duty to do. An example of the Inner House considering the extent of the judge's duty may be found in the commendably brief report in *Hill* v *Black & Ors* 1914 SC 913, a case in which the pursuer brought an action against a company in liquidation without the leave of the court as required by the Companies Act 1908. The action was also brought against the liquidator and secured creditors none of whom raised any objection to the competency of the action. In an appeal by the creditors who *inter alia* argued that the court was bound to dismiss the action as incompetent due to non-compliance with the requirement for leave, the court held that as the company and the liquidator had waived any objection to the competency it was not *pars judicis* for the court to enforce that requirement. That *pars judicis* means the judge's duty is confirmed in Trayner's *Latin Maxims and Phrases* (page 438). *Pars judicis* is discussed in more

detail in Macphail: *Sheriff Court Practice* 2.09 - 2.17. The following passage from Macphail states the general principle at 2.09:

> "Under the inherent jurisdiction of the court to preserve the due administration of justice the sheriff is empowered to take notice of certain matters whether or not they have been urged upon him by any of the parties to the action. It is thought that such matters include any aspect of the litigation which may cause prejudice to a specific public interest, such as the public interest in the regular conduct of litigation, or to the interests of third parties not called in the action, or which may require the court to exceed its proper powers; but that they do not include objections based on rules conceived only for the benefit of a party to the action. "Parties to litigation are free to waive many advantages designed for their benefit, be they evidential or procedural, and indeed they may have perfectly sound reasons, tactical or otherwise, for doing so." [*McFadyen* v *Wilson*, Sh. Pr. Caplan, Kilmarnock Sh. Ct, Jan 20, 1984, unreported.] It is thought, accordingly, that where a party waives such an advantage, as by failing to state a plea or objection, and does not thereby infringe any public interest or public policy or the interests of any party not called, it is not for the sheriff to take exception. [*Hill* v *Black*, 1914 S.C. 913; *Reid* v *Tudhope*, 1986 S.L.T. 136; and see the discussion of the maxim *quilibet potest renuntiare juri pro se introducto* in *Thomson* v *Stirling* DC, 1985 S.L.T. (Lands Tr.) 4.]"

[34] That statement of principle is supported by authorities to which we will refer. These authorities consider undefended ordinary actions in the Sheriff Court and Court of Session. Hitherto, the practice and procedure of the court in relation to undefended proceedings involved not only the court's duty or inherent jurisdiction but the application of the court rules on procedure and practice. The principles which derive from the case law are well established and are not thought to be controversial. It is *pars judicis* both at common law, and under statute, for the court to notice whether the cause falls within its jurisdiction (Civil Jurisdiction and Judgments Act 1982). The court is bound to consider whether it has jurisdiction irrespective of whether this is raised by any party. It is also *pars judicis* to notice questions of competency either in respect of the form of the proceedings or the remedy sought. Accordingly, a sheriff may dismiss an undefended ordinary cause action (and summary cause in terms of rule 8.3) if the action is incompetent or "that there is a patent

defect in jurisdiction" (Macphail: 2.15). Summary Cause Rule 8.3 envisages the sheriff considering competency and jurisdiction in a defended cause action at the first hearing. In an undefended summary cause the sheriff clerk would refer any question of competency or jurisdiction to the sheriff prior to warranting or at any time before decree in absence is granted. The sheriff must be satisfied that a ground of jurisdiction exists before granting decree (SCR 23.1). The court is also entitled to consider whether the cause of action has prescribed without a plea to that effect. If a claim has prescribed there is no longer a right which can be enforced.

[35] Questions of relevancy and specification do not normally fall within the court's inherent jurisdiction. Relevancy and indeed specification ought to be raised by the defender, normally by plea. The court has no power to take notice of how relevant the averments which support the crave or claim might be. The court's duty and powers in an undefended ordinary cause were considered in *Cadbury Bros Limited* v *T. Mabon* (*supra*); and *United Dominions Trust* v *McDowell* (*supra*) and were cited by the appellant's agent at the discussion (hearing) in the case involving Kirsty Brown. In that case the sheriff distinguished these authorities principally as they relate to ordinary cause procedure whereas he was considering the simple procedure rules. The sheriff did not consider that they were binding on him.

[36] In *Cadbury* the pursuers raised an action for payment in Duns Sheriff Court in respect of "goods supplied" to the defenders with no further specification provided as to the type or quantity of goods. There are indeed similarities between *Cadbury* and these appeals in respect of fact and procedure. The sheriff substitute in *Cadbury* took the view that the pursuers ought to have provided better specification of the goods supplied. When the pursuer's solicitor declined to do so he dismissed the action. The sheriff (Gordon Stott QC)

allowed the pursuers' appeal observing, under reference to Dobie*: Sheriff Court Practice,* that any plea to the relevancy or specification must be taken by the defender not by the sheriff. As the sheriff considered the extent of the court's discretion in an undefended cause it may be helpful to set out the relevant part his opinion:

> "This is an action for payment of a business account. No appearance was entered for the defenders, and the action has throughout been undefended. The sheriff – substitute has, however, dismissed the action, founding on Rule 23 of the Sheriff Courts Act, which provides that, if the defender does not lodge a notice of appearance, the sheriff "may, at any time after the expiry of the *induciae*, upon a written craving being endorsed on the initial writ by the pursuer or his agent, decern in terms of the crave of the initial writ". The sheriff substitute rightly observes that the word used is "may", not "shall"; and, that being so, I agree that he is not constrained blindly to append his signature to the crave without regard to its terms. He is entitled to consider what he is being asked to do, and in the extreme case (e.g., incompetency, or want of jurisdiction) to refuse to do it. Here, however, the decree sought is in itself unexceptionable. The sheriff substitute's reason for refusing it is that the pursuers have failed to furnish him with any specification of the goods in respect of which the account was rendered. In other words, the sheriff substitute has *ex proprio motu* held the action irrelevant for lack of specification. In doing so, he has, in my opinion, exceeded the limits of the discretion conferred upon him. As I see it, the only purpose of furnishing a detailed account is to enable the Court to verify it – that is to say, to "examine the justification for the amount claimed". This the Court in an undefended action has no right to do – *Terry* v *Murray*, 1947 SC 10".

The sheriff's comments at the conclusion of the report may also be seen as having relevance to the instant appeals expressing, as they do, a degree of prescience which embraces the principles of the simple procedure rules:

> "It may be unfortunate that the sheriff is not empowered to go behind a defender's admission and examine the account for himself; but on the other hand, it may perhaps be said, in support of the rule, that when a debt is not being disputed it is in everyone's interest that the machinery for recovering it, and the writ upon which decree is to be granted, should be as simple and free from complication as possible".

[37] In *United Dominions Trust Limited* v *McDowell* the sheriff dismissed an undefended action for payment on the ground that the sum sued for in breach of contract was so

exorbitant as to amount to a penalty which it was *pars judicis* for him to notice. Allowing the pursuers' appeal the sheriff principal (Prosser) considered the court's powers of intervention *ex proprio motu* in an undefended action (applying the same ordinary cause rule (OCR.23) as in *Cadbury)*. He notes that, as the sheriff also accepts, the court had no right to take issue with the relevancy or specification of the pleadings: *"and in my view that is indeed the position even if some destructive averment, undermining the basic relevancy of the case, is plain to see"*. The possibility of the court refusing decree in absence is acknowledged standing the terms of the rule. However, that possibility is limited to situations where the decree sought was incompetent in itself or outside the jurisdiction of the court in question.

[38] What constitutes fair notice in terms of pleading was considered in *British Railways Board* v *Strathclyde Regional Council* 1982 SLT 55 and *Watson* v *Greater Glasgow Health Board* [2016] CSOH 93. In the former case the court decided that lack of specification does not render the initial writ a nullity. What constitutes the material facts and the legal basis of the claim will clearly vary from case to case but [*Watson* para 20] "not much will be required in a debt action".

[39] The following propositions are advanced on behalf of Cabot, endorsed by the *amicus curiae* and are accepted by this court as sound principles which apply when the sheriff is exercising ordinary jurisdiction in undefended proceedings.

- What will satisfy the requirement of fair notice by way of averment will vary from case to case, although generally "not much will be required in a debt action" (*Watson* v *Greater Glasgow Health Board* [2016] CSOH 93).

- The court ought not to dismiss an action *ex proprio motu* on the ground that the averments in the writ are irrelevant (*Cadbury Brothers Limited* v *T Mahon Limited* 1962 SLT (Sh Ct) 28). Even where an averment is plainly irrelevant from the face of the pleadings (*United Dominions Trust Limited* v *McDowall* 1984 SLT (Sh Ct) 10).

- Material defects in specification will not render an action a fundamental nullity (*British Railways Board* v *Strathclyde Regional Council* 1982 SLT 55).

[40] However, the key issue in these appeals is the extent of the court's powers under the simple procedure rules in undefended debt recovery cases in respect of consumer credit agreements. It appears to us that the case law which established these principles would be relevant and apply to simple procedure cases also unless it was the intention of the legislature to confer quite different and more extensive powers on the court in simple procedure cases compared with those enjoyed currently by the sheriff in ordinary cause and in summary cause actions.

Simple procedure and its rules

[41] Section 72 of the 2014 Act, as we have already observed, creates a new form of civil procedure in the sheriff court known as simple procedure and provides that under section 104(1) further measures may be made by act of sederunt in connection with this new procedure. The proceedings that are to be brought under simple procedure are set out in section 72(3) and they are:

(a) proceedings for payment of a sum of money not exceeding £5,000,
(b) actions of multiplepoinding where the value of the fund or property that is the subject of the action does not exceed £5,000,
(c) actions of furthcoming where the value of the arrested fund or subject does not exceed £5,000,
(d) actions *ad factum praestandum*, other than actions in which there is claimed, in addition or as an alternative to a decree *ad factum praestandum,* a decree for payment of a sum of money exceeding £5,000,
(e) proceedings for the recovery of possession of heritable property or moveable property, other than proceedings in which there is claimed, in addition or as an alternative to a decree for such recovery, a decree for payment of the sum of money exceeding £5,000."

Section 75 details the factors that are to be taken into consideration in the making of rules for simple procedure. These are that, so far as possible, when conducting a simple procedure case, the sheriff:

> (a) is able to identify the issues in dispute,
> (b) may facilitate negotiation between or among the parties with a view to securing a settlement,
> (c) may otherwise assist the parties in reaching a settlement,
> (d) can adopt a procedure that is appropriate to and takes account of the particular circumstances of the case.

[42] When legislating to introduce this new procedure the Scottish Parliament proceeded on certain recommendations of the Scottish Civil Courts Review (SCCR) which reported in 2009. The SCCR took the view that there was considerable scope for improving the procedures for dealing with lower value cases and recommended that the existing summary cause and small claims procedure should be replaced by a new simplified procedure for all actions of a value of £5,000 or less. The procedure should be designed with unrepresented litigants in mind. It was intended that the court should take an interventionist approach to identify the issues and assist the parties to settle, if possible, and to determine how the case progressed. It was envisaged that the rules should be drafted for party litigants rather than practitioners and when consulting on the draft rules there should be an "intelligibility rule – test" with members of the public. The rules should make clear that the court will control how the case progresses and will take an active role in identifying the issues in dispute and deciding what factual information and legal argument the court requires in order to determine the case. At para 131 the following recommendation was made:

> "131. We recommend that the rules should be drafted for party litigants rather than practitioners. They should describe in outline how the case will proceed; what approach the district judge will take in identifying the issues; how he will deal with questions of fact and law; the oral evidence and documentation that will normally be required; the significance of time limits; the in court advice service, if any, that is available; and the availability of

> other forms of dispute resolution. The rules themselves should specify the circumstances in which the judge may grant a decree by default or a decree in absence, dispose of the case at the first hearing, or continue it for negotiations or mediation. The rules should also entitle the judge to permit lay representation and to hold any hearing in chambers".

Further recommendations relating to the new procedure were made in section C of the annexe to chapter 5. Of course, the detail of the new procedure and its rules was recognised to be a matter for the Scottish Civil Justice Council (SCJC).

[43] Simple procedure replaces small claims and summary cause procedure although summary cause procedure remains available for certain proceedings. Simple procedure is only available in the sheriff court. Although this is a new procedure it borrows much from summary cause procedure both in respect of the proceedings which may be brought and in respect of the court's apparent powers when no defence or response is lodged or indeed when a time to pay application is lodged as in the circumstances of these appeals.

[44] Section 75 of the 2014 Act identifies the objectives which are to be achieved when the Court of Session is exercising its rule making powers by virtue of section 104. These are noted above. Having regard to these provisions we consider whether there was an intention on the part of Parliament to innovate on or extend the sheriffs' powers in undefended simple procedure cases.

[45] Delegated legislation is to be construed in the same way as an Act. The intention of the legislature as indicated in the enabling act is the prime guide to the meaning of delegated legislation. (Bennion on Statutory Interpretation: section 3.13). The statutory guidance to the rule makers in section 75 of the 2014 Act focuses primarily on the court identifying the issues arising between parties; facilitating settlement and conducting proceedings in the manner which befits the particular case and its issues. It can readily be seen that the intention is to emphasise the court's active role in controlling how the case

progresses by identifying the true questions to be determined and by assisting the parties settle the case where possible. Section 75 is concerned with disputed claims. It does not appear that Parliament had in mind how the court would approach undefended cases or such cases where a debt or liability is admitted or was to any extent concerned with cases where a party chose not to dispute the claim. The recommendation in paragraph 131 of the SCCR that "the rules themselves should specify the circumstances in which the judge may grant a decree by default or a decree in absence" was not taken forward by Parliament or the SCJC in developing rules.

[46] In our approach to construing the procedural rules we recognise and apply an important principle of statutory interpretation to the effect that it requires clear and unambiguous language to change the common law and established principles of civil practice and procedure. Stair (The Stair Memorial Encyclopaedia of the Laws of Scotland, volume 12, paragraphs 1126-1127) sets out this presumption succinctly:

> "**Presumption against Changes in Existing Law and Practice**
>
> **1126. Common law.**
> There is a presumption against the common law being changed by statute, and if a deep seated principle of the common law 'is to be overturned, it must be overturned by a clear, definite and positive enactment, not by an ambiguous one'. If the arguments on a question of interpretation are 'fairly evenly balanced, that interpretation should be chosen which involves the least alteration of the existing law'.
>
> **1127. Rules of practice and procedure**
> The position with regard to changes effected by statute to rules of practice and procedure is the same as it is to alterations to the substantive common law. Thus in *Kinnear* v *Whyte*, Lord Ardmillan said:
> 'When we have an uniform and long continued rule of practice, we must be very careful not to construe a new Act in such a manner as to introduce an alteration not plainly intended by the Legislature'.

[47] The simple procedure rules are prefaced by "principles" (part 1.2). These are guiding principles by which the parties and the court are expected to act. They are not rules.

The principles are overriding objectives intended to govern the operation of all the rules and seek to achieve a change of ethos or cultural change in the way in which litigation is conducted underpinning the exercise of the court's case management powers. The sheriff's responsibilities are set out at 1.4 and in these appeals the sheriffs place some emphasis on 1.4(1) and (2):

> **1.4 What are the sheriffs' responsibilities?**
>
> (1) The sheriff must take into account the principles of simple procedure when managing cases and when interpreting these rules.
>
> (2) The sheriff must ensure that parties who are not represented, or parties who do not have legal representation, are not unfairly disadvantaged.

The sheriffs' powers may be found at 1.8 and of relevance to these appeals are:

> **1.8 What are the sheriff's powers?**
>
> (1) The sheriff may give orders to the parties, either in person or by giving written orders.
> :
> :
> (3) The sheriff may do anything or give any order considered necessary to decide the case.
> :
> :
> :
> (11) If a claim, or part of a claim, obviously has no real prospect of success, the sheriff may dismiss the claim or that part of it at any time.
> :
> :
> (12) If a claim, or part of a claim, obviously will not succeed because it is incompetent, the sheriff may dismiss the claim or that part of it at any time".

[48] In these appeals the rules with particular application are SPR 7.3 (and part 5) and 7.4 which come under the heading of "admitted claims". Part 8 – Orders and also Rule 8.4 is also clearly of relevance given the procedure followed in all three appeals.

[49] The simple procedure rules in common with the ordinary cause rules and rules governing the sheriffs' summary civil jurisdiction do not compel or require the sheriff to

grant decree in absence – only the rules of the Court of Session require that decree in absence be granted. Nevertheless, the sheriff's discretion is not unfettered. It is limited by the court's inherent jurisdiction and its own rules. The conventional approach is that decree in absence will be refused only in very limited circumstances as discussed above.

[50] From an analysis of the simple procedure rules it appears to us that the main change is the focus on the court's power to intervene to assist parties resolve or settle their disputes. The court will control the conduct of the case and may make orders which will identify the issues of fact and law which the court may have to determine and allow the sheriff to determine the appropriate procedure for the circumstances of a particular case. The court's powers do appear wide and constitute, in effect, a more inquisitorial and pro-active approach. The second most notable feature of the rules is the language which is clearly designed with party litigants in mind. (See in particular the glossary at SPR Part 21). The claimant and respondent are guided through the claim form; the response and the conduct of the case in fairly clear language avoiding unnecessary legal terminology – as advocated in the SCCR and the Scottish Government's Policy Memorandum document which accompanied the Courts Reform (Scotland) Bill. These features mark a departure from the more traditional approach to litigation in the Ordinary Cause Rules. It is, nevertheless, proper to observe that the Summary Cause Rules also emphasise the sheriff's role in identifying the issues in dispute and promoting settlement by negotiation (See SCR 8.3).

[51] The principles of simple procedure (Part 1- 1.2) are eloquent of the need for the court to encourage the prompt and proportionate use of time, expense and resources to achieve a just resolution of the parties' dispute. We recognise that on a proper construction of the simple procedure rules they are designed to promote the court's powers in disputed claims. It is not evident to us that the legislative intention behind the rules extends the court's very

limited inherent jurisdiction to enquire into the merits of an undefended action. The interventionist and problem-solving approach required of the sheriff in the context of the principles is that such powers are directed at defended claims where there is *litiscontestation*. Where the claim is not defended the sheriff is not to know whether a party has had the benefit of legal advice or not. The responsibility of the sheriff to ensure that parties who are not represented or do not have legal representation in terms of rule 1.4(2) is not engaged. The provisions of Rule 13.5, 13.6 and 13.7 for recall of a decision made in terms of rule 7.4(2) when a party has not responded to a claim and the claimant has made an application for a decision provide a safeguard in a situation where a respondent seeks to state a defence late.

[52] The introduction of "*unless orders*" in terms of SPR 8.4 appears to have the purpose of enhancing the court's case management powers designed to ensure the sheriff has the proper tools to conduct simple procedure cases in accordance with the objectives set out in section 75 of the 2014 Act. The utility of the "*unless orders*" in undefended cases may be more apparent than real. In our view they are technically competent but designed for defended cases where there is *litiscontestation*. The mere existence of a power to make an "*unless order*" does not innovate on the existing common law and practice nor does it extend the sheriff's jurisdiction in undefended cases in the absence of an express and clear power within the rules. We are of the same opinion as to the effect of the sheriff's apparent powers in SPR 1.8 (see above). The existence of these powers does not, in itself, supply the necessary clear legislative intention or rule to extend the court's limited powers when the sheriff is considering whether to grant decree in absence in undefended claims. In that circumstance the sheriff has no right to take issue with the relevancy and specification of the claim and we detect no basis either in the simple procedure rules or the enabling act to alter that approach.

Indeed it would run contrary to the legislative intention for a speedy inexpensive way to resolve disputes (SPR1.1).

[53] Further aspects of the court's duty fall to be considered. Firstly, has the ambit of *pars judicis* been extended more recently by virtue of the court's decision in *McLeod* v *Prestige Credit Limited* [2016] CSOH 69? Secondly, as the agreements which form the basis of Cabot's claim against the respondents are agreements regulated by the Consumer Credit Act 1974 and associated regulations, does their enforcement raise a matter of "public interest" such as to bring these proceedings, even if undefended, within the meaning of *pars judicis*? Lastly, the court's duty under the Human Rights Act 1998 in relation to adjudicating undefended simple procedure claims.

[54] In the course of submissions the opinion of the Lord Ordinary in *McLeod* v *Prestige Credit Limited* was considered. In that case the Lord Ordinary dismissed as irrelevant an action for production and reduction of a Sheriff Court decree. The Sheriff Court proceedings were raised by a party who sought to enforce his remedies under the Conveyancing and Feudal Reform (Scotland) Act 1970 in respect of a standard security granted by the heritable proprietor to a third party lender who had assigned it to the pursuer. At the proof or evidential hearing the pursuer failed to produce either the principal or a certified copy of the calling up notice on which the case was founded. The proof proceeded in the absence of the debtor who had departed the court as he did not recognise the jurisdiction of the sheriff. The evidential hearing proceeded by way of submissions based on the copy documents with no witness speaking to these documents. The Lord Ordinary was of the opinion that the pursuer's failure to present evidence of requisite quality was "an issue of substance and by no means a technicality" which ought to have been raised by the sheriff *ex proprio motu*. As it happened this issue did not constitute exceptional circumstances making reduction of the

decree necessary. Nevertheless, the question is whether the Lord Ordinary's observations as to the duty of the sheriff might be thought to extend the court's duty, that is, to take notice of questions of admissibility of evidence. We have considered what effect, if any, this decision might have in the circumstances of these appeals. In our view *McLeod* was concerned with whether the pursuer had proved his case and in particular with the law of evidence at proof in a defended action. The case is clearly of interest as it points to there being a duty on the sheriff to notice any deficiencies in the material presented as evidence whether it is objected to or not, but it is concerned with proof. That the point relates to the law of evidence is clear from the Lord Ordinary's opinion para [18]:

> "That leaves the matter of Prestige's failure to present evidence of the requisite quality at the evidential hearing before the sheriff. I regard this as an issue of substance and by no means a technicality. Whatever right Prestige may have had to refuse to provide Mr McLeod with the original or 'verified' documents or affidavits that he demanded from them for his own use, neither they nor the sheriff were entitled to disregard the law of evidence when decree in terms of the summary application was sought and granted."

We therefore agree with the submission that the Lord Ordinary's observations have no real application to the circumstances of these appeals.

[55] In each of these cases the agreement on which the claim proceeds is one regulated under the Consumer Credit Act 1974 ("the 1974 Act"). The sheriff in each of these cases express concerns about Cabot's title to sue and the lack of specification provided as to the agreement and the assignation. In each of the cases the sheriff has considered whether the agreement is enforceable in terms of the 1974 Act and its regulations. The sheriffs interpret D2 of the claim form to mean that the agreement had been signed at the respondent's address. They wish to be satisfied that the agreement complies with the Cancellation of Contracts made in a Consumer's Home or Place of Work, etc Regulations 2008 ("the 2008

Regulations") otherwise it might not be enforceable. It appears from the stated cases and report that the sheriffs, without suggesting explicitly that the agreements founded on by Cabot were unenforceable, took the view that unless title to sue and enforceability were proved to their satisfaction the appropriate course was to dismiss the claim.

[56] At this stage we observe that the 2008 Regulations referred to by the summary sheriff in Brown and more obliquely in Gardner and McGregor do not apply to contracts entered into on or after 13 June 2014. (Regulation 2 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 3134 of 2013). The regulations could not apply therefore in the cases of McGregor and Brown.

[57] Consumer Credit Legislation regulates lending and protects borrowers. There is clearly a public interest in consumer protection. The House of Lords considered the enforceability of regulated consumer credit agreements and section 127(3) and (4) of the 1974 Act, in particular, in *Wilson* v *First County Trust Limited* (No 2) [2004] 1 AC 816. Section 127(3) and (4) operated to restrict the creditor's rights in a regulated credit agreement by rendering the agreement unenforceable unless it contained prescribed terms and was properly executed. In *Wilson* the House of Lords considered whether the provision was incompatible with *inter alia* Article 6(1) of the first protocol ECHR and decided the provision was not incompatible with convention rights observing that Article 6 guarantees the procedural right to have a claim adjudicated by an independent and impartial tribunal. The court decided that although section 127(3) and (4) restricts the substantive rights of the creditor it does not restrict access to the court for a determination whether an agreement is enforceable or not. Recognising the restriction that the provision places on enforcement of agreements for the protection of borrowers the agreement itself is not void by virtue of failure to strictly observe the requirements of the legislation and, for example, the debtor

may enforce his rights in such an agreement whether enforceable against him or not. The court however observed that section 173(3) of the 1974 Act expressly permits consensual enforcement against the borrower. A borrower may consent to the sale of a security or to judgement. We consider this to be a matter of some importance when analysing the extent of the court's duty in undefended proceedings involving consumer protection legislation. A debtor who decides not to defend an action or respond to a claim may be considered to have admitted not only the validity of the claim but liability for the debt. In the case of McGregor the admission is explicit. Accordingly, we conclude that claims for payment involving regulated agreements raise in broad terms matters of public interest but the court's function in such defended claims is to determine the parties' competing positions on live issues whether relating to the validity of the agreement and its terms and/or liability for a debt arising in accordance with consumer rights legislation. (See for example section 71 of the Consumer Rights Act 2015.) That section was not referred to in the course of the appeal hearing but we note that section 71(2) of the Consumer Rights Act 2015 provides:

> "The Court must consider whether the term is fair even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it."

The explanatory notes to the Bill refer to the decision of the EUCJ in Case C-168/05 *Mostaza Claro* (2006) ECR I-10421 paragraph 38:

> "the nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair."

In the subsequent case Case C-243/08 *Pannon* (2009) ECR I-4713 the Court of Justice clarified that in fulfilling this duty, the court would not have to look at the fairness of the term if they do not have adequate information to do so, (at para.35):

> "the national court is required to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task."

Thus in undefended claims we cannot see a basis either in the rules of court or in consumer credit or consumer rights legislation to require the court *ex proprio motu* to investigate the enforceability of the agreement on which the claim is based. We accept the submission made on behalf of the appellant that it is not necessary in actions concerning regulated consumer credit agreements to produce the contractual documentation at the commencement of the action. The Court of Session exercising its rule making power made an Act of Sederunt (Amendment of the Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) 2009) 2009/402 which amended not only the Sheriff Court Ordinary Cause Rules; Summary Cause and Small Claims Rules but crucially also amended an Act of Sederunt (Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) 2009) 2009/294 promulgated earlier the same year but yet to come into force which made provision for production of a regulated agreement with the initial writ, etc. The outcome of this interesting legislative minuet is that there is no requirement to produce a copy of the agreement along with the writ. Instead, there is a simple requirement of an averment that such an agreement exists and details of the agreement. Having regard to the Act of Sederunt, and *Pannon,* and in the absence of any specific provision in the simple procedure rules requiring such documentation, we find it both surprising and irregular that the sheriffs not only required that such documentation be produced but in the absence of such documentation declined to grant decree in absence and dismissed the claims. We are therefore of the view that the sheriffs in so doing exceeded their powers.

[58] The postscript to *Wilson* (*supra*) is that sections 127(3) and (4) of the 1974 Act were repealed by the Consumer Credit Act 2006 (Schedule 4 paragraph 1) with effect from 6 April 2007. To the extent that the sheriff in Brown relied upon that provision he must be regarded as having fallen into error.

[59] Finally, having regard to the court's duty as a "public authority" in terms of the Human Rights Act 1998 (the "1998 Act"), section 6 makes it unlawful for a public authority to act in a way which is incompatible with a convention right. In *Wilson* (*supra*) the convention rights, with which these appeals are also concerned, are those set out in Article 6(1). That convention right provides the guarantee to everyone of access to the court for determination of his or her civil rights and obligations. As the court observed in *Wilson* the rights which Article 6(1) guarantees are rights of institutional and procedural fairness. They do not guarantee an individual's substantive civil rights and do not create substantive civil rights. Accordingly, in our view, Article 6 does not place any specific obligation on the court in simple procedure cases to investigate potential and perhaps speculative enforceability issues or defences which the defender himself chooses not to advance. In each of these cases the sheriff was being asked to do something (grant decree in absence or to make a decision awarding the claimant what was asked for in the claim form) which was both competent and within his jurisdiction. Providing the procedural steps are followed; the court has jurisdiction and service of the claim has been properly effected, we do not consider that there is any threat to or breach of the convention right under Article 6 by the sheriff granting decree in absence or by instalments. We have already considered how the rules of court and the common law approach the issues which arise in these cases from the stand point of *pars judicis* or the court's inherent jurisdiction. We therefore see no basis for suggesting that such a procedure for granting decree in absence might give rise to a breach

by the court of any convention rights. On the contrary, it might be considered unfair procedurally from the claimant's perspective if the court declined to grant decree in absence in circumstances where the claim is competently brought and all procedural rules had been complied with.

[60] There are certain features common to each of these cases which form part of the sheriffs' reasoning for dismissing the claim.

[61] The first involves simple procedure rules – principles and the sheriff's responsibilities (SPR 1.2 and 1.4). A common thread in each of these appeals is that the sheriffs construe the principles of simple procedure and their responsibilities to mean that they have a duty to make enquiries of the claimant in undefended proceedings in accordance with SPR 1.4(1) and (2) which are:-

> **1.4 What are the sheriffs' responsibilities?**
>
> (1) The sheriff must take into account the principles of simple procedure when managing cases and when interpreting these rules.
>
> (2) The sheriff must ensure that parties who are not represented, or parties who do not have legal representation, are not unfairly disadvantaged.

1.4(1) refers to the five principles at SPR 1.2. It appears to us that only the first principle is capable of having any application in undefended cases. The other principles envisage dispute resolution of defended causes. The first principle is:-

> **1.2**
> (1) Cases are to be resolved as quickly as possible, at the least expense to the parties and the courts.

[62] Accordingly, the live responsibility which the sheriffs in all of these appeals rely on is SPR 1.4(2) or the concept of the level playing field. However, we have difficulty in understanding why that would apply in undefended claims. The respondents Gardner and Brown have chosen not to respond at all which may be seen as an admission that the debt is

due to Cabot or at least that they have chosen not to contest the claims. If the claim has been properly served another explanation does not readily suggest itself. Even though one may exist it would be speculation to suggest another explanation. The respondent has chosen not to become a party to these proceedings. They are neither an unrepresented party nor one without legal representation. They are not a party to proceedings at all. In our opinion SPR 1.4(2) is directed towards disputed claims.

[63] It is not the sheriff's function to advocate the cause of the defender who chooses not to contest the claim. There is no rule which either explicitly or implicitly suggests that the respondent can choose not to participate in proceedings in the knowledge and comfort that the sheriff will investigate possible defences and make enquiries of the claimant before allowing decree to pass. Mr McGregor is, of course, a party to proceedings in the sense that he has unequivocally admitted liability for the debt and has asked the court to make an order to which Cabot are in agreement. It is difficult to contemplate why the particular responsibility to maintain a level playing field would have any application in that situation.

[64] We observe that the role of the court with party litigants has been considered recently by the UK Supreme Court in the case of *Barton* v *Wright Hassall* LLP [2018] 1 WLR 1119. The Supreme Court at paragraph 42 had this to say:

> "If, as many believe, because they have been designed by lawyers for use by lawyers, the [Rules of Court] do present an impediment to access to justice for unrepresented parties, the answer is to make very different new rules….rather than to treat litigants in person as immune from their consequences."

In simple procedure we have new rules written very differently with unrepresented parties in mind. The rules will assist them participate. The sheriff has a responsibility to ensure that they are not unfairly disadvantaged. The rules themselves are designed to assist not only the court in this function but the party litigants themselves by guiding them through

the process. The sheriff's duty is to come to a just resolution of the claim. The court, in a defended case, has a duty to all parties (see *Barton* v *Wright Hassall* (*supra*) and the Opinion of Lady Paton in an application for permission to appeal from this court to the Court of Session in the case AW [2018] CSIH 25).

[65] Accordingly, to the extent that the sheriffs rely on rule 1.4 as justification for the making of "*unless orders*" and then to dismiss the claim when the orders are not complied with, they fell into error.

[66] Another common feature in each of the cases is to the effect that Cabot or their agents had not properly or fully completed the claim form. It is suggested that Cabot have not set out the details of the Consumer Credit Agreement and that they have failed to provide details of any guarantor; the agreed payment arrangements and that they give no specification as to the manner or date of the demands for payment.

[67] We have two observations to make. Firstly, in terms of SPR 3.9 the sheriff clerk has the responsibility of checking the claim form for problems which mean that it cannot be registered. One of these problems is that the claim form is incomplete (SPR 3.9(1)(d)). SPR 3.9(2) provides that "if there are no such problems, the sheriff clerk must register the claim". In all these cases the sheriff clerk has registered the claim and must therefore be presumed to have fulfilled her responsibilities and considered the claim form to be complete. As we have discussed very little is required in a debt action and in all these cases Cabot give the requisite information, albeit brief, as to the date of the agreement and its reference number. There is no requirement to name a guarantor if none exist. It would be absurd for the claim to be rejected due to a failure to refer to an ancillary matter such as whether a guarantor exists or not. In each of the claim forms at D1 it is narrated that the sums are payable in demand, which negates any need to make reference to payment terms

in D4. In any event, as we have noted, a lack of specification is not a proper reason for rejecting a claim. In the course of the hearing reference was made to other cases where the sheriff clerk had not registered a claim form. As will be clear from this opinion there is no bar to the registration of a claim where the information supplied follows the information provided here.

The McGregor Appeal

[68] Conceptually, we find it difficult to follow far less agree with the sheriff's reasoning in this case. Mr McGregor admits the debt and seeks time to pay by instalments. Cabot are content with his proposal to pay off the debt however the sheriff declines to grant an order to that effect. Instead, the claim is dismissed the sheriff observing that Cabot are not prevented from bringing the claim again. The sheriff's decision appears inconsistent not only with the court's duty or *pars judicis* but also with the principle set out at SPR 1.2 which states that: "*cases are to be resolved as quickly as possible, at the least expense to parties and the courts.*" The sheriff's dismissal of the case appears to contradict that principle as it causes additional expense; unnecessary delay and disproportionate resort to court resources to resolve a claim which both parties are agreed should be settled. The sheriff at paras [29] and [39] accepts that the time to pay application involves an admission of the claim but states: "*nevertheless in my judgement this did not prevent me from issuing an 'unless order' having regard to the sheriff's responsibilities and in the knowledge that the appellants in similar types of cases have been unable to prove title to sue*." Reliance on unspecified knowledge of other cases is not *pars judicis*. It is simply a misconceived approach to the court's powers under SPR 7.4. Unless there is a substantial lack of competency or jurisdiction it is difficult to divine why the order asked for would not be granted. The sheriff's refers at para [41] to potential dishonesty and

scams. Dishonesty is something the court should rightly be concerned with but only where the dishonesty is patent or raised by the defender. There is no requirement to lodge the loan agreement at this stage (see SI No 402 of 2009). We, therefore, conclude that by referring to irrelevant considerations and exceeding his powers in an undefended case the sheriff was in error and mistaken as to his function and duty when considering the time to pay application. We also consider him to have been plainly wrong in issuing the "*unless order*" as for the reasons narrated there was no basis for such an order.

[69] We propose to answer all questions in the affirmative and allow the appeal.

The Gardner Appeal

[70] In this case the respondent failed to lodge a response or defence to the claim. The sheriff is entitled to point out that he is not compelled to grant decree in absence or an order for the sum asked for by the claimant. The sheriff has discretion but the discretion is not unfettered. In this case, it appears that the sheriff has exceeded his duty or inherent jurisdiction. Although it is technically competent to issue an "*unless order*" the sheriff has done so for reasons which cannot be justified by reference to *pars judicis*. In that regard we are of the opinion that the making of the "*unless order*" is vitiated as it flows from the sheriff exceeding his jurisdiction in undefended cases. Accordingly, we propose to answer the questions of law in the affirmative and allow the appeal.

The Brown Appeal

[71] In this case the respondent chose not to defend which may be taken as an admission that she is due to pay the debt. No response form was lodged and this is therefore an undefended claim. The sheriff was asked to consider whether to grant the order sought by

Cabot. He declined to do so for the reasons given in the appeal report. The sheriff required sight of documents which the rules of court do not require the claimant to provide in cases involving enforcement of consumer credit agreements. To the extent that the sheriff asked for better specification and considered the claim form to be deficient we consider that he fell into error by misconstruing both the extent of his inherent jurisdiction (*pars judicis)*; the claim form and the simple procedure rules. It appears that the sheriff has misdirected himself as to the applicability of section 127(3) and (4) of the Consumer Credit Act 1974 which had been repealed and likewise the applicability of the 2008 regulations to which we have referred above. The sheriff appears to refer to the original lender as "*Vanquis*" rather than JD Williams in explaining his reasons for not awarding the claimant the order they seek at paragraph [14]. We consider that simply to be a mistake rather than an error of law. In this case the sheriff, following Cabot's refusal to comply with the "*unless order"*, fixed a discussion in court. Although persuaded by the appellant's agent that he did not require to see the assignation or proof of intimation of the assignation nevertheless the sheriff, in our view, wrongly distinguished the authorities referred to on behalf of Cabot as to the extent of the court's jurisdiction in undefended cases. Although not strictly binding on the sheriff they constitute a body of law considered to be correctly decided. These authorities may derive from ordinary cause procedure but are relevant to the construction of the simple procedure rules. They are of particular relevance and force in the absence of any express provision in the simple procedure rules as to the circumstances in which the sheriff may decline to grant decree in absence. Accordingly, we are likewise of the view that the sheriff, in this case, misunderstood the extent of his jurisdiction in undefended cases and that in turn led the sheriff to make an "*unless order"* in terms of SPR 8.4 unnecessarily. We therefore propose to allow the appeal by answering the questions of law in the affirmative.

[72] The effect of these appeals is, in our opinion, that the sheriff's inherent jurisdiction in undefended causes is largely unaltered by the simple procedure rules. The common law which underpins the sheriff's ordinary jurisdiction has equal relevance and application in simple procedure. We recognise that the simple procedure rules have proved challenging for sheriffs since they came into force in November 2016. As with other forms of civil procedure the incidence of undefended claims is high. It is accepted that the rules provide the sheriffs with an array of apparent new powers to make orders to manage the litigation in keeping with both the rules and the principles by which the rules are to be applied. For reasons already given, the court must operate within its powers and the mere existence of a power to make orders does not thereby extend the court's inherent jurisdiction. It does however provide the sheriff with better tools to manage proceedings effectively and in the spirit of the principles and rules in contested cases. The interventionist, proactive problem-solving role of the sheriff should be focused on those cases which are defended. The "*unless order*" is one such tool. It will enhance the sheriff's powers and therefore ability to control and manage defended claims. Although technically competent, the use of "*unless orders*" in undefended proceedings is not appropriate other than to determine matters within the court's limited scope of enquiry such as jurisdiction, competence and prescription. Otherwise, we do not consider that they have a place in undefended proceedings. Their use in undefended claims such as these risks not only the court exceeding its jurisdiction but will inevitably lead to an inconsistency of approach and involve the judiciary, parties and the court system in an intolerably burdensome and unnecessary procedure which would have the effect of delaying justice and imposing unwarranted costs on parties and the justice system.