SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY AT DUMFRIES

[2019] SC DUM 36

DUM-SD23-19

NOTE BY SHERIFF GEORGE JAMIESON

in the cause

BLACK HORSE LIMITED

Pursuers

against

SHARON PATRICIA CAMERON

Defender

Act: Bryce
Alt: Absent

Dumfries 20 March 2019

The sheriff, having resumed consideration of the cause, dismisses the action with no expenses due to or by either party.

NOTE

[1] This is a simple procedure case in which the claimants seek delivery of a motor vehicle with a value of £32,169.48 (the amount due under the hire purchase agreement), and an enforcement order under sections 65(1) and 127(1) of the Consumer Credit Act 1974 ("the 1974 Act"). They have no alternative crave for payment. They have altered part 5D of the Claim form to accommodate these craves.

[2] The sheriff clerk depute sought my guidance on whether this action was competent under simple procedure. I advised her to grant warrant for service, under reservation of the

question of competency. The action was ultimately undefended. I thereafter fixed a hearing on the claimant's application for a decision in terms of the claim form.

[3] There are two aspects to the competency of this simple procedure which are discussed in this Note. The claimant's local agent, Mr Bryce, addressed me on both of these points at the discussion in court on the competency of the action. His instructions were somewhat sparse, to say the least, but I have now been able to consider the arguments made in favour of the action being competent.

[4] In the event, I have not been persuaded on either point and I have accordingly decided to dismiss the action as incompetently laid – i.e. it is not competent to combine in a simple procedure claim a request for delivery of a motor vehicle with a value in excess of £5,000, and a request for an enforcement order under the 1974 Act.

The claim for delivery and the simple procedure rules

[5] The sheriff court "simple procedure" was introduced by section 72 of the Courts Reform (Scotland) Act 2014 as a replacement for summary cause and small claim procedure. Currently, it has been brought into force only in respect of a "relevant claim".

[6] Broadly speaking, relevant claims are cases that were small claims prior to 28 November 2016, subject to an increase in the monetary limit from £3,000 to £5,000. The issue is whether an action for delivery falls within the definition of relevant claim. Actions that are not a "relevant claim" remain subject to summary cause procedure for the time being.

[7] To understand what constitutes a "relevant claim", it is first necessary to consider the terms of section 72(3) of the 2014 Act.

[8] This provides that the following types of proceedings may only be brought subject to simple procedure (and no other types of proceedings may be so brought):

(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 a sum of money exceeding £5,000.

[9] There is no particular requirement in relation to actions *ad factum praestandum* or in actions for recovery of heritable or moveable property that the value of the property is less than £5,000, provided the claimant does not include either an additional or alternative crave for a sum exceeding £5,000. So, assuming section 72 is brought fully into force, the claimants would be able to seek an order for delivery of a motor vehicle with a value exceeding £5,000 under the simple procedure. Indeed, no other procedure would be competent in respect of a stand-alone claim for delivery.

[10] So, which of the actions in the section 72(3) list are "relevant claims", i.e. claims in respect of which simple procedure, rather than summary cause procedure, is appropriate because section 72 is currently in force *only* in respect of those claims?

[11] To answer this, it is necessary to consider the terms of the Courts Reform (Scotland) Act 2014 (Commencement No 7, Transitional and Saving Provisions) Order 2016 (SSI, No 291). Article 2 of the Order brought *inter alia* section 72 of the 2014 Act into force on 28 November 2016, but only "for the purposes of a relevant claim".

[12] Article 1(2) of the Order defines "relevant claim" as a claim:

> "(a) Raised on or after 28 November 2016 that would be a small claim but for the repeal [of the provisions of the Sheriff Courts (Scotland) Act 1971 relating to small claims]; and
> (b) Which would be such a claim were the figures of £3,000 within each of article 2(a) and (b) of the Small Claims (Scotland) Order 1988 figures of £5,000".

[13] To my mind, this, put simply, means that a "relevant claim" is one that would have fallen within the definition of a small claim prior to the abolition of that procedure on 28 November 2016, subject to the increase in the small claim monetary limit from £3,000 to £5,000.

[14] Article 2 of the 1988 Order defined a small claim (read subject to the increase in the monetary limit to £5,000) as one of the following:

> "(a) Actions for payment of money not exceeding £5,000 in amount, other than actions in respect of aliment or interim aliment, actions of defamation and actions for personal injury; and
>
> (b) Actions *ad factum praestandum* and actions for recovery of moveable property where in any such action there is included, as an alternative to the claim, a claim for payment of a sum not exceeding £5,000."(Emphasis added.)

[15] Accordingly, small claim procedure *only* included actions for delivery of moveable property where there was included in the summons a claim for payment of money (not exceeding £3,000) as an *alternative* to the delivery crave. The only change made with the introduction of simple procedure is the increase of the monetary limit from £3,000 to £5,000.

[16] There is only one simple procedure claim form which encompasses the three types of claim currently brought within the definition of "relevant claim". An explanation of simple

procedure is given at the top of the first page of this form. This includes the statement that the simple procedure is – "a court procedure for settling or determining disputes with a value of **£5,000 or less**".

[17] Section D5 advises the claimant to select one of the three option(s) that best describes the type of order he would like the court to make if his claim is successful. He is advised that he can "ask for more than one type of order" to be made in a claim and that he can also ask for alternative orders. For example, he could ask for the respondent to be ordered to repair something or, failing that, to give him money to buy a new item.

[18] There then follows three tick boxes. The first is in relation to a claim for payment of money; the second is for an order for delivery of something to the claimant, alternatively payment; and the third is for an order to do something for the claimant (i.e an *order ad factum praestandum*), alternatively payment. These correspond to the three categories of action that formerly fell within small claim procedure.

[19] One of the aims of simple procedure was to create a "simpler" terminology so that lay users might more readily understand matters of court procedure. But this simple language has to be back translated for legal purposes. Thus rule 3(1) of the Act of Sederunt (Simple Procedure Rules) 2016 interprets the simple expressions by giving them their correct legal terms.

[20] It is in that list of translations, for example, one learns that "a decision which orders the respondent to do something for the claimant" means a decree *ad factum praestandum*; and "a decision to order the respondent to deliver something to the claimant" means "a decree for delivery or recovery of possession".

[21] So, although the second and third option boxes in part D5 of the claim form use "simple" language, these expressions actually refer back to the actions *ad factum praestandum* and actions for delivery (recovery of moveable property) in article 2(b) of the 1988 Order.

Claimants' arguments to the contrary

[22] The arguments were: (1) the Scottish Courts and Tribunals Service website describes "simple procedure" as including "actions for delivery or for recovery of moveable property, or actions which order people to do something specific"; (2) hundreds of decisions in such cases have been granted in all jurisdictions and "the sheriffs appear comfortable with the style of claim being suitable for simple procedure"; and (3) "there is nothing to prevent a stand-alone return of goods action under simple procedure".

Discussion

[23] I think the first two arguments must give way to the plain intention of the implementing legislation. That is, that simple procedure has currently only been brought into force for the former small claims. Those claims included *only* actions for delivery with a claim for payment of up to (now) £5,000 as an *alternative* to delivery. Accordingly, a stand-alone action for delivery of goods with a value of over £30,000 cannot, at the present time be regarded as a "relevant claim", so that it may competently be brought under simple procedure. In my opinion, the correct procedure at the present time for such an action is by summary cause summons in the sheriff court.

[24] As to their third argument, the claimants' agents have not elucidated further on why there is nothing to stop them bringing these actions under simple procedure. In my opinion, what stops them is that section 72 has not yet been brought into force in respect of such

actions. Further, they have in framing their claim form, deliberately deleted the content of the second options box from an action for delivery/alternatively payment, to crave an enforcement order and delivery. There is no alternative claim for payment. This seems to me to be in direct contradiction of the simple procedure claim form and the implementing legislation.

[25] There may of course be circumstances in which a claimant combines different causes of action in one simple procedure claim form. For example, a respondent might commit a delict whereby he invades the claimant's property, assaults him, and removes a family heirloom he claims to own. There is nothing to stop the claimant from ticking option box one (damages for the assault not exceeding £5,000) *and* option box two for return of the heirloom, alternatively damages for its value (not exceeding £5,000).

[26] But in the present case, there is only one cause of action – breach of a hire purchase agreement; and the claimant can therefore choose *within simple procedure* either to seek damages, or delivery, alternatively payment. Since the value exceeds £5,000 neither option is actually open to them in this case and accordingly this action must be regarded as being incompetent as laid.

The application for the enforcement order

[27] The 1974 Act is a consumer protection measure. A hire purchase agreement must be in the form prescribed by regulations. If it is not in that format, it may be enforceable only on an order of the court. Section 65 of the Act deals with the "consequences of improper execution".

[28] Section 65 provides as follows:

> "(1) An improperly executed regulated agreement is enforceable against the debtor or hirer on an order of the court only.
> (2) A retaking of goods or land to which a regulated agreement relates is an enforcement of the agreement."

[29] Section 127(1) of the Act provides that the court shall dismiss an application for an enforcement order if, but only if, it considers it just to do so having regard to— (i) prejudice caused to any person by the contravention in question, and the degree of culpability for it; and (ii) the powers conferred on the court by subsection (2) and sections 135 and 136.

[30] Sections 135 and 136 contain powers to suspend or attach conditions to enforcement, or to vary the agreement.

[31] Section 127(2) of the Act provides that if it appears to the court just to do so, it may in an enforcement order reduce or discharge any sum payable by the debtor or hirer, or any surety, so as to compensate him for prejudice suffered as a result of the contravention in question.

[32] Section 129(1)(a) of the Act allows the debtor or hirer to make an application for time to pay (a time order) in an application for an enforcement order.

[33] Section 141(3) of the Act confers exclusive jurisdiction on the sheriff court in respect of any action by the creditor or owner to enforce a regulated agreement.

[34] There is, to my knowledge, no provision of the 1974 Act, or any Act of Sederunt, which specifically determines the form of process in applications to the court for an enforcement order under section 65 of the 1974 Act.

[35] The Act of Sederunt (Consumer Credit Act 1974) 1985 (as amended) makes provision for certain ancillary procedural issues and orders arising in proceedings under the Act, but only in respect of ordinary actions and summary causes.

[36] It is silent as to the form of process for a statutory application under section 65 of the 1974 Act.

[37] Rule 5A provides that where there are "no proceedings" in respect of a regulated agreement before the court, an application for a time or an ancillary order under *inter alia* section 135 or 136 "shall be by summary application".

Submissions anent this part of the claim

[38] Mr Bryce was not given any instructions to address this point. He suggested that one solution might be for the court to dismiss this application and grant decree for delivery only.

Decision on the application for the enforcement order

[39] In the absence of fuller submissions, I conclude that I cannot grant the orders sought by the claimants. A decree, in this case for delivery only, carries with it a warrant for execution (to use traditional legal terminology). It therefore amounts to a judgment that an enforcement order should be made. In my opinion, the claimants' entitlement to a decree for delivery depends on the court being persuaded to grant an enforcement order.

[40] Can, therefore, such an application be made under simple procedure? In my opinion, it cannot. First of all, this is a discretionary remedy. It is exclusive to the sheriff court. It seeks a remedy that is novel and not part of the common law jurisdiction of the sheriff. As a special statutory application it should, in my opinion, be made by summary application. The summary application rules have special rules for service where a time order may be applied for under the 1974 Act (SAR, rule 2.7(5) and 2.22), so are well suited to such cases.

[41] Secondly, and more simply, section 72 of the 2014 Act makes no provisions for these applications to be made under simple procedure. Indeed, simple procedure is wholly

unsuited to such applications. They are not to be granted merely in absence of the respondent, because the court always has to satisfy itself that it is just to grant the order.

[42] Further, it is not fair on respondents to allow such applications to be tucked away at part D5 of a claim form. Respondents have a significant range of rights that they can invoke as set out in sections 127(2), 129, 135 and 136 of the 1974 Act. These provisions involve the exercise of statutory discretion, and the application of specialised law by the court. The use of simple procedure for such applications tends to obscure these important points.

Decision to dismiss the claim

[43] It is *pars judicis* for the court to notice questions of competency either in the *form of the proceedings* or the *remedy sought* (*Cabot Financial Ltd* v *McGregor* [2018] SAC (Civ) 12, at paragraph [34]) (*Emphasis added*). But when should the court do so? It has been said that the court may be bound to have regard to external interests in justifying its intervention (*Simpson* v *Downie* 2013 SLT 178 at page 181, paragraph [10]), such as the time and expense involved to the court and the claimant in doing so, or in the risk of upsetting long established understandings of how a particular procedure is meant to operate.

[44] If there is a consensus as to a form of process, and the issue raises no fundamental question as to whether the court has the power to grant the remedy (perhaps in a different form of process), it may be the court should not seek to raise the point, or, if it does, to address the issue of an improperly used process in some way other than dismissal of the action, such as by not awarding expenses. But I think this is a clear case for dismissal - I do not think it is in the public interest for applications for enforcement orders under the 1974 Act to be included in simple procedure cases for the reasons I have identified.