SHERIFFDOM OF SOUTH STRATHCYLDE, DUMFRIES AND GALLOWAY AT HAMILTON

[2025] SC HAM 13

HAM-SE15-24

JUDGMENT OF SHERIFF J SPEIR

in the cause

BLACK HORSE LIMITED

Pursuer

against

D

Defender

Pursuer: R. Mitchell, Esq.,Advocate ; Eversheds Sutherland (International) LLP, solicitors, Edinburgh
Defender: J. Bird, CAB Hamilton

HAMILTON, 4 February 2025

Introduction

[1] In what circumstances should a court make a time order under and in terms of section 129 of the Consumer Credit Act 1974? That is the issue raised in the present case in circumstances where the debtor seeks such an order to prevent the creditor from enforcing a credit agreement by way of an action for delivery of a motor vehicle following non-payment of the contractually agreed repayment of a loan by instalments.

Background

[2] On 2 October 2021 the parties entered into a Hire Purchase Agreement ("the Agreement") in respect of a Peugeot motor vehicle ("the vehicle"). The Agreement is

regulated by the Consumer Credit Act 1974 ("the 1974 Act"). The purchase price of the vehicle was £21,568.00. The defender paid a deposit of £1084.15 towards said purchase price with balance of £20,483.85 being paid by the pursuer. This is the amount of credit provided under the Agreement. Allowing for hire purchase charges and interest, the repayable balance, payable by the defender to the pursuer, was £26,332.75. The applicable interest rate was 8.55% with an APR of 8.9%. The contract stipulated payment of said sum in equal monthly instalments of £420.81 for a period of 60 months. On payment of the final monthly instalment title in the vehicle would pass to the defender. The defender paid 20 instalments totalling £8416.20 after which she defaulted on the payment schedule. On 19 December 2023, the pursuer issued to the defender a Default Notice under section 87 (1) of the 1974 Act. At that time the arrears stood at £2,524.86, being 6 months missed payments, not including interest. The Default Notice gave warning *inter alia* that unless the arrears were paid the pursuer was entitled to end the agreement and recover the vehicle. No such payment was made and on 17 April 2024, the pursuer issued to the defender a Notice of Termination. On 9 May 2024 the pursuer presented a summons craving an order for delivery of the vehicle failing which for warrant for officers of court to take possession of it. In response the defender completed and lodged a pro forma statement of defence. That did not disclose a defence as such but indicated and intention to attend court and offer a monthly payment plan. Subsequently and after sundry procedure the defender lodged an application for a time order under section 129 of the 1974 Act. That application admitted the arrears but sought an extension of the agreement with an increase in the monthly payments to £438 and to refuse the order for delivery *sine die*. That application was accompanied by a spreadsheet purporting to show the defender's income and expenditure. No vouching whatsoever was lodged in support of it. Thereafter a hearing on the application for a time order was assigned, parties having agreed that there was otherwise no defence on the merits of the action and that a proof was unnecessary.

Submissions

Pursuer's submissions

[3] For the pursuer it was submitted that the application for a time order should be refused and decree *de plano* granted as craved. The appropriate test for determining the application was whether it was "just" to grant a time order on the facts and circumstances of the present case. Reference was made to the English Court of Appeal (two bench) decision *First National Bank plc* v *Syed* [1991] 2 All E.R. 250 and in particular the dicta of Dillon L.J. at page 250 where he stated (referring to section 129):

> "Under this section, then, the Court is empowered to order payment by instalments which are reasonable having regard to the means of the debtor. But the Court can only exercise the power if it appears, or is considered, just to do so. But consideration of what is just does not exclude consideration of the creditor's position; it is not limited to the debtor's position. I cannot think that it is just, in the circumstances of this case, and in the light in particular of the fairly long history of default and merely sporadic payments on the Defendants' part, and of the absence of any realistic, as opposed to merely speculative, prospect of improvement in the Defendants' finances, to require the Plaintiff to accept the instalments the Defendants can afford, when those will be too little even to keep down the accruing interest on the Defendants' account"

[4] Accordingly when considering whether or not a time order should be granted the court should take into consideration: the position of the debtor, the position of the creditor and whether the proposed payment is reasonable and affordable given the circumstances. In the present case a time order would not be just because the defender had a long history of missed payments; and it would significantly extend the contract period to the prejudice of the pursuer. In relation to the first point counsel for the pursuer advised the current total

outstanding was £23,632.65 made up as follows: (a) a current balance of £15,592.40, (b) arrears of £5,072.15 and (c) a termination figure of £2,968.10. The Agreement had 21 months remaining that being the period within which the defender was obliged to repay the amount owed to the Pursuer. If a time order was granted in the terms sought this would require an extension of the remaining term to 44 months which would not be just. Even if the proposed monthly amount was £500 then counsel estimated that the term would still be in the region of 37 months which was still significantly in excess of the contractual term. As the defender had defaulted on the agreed contractual monthly payments of £420.81 it was not credible based on the information provided that she would now be able to afford to pay in excess of that as she proposed. There had been no payments made for over a year. The current market value of the vehicle was estimated to be £9,325. If the pursuer was able to recover and sell it now at that price that would cover almost half of the amount owed to the Pursuer and by corollary reduce the balance that the defender still owed under the Agreement. The vehicle will however continue to depreciate and if there was a further default in any time order made both parties would accordingly be prejudiced thereby.

Defender's submissions

[5] On behalf of the defender her representative accepted that she was in default. He did not challenge the figures put forward by counsel for the pursuer. He also accepted that the vehicle was a depreciating asset. The defender was nonetheless seeking a time order so that she could retain the vehicle. She required it in order to commute to and from her work as a carer for a local authority. She had a health condition for which she receives adult disability payments. She was married and had three children to support. Her husband had only recently returned to work after having been off for 6 months due to health issues.

Reference was made to the schedule of income and expenditure prepared and lodged by the defender. This showed a surplus of £438 per month which was where the proposed figure in the time order application came from. He was instructed to increase this sum to £500 per month as the defender no longer required to pay for childcare. The defender's representative confirmed that she was repaying other debts as disclosed in the schedule but he did not have the details of how much was outstanding in respect of those. It might be however that the defender was eligible to receive additional benefits and was currently seeking assistance to apply for those. Under reference to section 129 of the 1974 Act it was submitted that in determining an application for a time order the court required to consider whether it was reasonable and would it remedy the breach by the defender of the hire purchase contract. It was submitted that this test had been met in the present case and accordingly it was in the interests of justice to grant the time order being sought and the case should be continued *sine die* for that to be given effect to.

Decision and reasons

[6] So far as material section 129 of the 1974 Act *inter alia* provides:

> "(1) … if it appears to the court just to do so -…
> (b) on an application made by a debtor or hirer under this paragraph after service on him of –
> (i) a default notice
> (c) in an action brought by a creditor or owner… recover possession of any goods or land to which a regulated agreement relates, the court may make an order under this section (a 'time order').
>
> (2) A time order shall provide for one or both of the following, as the court considers just-
> (a) the payment by the debtor or hirer or any surety of any sum owed under a regulated agreement or a security by such instalments, payable at such times, as the court, having regard to the means of the debtor or hirer and any surety, considers reasonable …"

[7] Thereafter section 136 ("Power to vary agreements and securities") states: "The court may in an order made by it under this Act include such provision as it considers just for amending any agreement or security in consequence of a term of the order."

[8] Thus, it follows that, in an action such as the present, before a court grants decree in favour of a lender for the possession of property subject to a regulated agreement it requires to consider whether it would be just, as an alternative thereto, to grant the application for a time order. In the event that the court makes such an order it has wide powers to amend the Agreement between the parties to give effect to that order. Typically that would be to extend the contractual term for payment of the loan but the wording of the provision does not suggest that the power is restricted to just that.

[9] The Agreement in the present case contain what are common provisions in hire purchase agreements including:

- that ownership of the vehicle remains with the lender until all sums due under the vehicle have been paid;
- that if any loan instalment is not paid on its due date, interest may be charged on it from then until the date of payment at the rate of interest applicable to the loan;
- that failure to pay instalments when due would entitle the lender to repossess the vehicle if necessary by way of court order.

[10] Prior to hearing parties' submissions I had identified an English Court of Appeal case in point and decided after the case of *Syed, supra,* namely the three bench decision in the joined cases of *Southern and District Finance plc v Barnes, J & J Securities* v *Ewart and Equity Home Loans Ltd* v *Lewis* (1995) 27 H.L.R. 691(hereafter for brevity *Barnes, supra*). In giving the

leading judgment in this case Leggatt LJ, determined that the correct approach in determining applications for time orders was as follows:

> "(1) When a time order is applied for, or a possession order sought of land to which a regulated agreement applies, the court must first consider whether it is just to make a time order. That will involve consideration of all the circumstances of the case, and of the position of the creditor as well as the debtor.
>
> (2) When a time order is made, it should normally be made for a stipulated period on account of temporary financial difficulty. If, despite the giving of time, the debtor is unlikely to be able to resume repayment of the total indebtedness by at least the amount of the contractual instalments, no time order should be made. In such circumstances it will be more equitable to allow the regulated agreement to be enforced.
>
> (3) When a time order is made relating to the non-payment of money:
> (a) The 'sum owed' means every sum which is due and owing under the agreement, but where possession proceedings have been brought by the creditor that will normally comprise the total indebtedness; and
> (b) The court must consider what instalments would be reasonable both as to amount and timing, having regard to the debtor's means.
>
> (4) The court may include in a time order any amendment of the agreement, which it considers just to both parties, and which is a consequence of a term of the order. If the rate of interest is amended, it is relevant that smaller instalments will result both in a liability to pay interest on accumulated arrears and, on the other hand, in an extended period of repayment. But to some extent the high rate of interest usually payable under regulated agreements already takes account of the risk that difficulties in repayment may occur.
>
> (5) If a time order is made when the sum owed is the whole of the outstanding balance due under the loan, there will inevitably be consequences for the term of the loan or for the rate of interest or both.
>
> (6) If justice requires the making of a time order, the court should suspend any possession order that it also makes, so long as the terms of the time order are complied with."

[11] In the apparent absence of relevant authoritative Scottish case law I am content to accept and adopt this as the correct approach. I indicated to both counsel for the pursuer and the representative for the defender that this was my view and gave them each the opportunity to make supplementary written submissions. They declined to do so each

contending that the foregoing *dicta* was consistent with both of their original submissions. Specifically I was not addressed on what change if any would be required to the term of the loan or the rate of interest in the event that I was satisfied that it was appropriate to make a time order. These are the matters adumbrated in paragraphs (3) to (6) of the guidance set out by Leggatt LJ. Only the likely length of an extension to the term was addressed by counsel for the pursuer without demur from the defender's representative. Even then I am not persuaded that his calculations are correct. On the basis that the outstanding balance figure of £23,632.65 is accurate, and as I have indicated this was not challenged on behalf of the defender, then if this is to be repaid in instalments of £500 per month that gives a period of over 47 months before any additional accrued interest on arrears is applied.

[12] In the event, as I have decided for the reasons after explained that it is not just to make a time order, these issues of term extension and variation to the contractual interest rate do not require to be addressed further. But, in my view, in opposed time order applications, parties should be in a position to address the court on them in detail with clear and accurate calculations. In this regard, I regrettably find myself in disagreement with the sheriff who decided the case of *Murie McDougall Ltd* v *Sinclair* 1994 SLT (Sh Ct) 74 who determined *inter alia* that neither singly nor in combination did section 129 or section 136 give the court power to vary the contractual interest rate. He did so under reference to an unreported English county court case from 30 October 1989 the dicta from which he quotes at length (at page 80H-L of the report). The sheriff indicated that he was in agreement with the reasoning in that case which in turn rests on the proposition that as the 1974 Act contains specific provisions to allow for variation of extortionate credit agreements it would be wrong to allow for variations by the "back door" of applications under sections 129 and 136. This issue and the foregoing rationale was also submitted in argument in the case of *Barnes*,

supra but was rejected by the Court of Appeal who held that the court did have power to vary a term relation to interest in the context of determining a time order application but that the power was of limited scope and could only be used where it was truly required to give content to a time order and the making of it was just (per Leggatt LJ at page 698). I respectfully agree with that analysis.

[13] Turning to the present application, I am not satisfied that in all the circumstances of the case, including the parties' respective positions, that it is just to make a time order. The information available does not disclose the sort of "temporary financial difficulty" which Leggatt LJ identified as a basis for the relief that a time order would provide. Indeed, on the defender's own account the financial difficulty that would doubtlessly have resulted from her husband's absence from employment had arisen around June 2024. That is some considerable time after she began to default on the payments, being around April 2023. The schedule also discloses that the defender has a number of other creditors most of whom appear to be commercial lenders. From what I can glean, those debts appear to being servicing rather than being cleared. In the absence of any supporting vouching I am inclined to the view that the schedule is somewhat speculative. Further, I agree with counsel for the pursuer that the necessary extension that would be required to the Agreement to give effect to the time order would be excessive. When entered into the Agreement was due to terminate around November 2026. Based on the simple arithmetical calculation I have set out above, the estimated extension that would be required if payments were now to resume at £500 per month would move that termination date to around February 2029 at the earliest. While I accept that having to return the car to the lenders will present transport difficulties for the defender there was no indication that these were insurmountable by the use of public transport. On the other hand on a return of the vehicle now means it can be sold for its

present value rather than a depreciated one down the line if a time order was made and then further defaulted on, which on the information presented to me I have consider to more likely than not. In this scenario a sale for the present valued could potentially be to the benefit of both parties. Accordingly, I shall grant decree in the terms sought by the pursuer and refuse the application for a time order.

Expenses

[14] Parties were at odds on the question of expenses. Counsel for the pursuer submitted that they should follow success in terms of the usual rule. Further the pursuer had been left with no option but to raise these proceedings and if the defender had intended to seek a time order she could have made an application for that before the action was raised. The representative for the defender submitted that there should be no expenses due to or by. He submitted that the possibility of obtaining a time order prior to recovery proceedings being initiated was not well known. I prefer the submissions for the pursuer and shall make a finding of expenses against the defender.