EXTRA DIVISION, INNER HOUSE,
COURT OF SESSION

XA34/03

OPINION OF THE COURT

delivered by LORD OSBORNE

in

APPEAL

From the Sheriffdom of South Strathclyde, Dumfries and Galloway at Dumfries

by

JOHN EDWARD THOMPSON

Pursuer and Respondent;

against

JOHN JARDINE

Defender and Appellant;

Lord Osborne

Lord Hamilton

Lord Johnston

_____

Act: C. Sandison; Morrisons (for Stevenson & Johnstone, Langolm)

Alt: J.P. Robertson; Morton Fraser (for Seagrove & Co., Dumfries)

19 March 2004

The background

[1]The pursuer and respondent in this appeal raised an action for payment of £6,035, with interest, against the defender and appellant in Dumfries Sheriff Court. The basis of the action was the subject of brief averments in the initial writ. The pursuer and respondent averred:

"Between 9 November 2001 and 21 May 2002 the pursuer made loans to the defender amounting in total to seven thousand and thirty-five pounds (£7,035) in anticipation of their entering into a business partnership. The arrangement has fallen through and the loans now fall to be repaid to the pursuer.

On 4 April 2002 the defender made a repayment of £1,000. Despite requests made by the pursuer for repayment of the balance of £6,035 being the sum sued for it remains outstanding."

A single plea-in-law was stated in the initial writ, to the following effect:

"The defender being due and resting owing to the pursuer in the sum of six thousand and thirty-five pounds (£6,035) decree therefor should be granted as craved with expenses."

[2]On 18 September 2002, the sheriff pronounced an interlocutor in this action in the following terms:

"The sheriff (in absence) decerned against the defender for payment to the pursuer of the sum of £6,035.00 sterling with interest thereon at the rate of eight *per centum per annum* from 24 August 2002 until payment; together with expenses of £224.59 and the sheriff grants warrant for all lawful execution hereon."

Subsequently the defender and appellant lodged a Reponing Note, in which it was averred:

"On 18 September 2002 decree in absence was pronounced in this action against the defender in respect of his failure to enter appearance. Such failure was the result of the defender's agents failing to lodge a Notice of Intention to Defend within the *induciae*, which was caused partly by a delay in receiving Counsel's Opinion in relation to the case and partly by staff shortages and to (*sic*) pressure of business within the offices of the defender's agents.

The defender denies liability to repay the loan to the pursuer, on the basis that it was specifically agreed between the parties in the presence of two witnesses that the defender would pay the loan back to the pursuer when he was able to do so. That time has not yet arrived and accordingly this action is premature. No other agreement was reached between the parties and, accordingly, the loan is not repayable on demand.

The defender has consigned an E200 form in the hands of the Sheriff Clerk. In the circumstances, the defender craved and hereby craves the court: (1) to recall the said decree and to allow defences to be received; and (2) to prorogate the time to allow said defences to be lodged by a period of two weeks following the date of the hearing of the Reponing Note."

[3]On 10 October 2002, after having heard parties' procurators, the sheriff refused this Reponing Note. Subsequently the sheriff issued an Opinion in connection with that refusal, which itself was dated 22 October 2002. After explaining the circumstances in which the Reponing Note had been brought, the sheriff went on as follows:

"The pursuer's action seeks recovery of the balance of a loan of £7,035 which he made to the defender. There is no dispute that the money was lent. £1,000 has been repaid. The pursuer has demanded repayment of the balance which was (*sic*) not been paid.

The Note sets out why no Notice of Intention to Defend was lodged. That was apparently caused partly by a delay in receiving Counsel's Opinion about the case and partly by staff shortages and pressure of business in the offices of the defender's solicitor. That was expanded upon in the submission I heard from the solicitor. The Initial Writ was served on 24 August. The defender had handed the service copy to his solicitor on 26 or 27 August. The solicitor, who clearly had a doubt as to whether any defence to the action existed, had discussed the case with his Edinburgh correspondent who promised to send him a copy of an opinion of counsel in what appeared to be a similar case. That opinion arrived with a compliments slip about ten days later - almost certainly during the week before the period of notice expired on 13 September. The solicitor's secretary was on holiday. The lodging of the Notice of Intention to Defend was not dealt with. Of course what was missing in all

this was why not. The Notice of Intention to Defend is a pre-printed

form. It could easily have been lodged even without the assistance of a

secretary.

It was submitted that the Note disclosed a defence to the action. There had been a specific agreement between the parties that the loan would be repaid when the defender 'was able to do so'. It was said 'that time had not arrived' and that the action was premature. No further indication is given in the Note about why the defender was unable to pay the loan or what criteria should be employed to determine when the time for repayment had 'arrived'. Reference was made to *Neilson* v. *Stewart* 1991 S.L.T. 523 which had confirmed that parties could agree when a loan was to be repayable. At page 527J Lord Jauncey of Tullichettle, after

reviewing various cases, had said; 'I take from these passages that every loan carries with it an obligation of the borrower to repay. If the contract contains provisions for repayment these provisions will prevail. If, however, the contract contains no provisions or if for some reason the provisions turn out to be ineffectual then the obligation to repay revives. I entirely agree with the observations of the Lord President at page 350C that: "It is not essential that the parties should agree about the period of the loan because, in the absence of agreement to the contrary, a loan is repayable at any time on demand."'

Mention was made by the defender's solicitor of some of the other financial commitments of the defender which meant, it was said, that he was unable to repay the loan. What was in the Reponing Note was sufficient. The defence should not be examined too critically. Its relevance should not be tested (*Consultants and Technologists North Sea Limited* v. *Scott* 1986

S.L.T. 685).

The solicitor for the pursuer moved me to refuse the Note. He referred to the test set out in *Forbes* v. *Johnstone* 1995 S.L.T. 158. No reasonable explanation had been given for the failure to lodge the Notice of Intention to Defence (*sic*). The defence was utterly lacking in specification. The agreement averred was to (*sic*) vague and uncertain to be enforceable. If it was enforceable no factual basis for that was set out in the Reponing Note. No detail or even any indication was given as to why the defender maintained that he was unable to repay the loan. The culmination of the lack of explanation and the vagueness and lack of specification of the nature of the defence entitled me to refuse to repone the defender. It was reasonable that I should refuse to do so.

I applied the test set out in *Forbes* v. *Johnstone*. I considered all the circumstances of the case and attempted to balance one against another. I considered first the proposed defence. I attempted to do so in the light of the comments in *Consultants and Technologists North Sea Limited* v. *Scott* where (at page 686) it was said that the sheriff 'was wrong in looking in a reponing note for the specification required in a debate on relevancy on a closed record. A reponing note is only required to state a *prima facie* defence of substance

... '. In that case the proposed defence was that a cheque in full and final settlement of any sums due had been paid and accepted. The courts took the view that no further specification of that defence was required. That is hardly surprising. But the position in the present case, is it seems to me, very different. Repayment of a loan of money is sought. Repayment has been demanded but not made. Loans of money are repayable on demand unless parties agree to a term for the loan or a period for its repayment. A contract for the loan of money is generally characterised by the obligation of the borrower to repay the money lent. Otherwise a transaction becomes one of gift. What the defender appears to be asserting is that he can repay the loan, not at the demand of the pursuer or at any other time ascertainable by date or event or arising in objectively discoverable circumstances, that (*sic*) when he determines that he can. No other criteria of what 'was able to do so' might mean is given. That is both vague and uncertain. That vagueness and uncertainty was reflected in the submission I heard and is repeated in the language in the Note of Appeal - 'not yet in a position to make repayment' - and in the list of payments which the defender says he is able to make. What the Note outlined, it seemed to me, was not a contractual term which formed the basis of a proposed defence, but a set of circumstances which amounted to a vague and uncertain provision asserted by one party which was clearly ineffectual and unenforceable.

That was the basis on which I refused to repone the defender. The obvious initial doubts which the defender's solicitor had entertained about the proposed defence and the failure to lodge the Note of Intention to Defend promptly on receipt of the Counsel's Opinion were factors which seemed to confirm it.

For the avoidance of doubt I would just confirm that the pursuer's age was not a factor which affected my decision. The exchange about the possibility of enforcement by his executors was with the pursuer's agent when he referred to the matter."

[4]By a Note of Appeal, dated 17 October 2002, the defender and appellant appealed to the Sheriff Principal against the refusal by the sheriff to grant his Reponing Note on 10 October 2002 upon the grounds stated in it. Those grounds were as follows:

"1.The defender has a stateable defence to the action, namely that it was specifically agreed between the parties that the defender would repay the sums lent by the pursuer when the defender was able to do so. There were two witnesses to this verbal agreement and no other agreement was reached between the parties regarding a time or date when the loan fell to be repaid. The defender is not yet in a position to make repayment of the loan, as he has a number of pressing financial commitments to his landlady (by way of rent of his premises and her solicitor's legal costs), Dumfries and Galloway Council (the sums due for the implementation of a Traffic Regulatory Order in relation to the change of use granted by the Planning Committee for the defender's rented premises), the vehicles which the defender has purchased in relation to his taxi business, the rates for his premises and his own solicitor's legal costs (which have been deferred in the meantime). The defender was unable to obtain any further borrowing from his bank or any other conventional lending source, which is why he sought financial assistance from the pursuer.

2.The sheriff erred in law by refusing the Reponing Note on the ground that the defence stated was completely lacking in specification, when it is contended that all that is required within a Reponing Note is for an outline of the defence, which it is contended was adequately contained within the Reponing Note. The sheriff was most critical in his scrutiny of the defence and appeared to treat the hearing as if it were a motion by the pursuer for Summary Decree or a Debate.

3.The sheriff appeared to attach undue weight to the fact that the pursuer was 75 years of age and that his executors might be required to recover the loan from the defender. Be that as it may, it is contended that that was a risk which the pursuer chose when agreeing to lend the sums to the defender on the basis outlined by the defender in the Reponing Note.

4.The sheriff also appeared to accept the pursuer's arguments that the loan was repayable on demand because no date or time for repayment had been fixed, when it was contended on behalf of the defender that it was perfectly legitimate for the parties to agree on an 'open ended' term of the loan which, again, was a matter to be established one way or the other at Proof or Proof Before Answer.

5.The sheriff erred in law in considering that it was incumbent upon the defender's solicitor to give detailed reasons within the Reponing Note why the defender was not in a position to repay the loan at present. It is contended that such information might be required within a Closed Record but not within a Reponing Note. The sheriff gave the clear impression that it was this failure on the part of the defender's solicitor to specify the defence more fully which was ultimately his reason for refusing the Reponing Note."

[5]The hearing of the appeal to the Sheriff Principal took place on 16 January 2003. On 31 January 2003, the Sheriff Principal pronounced an interlocutor in the following terms:

"The Sheriff Principal having resumed consideration of the appeal refuses same; finds the defender and appellant liable to the pursuer and respondent in the expenses of the appeal; allows an account thereof to be given in and remits the same when lodged to the Auditor of Court to tax and to report."

Against that interlocutor, the defender and appellant has appealed to this court.

The submissions

[6]When this appeal came before us, counsel for the defender and appellant outlined the background to the appeal, which we have already described. He also drew our attention to certain passages in the judgment of the Sheriff Principal, which for present purposes it is unnecessary to narrate. Thereafter he submitted that both the sheriff and the Sheriff Principal had erred in law, with the result that the exercise by the sheriff of his discretionary power was flawed. Furthermore, the Sheriff Principal had erred in his understanding of the

facts in relation to which he had misdirected himself. He had taken irrelevant material into account. That was apparent at page 25B-C of the appeal print, where the Sheriff Principal had laid stress upon the inability of the parties to agree the terms of the contemplated partnership. It appeared that the Sheriff Principal was relying on the principle enshrined in the maxim *causa data causa non secuta*. That, however, was not in accordance with the way in which the case had been pled by the pursuer. Looking at the whole matter more generally, the defender had laid before the sheriff an explanation for his failure to lodge the necessary Notice of Intention to Defend and had demonstrated that he had a stateable defence to the action. The statability of the contemplated defence to the action was the main issue in the case; there had been no particular criticism made of the explanation for the failure to lodge the requisite Notice.

[7]Counsel for the defender and appellant then proceeded to draw our attention to a number of authorities considered relevant to the case. He submitted that the principles applicable to reponing were not in doubt. One of the criteria was whether there was a defence to the action which was "stateable". In this connection reference was made to *Neilson* v. *Stewart* 1991 S.C. (H.L.) 22, at pages 31, 36 and 40. The facts of that case were materially different from those of the present one. However, what emerged from the case was that every loan carried with it an obligation on the part of the borrower to repay; if the contract contained provisions for repayment those provisions would prevail. If, however, the contract contained no such provisions, or, if for some reason the provisions turned out to be ineffectual, then the obligation to repay on demand revived. In the present case, the defender and appellant averred that it had been specifically agreed that he would pay the loan back to the pursuer "when he was able to do so". Accordingly, the question in this case was whether such an agreement as that was effective in law to displace the normal rule that the obligation was to repay on demand. In that connection reliance was placed on *Wilson on Debt*, paragraph 4.1, at page 49, where the learned author recognised that advances of money might be made on the footing that they would be repaid only if the receiver was able to do so. That statement of the law was supported by *Shaw* v. *Kay* (1904) 12 S.L.T. 6 and 262. The agreement in that case was that a loan was "to be repaid by instalments as found most convenient to" the defender. A defence based upon those words had been held relevant for inquiry. The decision of the Lord Ordinary had been adhered to on appeal. In the present case the criterion was ability to pay, a criterion more favourable to the pursuer and appellant than convenience.

[8]Counsel for the defender and appellant submitted that further support for his client's position could be gained from *Forbes* v. *Forbes* (1869) 8 M. 85. The transactions involved in that case, as construed by the court, amounted to the recipient of the payment saying: "If I ever can repay you I shall do so." The view was taken that the transactions amounted to a loan, with the provision that repayment would be made if the debtor was able to do so. In other words, an agreement such as was averred to have been reached in the present case was regarded as effectual.

[9]Counsel for the defender and appellant also drew our attention to a case which he considered might be seen as in conflict with the position he had been advocating, *Ritchie* v. *Cowan and Kinghorn* (1901) 3 F. 1071. In that case Cowan and Kinghorn, creditors of Ritchie, on receiving payment of ten shillings in the pound of their debts, granted a receipt for the amount,

"being 10s. per £1, in full of our claim against the said Ritchie, ... it being, however, understood that the said Ritchie will pay the balance of 10s. per £1 whenever he is able to do so."

The court had held that the document instructed no legal obligation on Ritchie to pay the balance, but merely reflected an honourable understanding that he would pay whenever he was able to do so. That case, it was submitted, could be distinguished from the circumstances of the present one. The issue had been whether there had been a legal obligation to pay the balance at all, not whether an obligation to pay according to ability was effectual.

[10]Summarising his position, counsel for the defender and appellant submitted that the defence which had been outlined in the Reponing Note was at least a stateable defence. Of course, a mistake had been made in the present case by the solicitors acting for the defender and appellant. However, there had been no

dishonourable conduct, or deliberate failure to observe the court's rules. It was quite plain that the sheriff had misdirected himself in law, the result of which was that the whole matter was at large for this court. In so far as the Sheriff Principal had not recognised that position, he also had erred in law. In the whole circumstances the appeal should be allowed, the interlocutors of the Sheriff Principal of 31 January 2003 and of the sheriff of 10 October 2002 should be recalled, the Reponing Note should be allowed, the decree of 18 September 2002 should be recalled and the case remitted to the sheriff to proceed as accords.

[11]Counsel for the pursuer and respondent moved us to refuse the appeal. He pointed out that the matter involved the exercise of a discretion by the sheriff. He wished to examine how that ought to be treated by this court. In that connection he referred to *Forbes* v. *Johnstone* 1995 S.C. 220, a decision of five judges in which Sheriff Court practice relating to reponing had been considered. It was apparent from that case that the excuse advanced for failure to enter the process did not require to be reasonable. The explanation advanced for that failure had to be considered along with all of the other circumstances in exercising the discretion. Among those circumstances was the matter of whether the proposed defence was stateable. In this connection it was submitted that there was no rule of law to the effect that a sheriff would err if he refused to repone a defender who could show a stateable defence. Further, it was appropriate for a defender, against whom a decree had passed, in seeking to be reponed, to lay before the court material showing that the proposed defence could be supported. Without such material, a sheriff would be entitled to refuse a Reponing Note. It was accepted that, in a situation where a sheriff had made an error of law relating to the relevance of a proposed defence, his exercise of his discretion would be flawed and the matter would be open for reconsideration by this court. The proper view of the observations of Lord President Hope at page 225 in *Forbes* v. *Johnstone* was that, while a stateable defence was a necessary precondition for reponing, it might not be a sufficient basis for it.

[12]Assistance could be gained in relation to reponing from *Guardian Royal Exchange Group* v. *Moffat* 1986 S.L.T. 262. In that case an insurance company had raised an action to recover money stolen from two security vans. The two defenders had been convicted of the offence. Decree having been taken in absence, one defender had lodged a Reponing Note which had been refused by the sheriff on the ground that there was no stateable defence. The Sheriff Principal had refused the appeal to him, after which an appeal was taken to this court, which had been refused, the court holding that the sheriff had properly exercised her discretion. She had held that a number of matters advanced in criticism of the conviction of the defender did not amount to a substantial defence.

[13]It was appropriate to mention *Consultants and Technologists North Sea Limited* v. *Scott* 1986 S.L.T. 685. There were certain observations in that case, which appeared to favour the defender and appellant, to the effect that a Reponing Note was only required to state a *prima facie* defence of substance; it did not require to be scrutinised too critically on the matter of relevancy. However, there had been some criticism of that case in *Forbes* v. *Johnstone*, at page 224.

[14]Counsel for the pursuer and respondent went on to consider in detail the terms of the judgments of the sheriff and the Sheriff Principal. He contended that the latter showed that there was an insurmountable problem in relation to the proposed defence. Upon the view taken of the case by the Sheriff Principal, it was not necessary to consider the enforceability of a contractual condition that a loan should be repaid when the debtor was "able" to do so, since it was plain that the intended agreement between the parties had broken down; the anticipated partnership had never been entered into. That meant that the consideration for the loan had never come into existence. The result was that the loan was repayable on demand. In any event, there might not have been any loan at all; rather what might have occurred was the making of a payment in anticipation of a business arrangement which never came into being. However, counsel for the pursuer and respondent agreed with suggestions made by the court that the proper approach to the case was to look first at what had been decided by the sheriff. If he had been correct in the exercise of his discretion, that was an end of the appeal. If not, it was necessary to examine the reasoning of the Sheriff Principal, who had approached the matter in a somewhat different way.

[15]Counsel for the pursuer and respondent proceeded to elaborate his contention that the Sheriff Principal had impliedly had in mind the principle *causa data causa non secuta*. It was submitted that the pursuer's claim was essentially of that nature, although no specific reference to the principle was to be found in the pleadings. In this connection reference was made to *The Cantiere San Rocco* v. *The Clyde Shipbuilding and Engineering Company Limited* 1923 S.C. (H.L.) 105.

[16]Dealing further with the judgment of the sheriff, counsel for the pursuer and respondent submitted that he had been correct in categorising the proposed defence as "vague and uncertain" and "ineffectual and unenforceable". However, he accepted that authorities on the matter of the contemplated defence were hard to find. Nevertheless *In re Vince*, *ex parte The Trustee in Bankruptcy* [1892] 1 Q.B. 587 and 2 Q.B. 478 was of assistance. The agreement there considered was one in which the ability of a borrower to pay any portion of the interest stipulated for featured. It had ultimately been held that the agreement was expressed in such vague and uncertain terms that it was impossible to give effect to it. Counsel for the pursuer and respondent agreed, however, that the words which were the basis of the ultimate decision were not those dealing with ability to pay.

[17]Counsel for the pursuer and respondent submitted that *Shaw* v. *Kay* was the only case before the court relating to a loan agreement which referred to ability to pay. The Lord Ordinary had distinguished between payment "as convenient" and "when the borrower was able to repay". He had not said that a condition containing words such as the latter would in fact have been enforceable; that had not been in issue in the case. Accordingly, that decision was not of assistance to the defender. Conditions relating to ability to pay were inherently too vague to be enforceable. A loan with such a condition attached might never be repaid, in which event it could not be properly regarded as a loan at all. The case of *Forbes* v. *Forbes* could be distinguished from the present case, since what was there involved was not a loan properly so called. A loan had to be repayable at some point in the future. There had to be an obligation of repayment. In that connection reference was made to *Bell's Principles* paragraph 194. The transaction involved in *Forbes* v. *Forbes* had been innominate and unusual. The same could be said of the alleged arrangement in the present case. That was a reason why the sheriffs had been entitled to expect substantial material to show that the defender was in a position to prove what he had stated was his proposed defence.

[18]Assuming that the submissions concerning the vagueness of the criterion of ability to pay were unsound, it was submitted that the judgments of the sheriff and Sheriff Principal were correct, having regard to authority which bore on the meaning of ability to pay. In this connection reference was made to *Broatch* v. *Dodds* (1892) 19 R. 855 at page 857. It was apparent from the judgment of the Lord President in that case that where ability to pay was in issue, references to ability to pay did not import any limit to liability other than "the whole means of the person undertaking". Looking at page 134 of the appeal print and, in particular, the terms of the Note of Appeal to the Sheriff Principal, it was plain that the defender had not sought to express his proposed defence to the action by reference to that criterion. He had made averments, not about his whole means, but about other debts which he was obliged to pay. In the whole circumstances the appeal should be refused.

[19]Counsel for the defender and appellant replied. He contended that *Broatch* v. *Dodds* could be distinguished from the circumstances of this case. That case had been concerned with what a person was able to pay, not with the time at which he might be able to pay the whole debt. In any event, it was inappropriate on a Reponing Note to explore such matters in detail. No doubt, if the appeal were allowed, they might be explored before the sheriff. Likewise, without full pleadings, it was almost impossible to reach a proper conclusion as to whether the principle of *causa data causa non secuta* was involved in this case. It appeared that *Forbes* v. *Forbes* had been put before the sheriff, but he had not referred to it in any way in his Note. As regards the case of *Guardian Royal Exchange Group* v. *Moffat*, it appeared that the ground of decision related to the statability of the defence proposed. It was notable that the defender had not said that he had not stolen the money; all that he said was that he had been wrongly convicted.

The decision

[20]In taking the decision which he did to refuse the Reponing Note of the defender and appellant, it is quite plain that the sheriff exercised a statutory discretion conferred upon him, in the circumstances of this case, by the provisions of Rule 8.1 of the Sheriff Court Ordinary Cause Rules 1993. That rule provides:

"(1)In any cause other than" (certain causes not involved here) "the defender may apply to be reponed by lodging with the sheriff clerk, before implement in full of a decree in absence, a reponing note setting out his proposed defence and explaining his failure to appear. ...

(3)The sheriff may, on considering the reponing note, recall the decree so far as not implemented subject to such order as to expenses as he thinks fit; and the cause shall thereafter proceed as if the defender had lodged a notice of intention to defend and the period of notice had expired on the date on which the decree in absence was recalled".

It was a matter of agreement before us that, if it were shown that the sheriff's exercise of discretion was flawed by reason of, *inter alia*, the commission of an error of law, his exercise of discretion would fall and the matter of the Reponing Note would be at large before us.

[21]In these circumstances the question arising is whether the sheriff's exercise of discretion proceeded upon the basis of an error of law. It was a matter of agreement before us that the principles outlined by Lord Jauncey of Tullichettle in *Neilson* v. *Stewart* at page 40 provide the general legal principle applicable to this case. He there said:

"I take it from these passages that every loan carries with it an obligation of the borrower to repay. If the contract contains provisions for repayment those provisions will prevail. If, however, the contract contains no provisions or if for some reason the provisions turn out to be ineffectual then the obligation to repay on demand revives. I entirely agree with the observations of the Lord President that: 'It is not essential the parties should agree about the period of the loan because, in the absence of agreement to the contrary, a loan is repayable at any time on demand'".

In this case, in the reponing note, the defender and appellant avers that he

"denies liability to repay the loan to the pursuer, on the basis that it was specifically agreed between the parties in the presence of two witnesses that the defender would pay the loan back to the pursuer when he was able to do so. No other agreement was reached between the parties and, accordingly, the loan is not repayable on demand."

The existence of that agreement constitutes the proposed defence of the defender and appellant to the pursuer's claim for repayment of the balance of the loan. In his Opinion, dated 22 October 2002 the sheriff had characterised that agreement as "both vague and uncertain". He went on to say:

"What the note outlined, it seemed to me, was not a contractual term which formed the basis of a proposed defence but a set of circumstances which amounted to a vague and uncertain provision asserted by one party which was clearly ineffectual and unenforceable."

As we read the sheriff's observations, he appears to say that the arrangement specifically said by the defender to have been agreed between the parties as to repayment of the loan, which we have quoted, was "ineffectual and unenforceable".

[22]Against this background, the issue comes to be whether the sheriff's view concerning the agreement averred does, or does not, involve an error of law.

[23]Having regard to the authorities put before us during the course of the appeal, we have reached the conclusion that it does. In *Wilson on Debt*, paragraph 4.1, at page 49 the learned author says:

"It is possible for advances of money to be made on the footing that they will be repaid only if the receiver is able to do so. Where a loan between mercantile men was 'to be repaid by instalments as found most convenient to' the borrower, it was held that this referred to mercantile convenience - a time when the borrower had money sufficient in amount and free from the ordinary purposes of his business - and that the onus of proof as to this was on the lender."

In support of this passage the learned author cites *Forbes* v. *Forbes* and *Shaw* v. *Kay*. In *Shaw* v. *Kay*, the only reported judgment is that of Lord Pearson, the Lord Ordinary, to whose interlocutor the First Division subsequently adhered, without issuing Opinions. At page 7, Lord Pearson observed that:

"This is one of a class of cases which have occurred from time to time both here and in England, in which a debtor has qualified his obligation to pay by words referring to his convenience or ability. In some cases the words used may be construed as expressing merely a moral obligation, not capable of being enforced by action as in the case of *Ritchie* 1901 3 F. 1071. In the present case the document seems to me to import a conditional obligation to pay, enforceable at the instance of the creditor provided he can prove that the condition has been fulfilled. I cannot hold that the reference to the defender's convenience has the effect of making him the final judge in the matter. But it lies upon the pursuer to prove facts and circumstances showing that an instalment, if not the whole, can be quite conveniently paid by the defender."

At a later stage he goes on:

"Now, ability to pay is not the test. The expression used in the receipt is a good deal more favourable to the defender than an undertaking to pay when he is able to do so. I apprehend that as between mercantile men the expression 'as found most convenient to me' refers to mercantile convenience, and to the time when he should have money sufficient in amount and free from the ordinary purposes of his business ... "

It appears to us to be implied in what Lord Pearson says, in affirming the appropriateness of convenience as a criterion for a condition as regards payment, that he regarded ability to pay as also an appropriate criterion, although it was, of course, not that used in the case with which he was concerned.

[24]In *Forbes* v. *Forbes* after assessing the effect of the correspondence which was before the court, the Lord Justice Clerk, at page 90, concluded that what had been agreed amounted in substance to the recipient of the payments saying:

"I accept your liberality on the footing on which you offer it. If ever I can repay you I shall do so. I hope to pay everything in the end. But until better times come I take advantage of what you are so willing to do.

Better times have come, and the question is, whether there is any legal difficulty to prevent our giving effect to the manifest intention of the parties? I think there is none. If these conditions had been reduced to writing, a Court of law must have given effect to them as legal qualifications of the contract between the parties."

Lord Cowan, at page 92, put the matter this way:

"This is not the language of a man who holds himself discharged of all claim for repayment of the money he had received. On the contrary, it is the language of one who has been relieved from embarrassments by advances which he felt himself under obligation to repay as soon as he was able. A written obligation that the advances would be repaid as soon as the state of his affairs permitted would have received full effect. And though there be no formal obligation, this letter, in my opinion, puts the parties in the same legal position."

It is clear to us from what was said in that case that a condition related to ability to repay would be likely to receive legal effect.

[25]Reliance was placed on *Ritchie* v. *Cowan and Kinghorn* where a receipt was granted for an amount

"being 10s. per £1, in full of our claim against the said Ritchie, ... it being, however, understood that the said Ritchie will pay the balance of 10s. per £1 whenever he is able to do so."

It was held that that document instructed no legal obligation on Ritchie to pay the balance of ten shillings in the one pound, but was merely an honourable understanding that he would pay whenever he was able. It appears to us that that case can be distinguished from the present one. The receipt granted by the creditor bore to be "in full of our claim against the said Ritchie". In view of those words, it is perhaps not surprising that it was held that the succeeding words amounted to no more than an honourable understanding. In our view, the issue in the case was as to whether the later words in the receipt instructed any legal obligation at all; the issue was not whether, on the assumption that they did instruct what was intended to be a legal obligation, that obligation was effectual or not.

[26]As regards the case of *In re Vince, ex parte The Trustee in Bankruptcy* also relied upon by the pursuer and respondent, the agreement involved provided that, in the event of the borrower being unable to pay any portion of the interest by reason of the deficiency of his profits, a "due allowance" should be made by the lender to the borrower in respect of the same. As we understand it, that agreement proved to be unenforceable because of the uncertainty inherent in the words "due allowance". Thus the decision casts no doubt upon the validity or otherwise of any condition related to ability to pay. For all of these reasons, our conclusion is that the sheriff misdirected himself in law in holding that the alleged arrangement "was clearly ineffectual and unenforceable". It follows from that conclusion that the matter of the reponing note is at large before us for consideration.

[27]In our view, the approach which requires to be adopted to a reponing note was authoritatively set forth in *Forbes* v. *Johnstone* by Lord President Hope in the Opinion of the Court at page 225. There he said:

"What the rules in force, that is the amended Rule 28 and Rule 8.1 respectively, require is that the defender must set forth in the reponing note his proposed defence and he must explain his failure to appear. They also require the sheriff to consider the note before he considers whether or not to recall the decree. It is unlikely that a sheriff will be willing in the exercise of his discretion to recall the decree unless he is satisfied that the proposed defence is a stateable one. As for the explanation, it is not a requirement of the rules that he must be satisfied that it provides a reasonable excuse for the non-appearance. The sheriff in the present case has pointed out that defenders may fail to enter appearance timeously for various reasons, some of which may be inexcusable. But it might result in an injustice if a defender who had a perfectly sound defence were to be denied the opportunity of entering the process simply because the explanation for his non-appearance was not a reasonable one. As the matter is at the sheriff's discretion he is entitled, in such a case, to take account of all the circumstances and to balance one consideration against another in deciding whether or not to allow the reponing note."

[28]Applying that approach to the present case, the initial question which must be addressed is whether the reponing note discloses a stateable defence to the pursuer's and respondent's claim. In our view it does. The defender and appellant seeks to rely upon a specific agreement that he would pay the loan back to the pursuer "when he was able to do so". Having regard to the authorities which we have already mentioned, we consider that there is a sufficient basis to support the legal validity of such a condition of an agreement, in the event of it being established as a matter of fact. It was argued before us that it was necessary to go further and to enquire into the prospects for the proof of the proposed defence. However, we do not consider that such an examination is necessary or feasible in the context of a reponing note.

[29]An argument was addressed to us on the part of the pursuer and respondent, based upon the case of *Broatch* v. *Dodds*, which, it was said, gave content to the concept of ability to pay, in the context of a condition such as that said to have been involved here. However, we consider that the circumstances of that case are materially different from those involved in the present one. It involved an undertaking to pay what the debtor was able to pay. In the present case, the alleged condition related not to the amount of the payment but to the time when the defender might be able to do so. Reliance was also placed upon *Guardian Royal*

Exchange Group v. *Moffat* by the defender and respondent. We did not find that case helpful in the circumstances of the present one; plainly the assessment of whether a reponing note should or should not be granted must depend on the particular circumstances of each case. In that case it is notable that the circumstances advanced on behalf of the defender were in criticism of the soundness of his conviction. So far as we can see, he did not appear to contend that he had not in fact been involved in the offence concerned.

[30]It is, of course, also necessary to consider the explanation offered for the failure to enter appearance, as part of the assessment of the circumstances of a reponing note. As to that, it was not seriously contended that the mishap which had occurred in the present case was something which could never be excused. It appears to us that it was little more than an unfortunate oversight said to have been the result of staff shortages and pressure of business within the offices of the defender's agents. In all of these circumstances we have come to the conclusion that we should exercise the discretion which is now available to us to grant the reponing note. Accordingly, we shall allow the appeal, recall the interlocutors of the sheriff dated 10 October 2002 and of the Sheriff Principal dated 31 January 2003, recall the decree of 18 September 2002 and remit the case to the sheriff to proceed as accords.

[31]It is of course the position that the present appeal is taken against the interlocutor of the Sheriff Principal. We have not thought it necessary to examine his reasoning in detail. Although he adopted, as he put it, "a slightly different route" from that adopted by the Sheriff, he held that there was no basis for interfering with the Sheriff's exercise of his discretion. The fact is that we discern an error of law in the decision of the sheriff, which the Sheriff Principal has failed to recognise. It is upon that basis that we consider that his decision also was one proceeding upon an error of law. We are not persuaded, on such material as is before us, that the Sheriff Principal's different route leads to the conclusion that the proposed defence is unstateable.