SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT PERTH

[2019] SC PER 29

A10/19

JUDGMENT OF SHERIFF LINDSAY D R FOULIS

in the cause

CLYDESDALE FINANCIAL SERVICES LIMITED trading as Barclays Partner Finance, a company incorporated under the Companies Acts (company number 2901725) having its registered office in London

Pursuer

against

MR PRZEMYSLAW WOJCIK, residing in Perth

Defender

PERTH, 28 March 2019

The Sheriff, having resumed consideration of the cause, *ex proprio motu* finds the present action as laid to be incompetent and dismisses the action.

NOTE

[1] The parties entered into a conditional sale agreement in 2014 in terms of which the Defender agreed to purchase a Vauxhall Corsa motor car for a total price of £9,051.60. Unfortunately the Defender fell into arrears and breached the said agreement. As a result a default notice was served upon him in terms of section 88 of the Consumer Credit Act 1988 on 30 September 2018 and the agreement was terminated by the Pursuers on 29 November 2018. The sum of £2,217.94 remains outstanding in terms of the said agreement. The Pursuers remain the owners of the said car.

[2] Against that background the Pursuers instituted the present proceedings by way of initial writ in which they seek in terms of crave one payment of £2,217.94. In terms of crave

two they seek that the court finds and declares that they are entitled to recover possession of the said car and an order which may assist them in such recovery. In terms of craves three and four they seek an order for delivery of the said car and warrant to be granted to officers of court to search and take possession of the said car. The action was served on 22 January 2019 and no notice of intention to defend being lodged, the Pursuers minuted for decree. At this stage it was brought to my attention that all the orders sought apparently fell within the ambit of section 72(3) of the Courts Reform (Scotland) Act 2014. I accordingly arranged for the Pursuers' agent to address me specifically on the issue of whether the present proceedings were competent.

[3] The Pursuers' agent very helpfully forwarded outline submissions to me and these are appended to this note. These were expanded by oral submission to the effect that a crave for declarator was necessary in light of the provisions of sections 90 and 92 of the Consumer Credit Act 1974. The grant of the decree for declarator enabled the Pursuers to recover the motor car at their own hand. This order was essential having regard to the provisions of sections 90 and 92. They could be proactive in recovery and instruct their agents to recover the vehicle without necessarily any cooperation on the part of the Defender. An order for delivery was reactive in that the Defender was given the opportunity to deliver the car. The granting of the decree in terms of that crave allowed the Defender to deliver the car within a period. If the Defender did not comply, then officers of court were employed to search for and take possession of the vehicle. Delivery would only be relied on if agents could not recover the car. Section 72(3)(e) was not wide enough to cover what the Pursuers sought in terms of crave two. It was clear that a crave for declarator had to be instituted by initial writ under ordinary cause procedure. The action was truly one for such a remedy. The grant of declarator gave the Pursuers the power to recover the car and avoid acting in contravention

to section 90. It was a prerequisite for the Pursuers to exercise their rights as owners of the car.

[4] The starting off point for the determination of this matter is the Scottish Civil Courts Review published in 2009. The review recommended that actions for £5,000 or less should be the subject of a new procedure which would enable a party litigant to pursue or defend a matter to conclusion. An altogether less formal procedure was the aim. The explanatory notes to the Courts Reform (Scotland) Bill referred to the types of proceedings which could only be brought by simple procedure. These notes further observed that the method by which the court determined whether a case fell within the category of proceedings which could only be raised under simple procedure was laid down in *Milmor Properties Ltd* v *W and T Investment Co Ltd* 2000 SLT(Sh Ct) 2. I shall refer to this decision in more detail shortly. The policy memorandum accompanying the bill reiterated what had been expressed in the Scottish Civil Courts Review, namely that the overall policy intention was that simple procedure should enable and empower party litigants to raise or defend an action and conduct cases to a conclusion themselves. In short, the procedure was intended to be demystified and thus enable party litigants to conduct proceedings. Further the category of proceedings was determined by reference to the principles in *Milmor Properties Ltd.* These principles were to be relied on until such times as an Act of Sederunt was promulgated to indicate otherwise.

[5] I now turn to *Milmor Properties Ltd* v *W and T Investment Co Ltd*. In that decision Sheriff Principal Risk expressed the position quite clearly at page 4. Section 35(1) of the Sheriff Courts (Scotland) Act 1971 listed a number of proceedings. A form of process known as a 'summary cause' was to be employed for such proceedings. That list of proceedings included actions for the recovery of possession of moveable property. Sheriff Principal Risk

observed that the natural reading of that provision made it clear that the task of the court was to categorise the action which was before it rather than to categorise the craves seriatim. The statutory provisions in the 1971 Act and in the 2014 Act make no mention of craves. Therefore an action, which was appropriate in normal course to ordinary procedure, did not lose that character if it included an ancillary crave for a remedy, which if brought on its own, would require to proceed as a summary cause. When considered against these observations, in my opinion, the present proceedings seek payment, delivery, and recovery of possession of moveable property. The fact that the first five words of crave two are 'To find and declare that' does not alter this. There are slight differences in the terms of sections 35(1) and 72(3), such as 'shall be used' in the former is replaced by 'may only be brought' in the latter. Whilst the use of 'shall' and 'may' undoubtedly would normally denote the latter as not being prescriptive, 'may only' in my mind says in two words what was said in one in the earlier legislation, presumably to make it more easily understood by the lay litigant. In other words, the provision in the 2014 Act is mandatory. If there is any significance in the replacement of 'actions' in section 35(1)(c) by 'proceedings' in section 72(3)(e) it is lost on me, particularly when 'actions' is used in sections 72(3)(b) to (d). In short, what was said in *Milmor Properties Ltd* applies with equal force when considering what types of proceedings require to be raised under simple procedure. The fact that that decision was referred to in the explanatory notes to the preceding bill simply confirms this. The present proceedings do not seek payment of a sum greater than £5,000 and thus fall to be raised under simple procedure.

[6] In deference to the submission made on behalf of the Pursuers, it is worthwhile examining the nature of remedies available to recover moveable property to consider whether this is of any consequence. Walker's *The Law of Civil Remedies in Scotland*

distinguishes between possessors without title and those with a title. Under the latter section the author refers to protected goods in hire purchase and conditional sale. Reference to 'protected goods' appears again in section 90(7) of the 1974 Act. The Pursuers' agent referred to the provision of sections 90 and 92 of the 1974 Act. The text from *The Law of Civil Remedies in Scotland* which he produced, of course, predated the passing of that legislation. Nonetheless the reference to the provisions of the Hire Purchase (Scotland) Act 1965 indicates that they are in similar terms to those laid out in section 90 of the 1974 Act. It is clear that a right to recover possession requires court action. The author indicates that any action brought to recover possession may include various powers to preserve the moveable property. The court can order deliver of the property. It appears to me that the normal remedy employed to return property to the owner will be that of delivery.

[7] In the same section of *The Law of Civil Remedies in Scotland* Professor Walker deals with recovery from a possessor whose title has terminated. In the event that the Pursuers are granted an order for recovery, the Defender's title to possess the car has terminated. In that event the author professes that true owners such as the Pursuers can repossess the car at their own hand if this can be achieved without trespass, assault, or other wrongful conduct. If this is not possible, resort must be made to an order for delivery. To that end, it seems to me that an order simply for recovery of possession of the car suffices to entitle the Pursuers to repossess at their own hand. There is no need for the formulaic addition of the words 'To find and declare that.' If the court does make an order for recovery of the car it is in effect determining that the Pursuers are entitled to recover possession of the item. If such an order is made, the provisions of section 90 of the 1974 Act are also satisfied. An order for recovery of possession has indeed been granted. Indeed if the court makes an order for delivery, it is also effectively determining that the Pursuers are entitled to recover the car. In that event, I

have difficulty in envisaging why armed with an order for delivery, the Pursuers could not recover the car by their own hand. They would have a court order. Section 90 does not specify the type of order required.

[8] I have referred to the formulaic addition of the phrase 'To find and declare that.' This is the well known introduction to a crave for declarator. I take no issue with the proposition that a crave for declarator can only be sought by means of an ordinary action in light of the authorities to which I was referred. This comment does not, however, alter the observations made in *Milmor Properties Ltd*. Further support for this can be obtained from two sources. Firstly, the *raison d'etre* for the introduction of simple procedure was to replace the summary cause and small claims procedure with an altogether less formal procedure which would enable a party litigant to pursue and defend a dispute to a conclusion. At this point it should not be overlooked that according to Kelbie *Small Claims Procedure in the Sheriff Court* paragraphs 1.01 and 1.11 small claims procedure was envisaged to be simple, cheap, quick, and informal to encourage party litigants to conduct proceedings and therefore, presumably, the intention is that simple procedure should be even simpler, cheaper, quicker, and more informal. Therefore the niceties and formulaic requirements of certain orders were to be dispensed with. This can be contrasted with summary cause procedure. According to Mays *Summary Cause Procedure in the Sheriff Court* at para 1.02 the purpose of summary cause procedure was to provide a procedure that was cheap and efficient. This suggests that it was envisaged that representation would be legal as opposed to lay. Indeed support for that can be drawn from the fact that it was only with the introduction of small claims procedure that restrictions regarding expenses were introduced. Similar restrictions now apply to simple procedure.

[9] There is further support for a less formal approach when the various forms are considered. When summary cause actions were initially introduced in 1976 there were separate forms of summons for particular actions. For example, Form Aa was used when sums of money were sought and box 4 of the form under the heading 'CLAIM' had the words 'The Pursuer claims from the defender the sum of £… with interest on that sum at the rate of …% annually from the date of service and expenses.' A similar formula was employed on the other forms used for other types of action. A similar approach was adopted for small claim summons when that form of procedure was introduced in 1988. I refer to Form 1 in the appendix to the 1988 rules. In 2002 both codes of summary cause and small claim rules were updated. Whilst there was only one form of summons, Form 1, there were different types of claim depending upon the type of action. Reference is made as an example to Summary Cause Rule 4.1 and forms 2 to 9 in Appendix 1.

[10] In terms of the simple procedure rules 3.2 and 3.3 a claim is made by the completion of a Claim Form and in that form the claimant *inter alia* requires to set out 'what the claimant wants from the respondent if the claim is successful.' There is only one form available as a 'Claim Form' and this comprises Form 3A in Schedule 2 of the rules. Section D 'About Your Claim' has various sections including section D5 'If your claim is successful, what do you want from the respondent.' Thereafter in that section there is specific reference to three options, namely payment of a sum of money, delivery, and an order for the respondent to do something for the claimant. Whilst specific reference to these three remedies in the Claim Form might suggest that there is no provision for the 'self help' outcome the present Pursuers seek by their crave for declarator, there are two observations which can be made. Firstly, it is clear that the specific reference to these three remedies does not exhaust every type of proceedings detailed in section 72(3) of the 2014 Act. Further within the body of

section D5 a claimant is advised to select the option that best describes the type of order you would like the court to make. The claimant is advised that a claim can be for more than one type of order and alternative orders. Further the claimant is instructed to set out the detail of what order is being sought next to the three options. In other words, the claimant employing simple procedure is not restricted to these three specific options detailed in the form. These options can be adapted. In all the circumstances, having regard to the *raison d'etre* behind simple procedure, namely to be user friendly to a party litigant, the provisions of section 72(3) of the 2014 Act and the content of the rules, I consider that it would be open to the Pursuers to detail in a simple procedure claim form that they seek an order for recovery of possession of the car in question and an order entitling them to enter premises to recover the car under the qualification referred to in *The Law of Civil Remedies in Scotland*. By way of further illustration, both Form C in the appendix to the 1976 Summary Cause Rules and Form 3 in the Appendix 1 to the 2002 rules begin the relevant section detailing the order sought in the following way 'The Pursuer claims that, in the circumstances described in the statement contained….on this…summons, he is entitled to recover possession of the property.' Whilst this relates to heritable property, I see no reason in the circumstances why this approach cannot be adopted for moveable property in the completion of the simple procedure claim form. Accordingly, there is no requirement to crave declarator and thus the action raised is incompetent.

[11] Having considered that the present action has not been competently raised, the next matter to consider is what consequences should flow from that conclusion. The Pursuers' agent submitted that I could exercise my discretion and direct that the action proceeds as an action raised under simple procedure. I was referred to the decision of Sheriff Principal Caplan in *Borthwick* v *Bank of Scotland* 1985 SLT(Sh Ct) 49. Mr Roy, very properly, referred

me to authority which proposed a contrary view to that expressed by Sheriff Principal Caplan. For the purposes of the present decision I am prepared to proceed on the basis that I have a discretionary power to remove a case from a roll where it had no right to be when it could properly proceed on another roll as was envisaged in *Borthwick.* The question is whether that discretion should be exercised in favour of the Pursuers in this instance. If the Pursuers were indeed favoured in that way, I consider that the action would require to commence as if they had lodged a new claim under simple procedure. To do otherwise would effectively ignore that the action as raised was fundamentally flawed. Accordingly, there would be little really gained by exercising such a power in favour of the Pursuers in this instance. However, there are other grounds for not exercising any discretion in favour of the Pursuers in this case. In *Borthwick* the error made by the Pursuer's agent was considered by Sheriff Principal Caplan to be an understandable one arising from an oversight. Further, if the Pursuer did not receive the benefit of the court's discretion, he would have been without a remedy in terms of the Tenancy of Shops Act 1949. In this instance the clear impression I have gained was that the decision to proceed by way of initial writ was a conscious decision on the part of the Pursuers. Further, the consequences of my dismissing the present action will simply result in a new action being raised properly under simple procedure. Accordingly, on the assumption that a discretionary power is vested in the court as envisaged in *Borthwick*, I do not consider that it is appropriate to exercise it in the Pursuers' favour in this instance.

[12] Accordingly I shall dismiss the present action as incompetent. It may be something of a poor consolation prize but I am indebted to the considered submissions made by Mr Roy on behalf of the Pursuers.

SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT PERTH

COURT REF: PER-A10-19

OUTLINE SUBMISSION FOR THE PURSUER

for hearing on the pursuer's minute for decree set down for 7 March 2019

in the cause

CLYDESDALE FINANCIAL SERVICES LIMITED trading as Barclays Partner Finance, a company incorporated under the Companies Acts (company number 2901725) having its registered office [in] London

Pursuer

against

MR PRZEMYSLAW WOJCIK, residing [in] Perth

Defender

Introduction

1. This is an ordinary action where the pursuer seeks:
    1.1. decree for payment of the balance outstanding under a conditional sale agreement regulated by the Consumer Credit Act 1974 (the "1974 Act");
    1.2. decree of declarator that the pursuer is entitled to recover possession of the vehicle that was the subject of that agreement and to that end to enter upon premises which, in the circumstances, the pursuer cannot do other than on an order of the court under sections 90 and 92 of the 1974 Act;
    1.3. decree ordaining the defender to deliver that vehicle to the pursuer; and
    1.4. warrant to officers of court to search for and take possession of that vehicle and to deliver it to the pursuer and, to that end, to open shut and lockfast places.
2. The initial writ in the action was warranted on 16 January 2019 and served on the defender by officers of court on 24 January 2018. The defender did not lodge a notice of intention to defend or an application for a time to pay direction or time order on or before the expiry of the period of notice. Accordingly, on 14 February 2019, the pursuer lodged a minute craving the court to grant decree as craved and to find no expenses due to or by either party.

3. A hearing on the pursuer's minute was assigned for 26 February 2019. At that hearing, the sheriff asked to be addressed on the question of whether the action ought to have been raised as a simple procedure action under section 72 of the Courts Reform (Scotland) Act 2014 (the "2014 Act").
4. The sheriff indicated that his initial view was that the action was properly categorised as proceedings for the recovery of moveable property. That being so, absent a crave seeking a decree for payment of a sum greater than £5,000, the action was one of the types of proceedings which section 72(3) of the 2014 Act directs may only be brought subject to the simple procedure.
5. The sheriff acknowledged that the pursuer also sought decree of declarator, but suggested that that crave may be unnecessary and therefore did nothing to take the action outwith the ambit of section 72(3). The sheriff had regard to the second reason given by Sheriff Principal Nicolson in Rutherford v Virtue, 1993 S.C.L.R. 886 for refusing an appeal against the decision of the sheriff to dismiss the action in that case as incompetent.
6. After hearing submissions, the sheriff was persuaded that the crave for declarator was necessary or at least appropriate, but wished to be addressed further on whether the action should nonetheless have been raised as a simple procedure action standing the
7. terms of section 72(3) of the 2014 Act. In that regard, the sheriff no doubt had in mind the first reason given by Sheriff Principal Nicolson in Rutherford.
8. The purpose of this note is to set out the pursuer's position on that issue ahead of a further hearing on the pursuer's minute for decree assigned for 7 March 2019.

The pursuer's primary position

9. This action has been correctly raised as an ordinary action.
10. The default position is that all civil causes in the sheriff court should proceed as ordinary actions:
    10.1. Sheriff Courts (Scotland) Act 1907, section 39.
11. The two relevant exceptions to that default rule are found in the following Acts:
    11.1. Sheriff Courts (Scotland) Act 1971 (the "1971 Act"), section 35 (actions which require to be raised as summary cause actions); and

11.2. The 2014 Act, section 72 (actions which require to be raised as simple procedure actions).

12. Section 72 of the 2014 Act is essentially the successor to section 35 of the 1971 Act. Had it been Parliament's intention to expand or clarify the types of proceedings which require to proceed by simple procedure action to include actions of declarator, it could have expressly done so.

13. Parliament did so in respect of actions of furthcoming (2014 Act, section 72(3)(c)) and actions for aliment of small amounts (2014 Act, section 74).

14. That Parliament did not do so is telling in light of actions of declarator being given specific consideration by Parliament at the time of dealing with the 2014 Act: section 38(2)(a).

15. For present purposes, there is no material difference between the terms of section 72(3) of the 2014 Act and section 35(1) of the 1971 Act. Authorities on the interpretation of the latter are instructive in considering the proper approach to the interpretation of the former.

16. A decree of declarator may only be sought in an ordinary action:

16.1. Monklands District Council v Johnstone, 1987 S.C.L.R. 480.

16.2. Milmor Properties Ltd v W and T Investment Co Ltd, 2000 S.L.T. (Sh. Ct) 2.

16.3. Creston Land and Estates plc v Brown, 2000 S.C. 320.

16.4. City of Edinburgh Council v Burnett, 2012 S.L.T. (Sh. Ct) 137.

17. In so far as Rutherford v Virtue 1993 S.C.L.R. 886 suggests otherwise, it does not bind this court and should not be followed. It fails to take account of the effect of section 39 of the Sheriff Courts (Scotland) Act 1907.

The pursuer's alternative position

18. If the court does not accept the pursuer's primary position, the appropriate course is for the court to direct that this action should proceed as a simple procedure claim. The court has an inherent power to do so:

18.1. Borthwick v Bank of Scotland, 1985 S.L.T. (Sh. Ct) 49.

18.2. Macphail, para. 31.04.

19. The court should not dismiss the action. Tennent Caledonian Breweries Ltd v Gearty, 1980 S.L.T. (Sh. Ct) 71 is not binding on this court. It is inconsistent with the modern approach to litigation and should not be followed. It is, in any event, distinguishable.