



SHERIFF APPEAL COURT

[2024] SAC (Civ) 25
EDI-SG1031-21

Sheriff Principal N A Ross

DECISION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in appeal by

CABOT FINANCIAL (UK) LIMITED

Claimant and Appellant

against

TIMOTHY WILLIS

Respondent

Claimant and Appellant: Nolans
Respondent: Flexlaw Ltd

12 June 2024

[1] This is a simple procedure action in which the appellant claims payment, under assigned rights, of sums borrowed under two separate contracts. On averment, the first claim is under an agreement between the respondent and Lloyds Banking Group dated 9 October 2015, and which was terminated on 8 September 2017. The amount claimed is £1,503.25. The second claim is under an agreement between the respondent and Bank of Scotland dated 29 June 2016 and terminated on 29 December 2017. The sum claimed is £1,295.01. The appellant avers that the respondent was in breach of contract under each

claim, and that right to repayment in respect of each claim has been assigned to the appellant. Both claims are in respect of credit card agreements under which the respondent borrowed a sum of money repayable on demand. Both agreements were regulated under the Consumer Credit Act 1974 (the “1974 Act”).

[2] The response form does not address the merits of the claims. It avers that the appellant has failed to produce copies of the agreements, the assignation or the necessary statutory demand. Under section 87(1) of the 1974 Act a notice of default must be served on the debtor. The respondent’s position is that no such notice of default was served under either contract.

[3] The sheriff fixed a case management discussion and ordered the appellant to intimate and lodge the credit agreements, statements of account, notices of default, notices of termination, assignation of the claim and intimation of that assignation. The appellant complied with this instruction in part, but was unable to lodge notices of default or termination notices.

[4] Following a further case management discussion on 8 June 2023, which the sheriff describes as essentially becoming a debate, the sheriff decided that the appellant required to prove that default notices had been served in terms of section 87 of the 1974 Act. The sheriff appointed the cause to a preliminary proof restricted to the issues of whether, in effect, that had been done in a manner which complied with the 1974 Act. The sheriff noted that, at the case management hearing, the position of the appellant was that it had requested these from the original creditors, but had been informed that they were not available. The appellant would therefore not be able to lodge copies.

[5] After that case management hearing, but prior to the preliminary proof, the appellant lodged a minute of amendment. It sought to introduce an argument that, even if

notices of default were not sent, the effect of the assignation was to transfer the creditors' rights, which included the right to payment on demand. That claim would not require a default notice or termination of the contract.

[6] After further procedure, this amendment was refused. The proof diet was discharged. Further procedure ensued. The appellant introduced a further minute of amendment, in similar terms. That too was refused. The sheriff, in accordance with the requirements of simple procedure, assessed that the claim had no prospect of success, and dismissed the claim with expenses. The appellant appeals that final decision. The appeal was heard by written submission.

The appellant's submission

[7] The appellant submitted that the respondent did not deny being party to the credit agreements, or having borrowed money, or being in default by failing to make repayment. The sole defence is to put the appellant to proof that the statutory procedure had been followed. The appellant did not dispute that, in order to terminate the agreements, default notices must be served under section 87 of the 1974 Act.

[8] The appellant's position was that, even if the credit agreements had not been terminated, the appellant could still claim payment of any arrears, without need for termination. It was not necessary to amend the sum claimed. The issue was whether the appellant was entitled to repayment of the credit card debt. The sheriff had misunderstood the appellant's position – it was not that assignation gave a better right than that of the creditors, merely that it allowed the appellant to stand in the shoes of the creditor. The sheriff had not explained why the appellant could not claim payment of the arrears.

The respondent's submission

[9] The respondent submitted that this was an incompetent appeal, as an appeal is competent only against a final judgment. The appellant sought to appeal an earlier interlocutory judgment which refused to allow amendment of the case.

[10] In any event, having regard to the extensive procedural history of the case, the sheriff's decision to refuse amendment was a discretionary one which he was entitled to make under rule 9.7(8) of the simple procedure rules, and the decision should not be subject to review. The cause had been raised and prosecuted by reference to termination of the credit agreements. The appellant's new claim, that it did not require to prove that default notices had been served, was a change of position, and a radical one. It was appropriate that such a change of position be refused.

[11] The amendment was also irrelevant, as no change was sought in the sum claimed. The appellant's case was confusing. The claim required to be clear as to whether termination was founded upon or not. On the merits of the claim, the appellant had admitted that it could not locate copies of the default notices, and were therefore relying on their secondary position.

[12] The sheriff's decision to award uncapped expenses was correct having regard to the appellant's incremental acceptance that they could not prove their original case, and insistence in advancing an alternative case.

Decision

[13] This appeal turns, ultimately, not on the terms of the 1974 Act but on the principles of simple procedure.

[14] The appellant raised this action on a basis which it now accepts it cannot prove. The claim founded on termination of the credit agreements. The appellant, upon challenge, initially maintained that it was not necessary to produce default notices. That point was repelled at a case management discussion on 8 June 2023, which the sheriff described as essentially a debate. The interlocutor of that date expressly set out as a finding in law that, for the credit agreements to have been competently terminated, it was necessary for there to have been default notices for each agreement served in terms of section 87 of the 1974 Act.

[15] Following that finding, the appellant lodged an application to amend the claim. The appellant accepted that the necessary default notices could not be obtained. The application did not clarify whether the appellant accepted that this was a fatal competency point, or whether it was merely an evidential difficulty. The amendment went on to introduce a new and different basis of claim, namely that the assignation transferred the creditors' rights, and those rights included payment of arrears. This action could, therefore, be treated alternatively as application for payment of arrears of payments, which did not require termination.

[16] The sheriff dealt with this change of position. He recognised that a creditor may wish to recover overdue instalments without terminating the agreement. He recognised that no notice of default would be required. However, in the present case, neither of the original creditors had followed that route. They had claimed the whole sums advanced. They had sought to terminate the agreements, and had averred that they had done so.

[17] The appellant's claim has undergone a shift in legal basis. Following several hearings, and two attempts to amend in near-identical terms, on 19 December 2023 the appellant accepted that its case depended on being able to argue that notices of default were not necessary, and that it did not rely on termination of the credit agreements. That was not

the basis on which the claim was raised. The sheriff decided that the existing case had no prospect of success, and dismissed the claim under simple procedure rule 1.8(11).

[18] That represented an appropriate and correct decision. Simple procedure is intended to be simple and not difficult (*Cabot Financial (UK) Ltd v Bell* 2023 SLT 1275 at [19]). It is a court process designed to provide a speedy, inexpensive and informal way to resolve disputes. The manner in which this claim has been presented is anything but simple. The appellant, having accepted that the claim was originally raised on a basis which it could no longer prove, can have no complaint that the cause was brought to an end on the basis that it had no prospect of success. Sheriffs are given a wide discretion in how to resolve disputes in a just manner. That decision was not only in accordance with the rules, but represented a justified use of discretion bearing in mind the principles in rule 1.4(1).

[19] The decision to dismiss is particularly justified when the details of the change of case are considered. The appellant's submission does not recognise that the basis on which the claim was raised is apparently incompatible with the claim now made. The appellant, having founded on termination of the credit agreements, appears to have abandoned that case, but it is opaque whether it accepts that the credit agreements were not terminated, or whether it maintains they were terminated but cannot prove it. It is not explained whether the original averments of termination were false or alternatively, if true, why the contract terms can still be enforced. The sheriff required to decide whether an application to change the claim was consistent with the speedy, inexpensive and informal resolution of the action. The alternative was to dismiss the action. That course would still permit the appellant, after appropriate preparation, analysis and investigation, to present a different, considered and coherent case which was capable of being litigated in accordance with those principles. The sheriff's decision cannot be faulted.

[20] For completeness, the respondent's submission that this appeal is incompetent is not sustained. An appeal can, in these circumstances, serve to open previous interlocutors for consideration.

[21] The appeal is refused.

[22] In relation to expenses, there is no basis on which to disturb the sheriff's disposal, which was to award uncapped expenses. His description of the appellant's conduct as manifestly unreasonable is borne out by the misconceived claim and prolonged procedure which he describes. It is incompatible with what simple procedure is designed to achieve.

[23] The expenses of the appeal will be awarded to the respondent.