SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

[2019] SC ABE 38

ABE-A46-19

JUDGMENT OF SHERIFF PHILIP MANN

in the cause

SANTANDER CONSUMER (UK) PLC, a company incorporated under the Companies Acts (company number 02248571) having its registered office at Santander House, 86 Station Road, Redhill, Surrey RH1 1SR

Pursuer

against

ALAN CREIGHTON, residing at 23 Flat D, Marywell Street, Aberdeen, AB11 6JE

Defender

Aberdeen 18 April 2019

The sheriff, having considered the pursuer's minute for decree, Refuses to grant decree in terms of crave 1 *in hoc statu*; Grants decree in absence in terms of craves 2, 3 and 4 and in terms thereof:

1 Finds and Declares that:

(a) the pursuer is entitled to recover possession of Ford Focus motor vehicle, registration number [] and chassis number [] together with the keys, registration documents and service history therefor from the defender in terms of section 90(1) of the Consumer Credit Act 1974 (as amended); and

(b) the pursuer is entitled to enter any premises (as defined for the purposes of section 92(1) of the Consumer Credit Act 1974 (as amended)) in the occupation of the defender in order to recover possession of Ford Focus motor vehicle, registration number [] and chassis number [], together with the

keys, registration documents and service history therefor from the defender for the purposes of section 92(1) of the Consumer Credit Act 1974 (as amended).

2 Ordains the defender to deliver to the pursuer Ford Focus motor vehicle, registration number [] and chassis number [], together with the keys, registration documents and service history therefor and that within five (5) days of intimation upon the defender of this interlocutor.

3 Grants warrant to officers of court to search premises in the occupation of the defender and to take possession of Ford Focus motor vehicle, registration number [] and chassis number [], together with the keys, registration documents and service history therefor, and to deliver them to the pursuer and, to that end, to open shut and lockfast places.

Thereafter continues the cause in respect of the remaining craves of the writ (including crave 1) until further orders of court; on the pursuer's application grants permission to appeal this interlocutor.

Note

Introduction

[1] This is an action concerning a conditional sale agreement in respect of a motor vehicle entered into between the pursuer as creditor and the defender as customer. The agreement is regulated by the Consumer Credit Act 1974 but, so far as I can see, nothing turns on the terms of that Act.

[2] The defender has defaulted on the agreement and the pursuer has terminated it. In this ordinary action the pursuer seeks various remedies expressed in 6 separate craves.

Crave 1 is a crave for payment of a sum of money representing the full amount due and outstanding in terms of the agreement. Crave 2 is a crave for declarator that the pursuer is entitled to recover the vehicle and to enter any premises for that purpose. Crave 3 is a crave for delivery of the vehicle by the defender. Crave 4 is a crave seeking warrant for officers of court to search for and recover the vehicle. Crave 5 is a crave for the expenses incurred by officers of court in implementing crave 3. Finally, crave 6 is a crave for the expenses of the action.

[3] The defender failed to lodge a notice of intention to defend. The pursuer then lodged a minute seeking decree in absence in terms of craves 1 to 4 of the writ and requesting the court to continue the remaining craves until further orders of court.

[4] The minute for decree came before me in chambers. Having perused the initial writ and considered the minute for decree I sought clarification from the pursuer of the basis for its claim. In response, the pursuer's agents wrote to the court lodging a copy of the agreement and pointing out the terms of clause 7.2 thereof upon which it relied. Clause 7.2 is in the following terms:

> "7.2 If this clause applies we will have the right to treat this agreement as repudiated and terminate this agreement and subject to the rights given to you by law, take back the goods. If we terminate this agreement you will have to pay us immediately:
>
> 7.2.1 any unpaid monthly payments and other sums that you should have paid under this agreement before the date of the default notice; and
>
> 7.2.2 the rest of the total amount payable under this agreement less:
>
> a) a rebate for early repayment required by law; and
> b) the net proceeds of sale of the goods (if any) after deduction of the reasonable costs of finding you or the goods, recovery, refurbishment/repair, insurance, storage and sale."

[5] The agents maintained in the letter that the issue before the court was whether the sum first craved was presently due. They maintained that, on a proper construction of

clause 7.2, it was. Their position was that since the vehicle had not yet been delivered to the pursuer or recovered by it there had been no sale and there was nothing to deduct under clause 7.2.2(b).

[6] I was not prepared to accept that argument and so was disinclined to grant decree in terms of crave 1 at the present time. I arranged for the agents to address me in chambers. On 17 April 2019 Mr Tosh, solicitor, appeared before me to move the minute for decree on behalf of the pursuer.

The Pursuer's Submissions

[7] Mr Tosh's submissions were as follows:

1. The court had the power to refuse to grant decree in an undefended action, but that power should only be exercised in exceptional cases. Those exceptional cases generally fell into one of two categories: (i) where there was a very apparent want of jurisdiction or (ii) where there was a very apparent incompetency (in the strictest sense of that word) of the remedy sought: *Terry* v *Murray* 1947 S.C. 10 per Lord Mackay at 15.
2. The type of incompetency which warranted intervention *ex proprio motu* was incompetency of remedy going to the roots of the court's functions and powers: *United Dominions Trust Ltd* v *McDowell* 1984 S.L.T. (Sh. Ct.) 10 at 15.
3. The court had no right or duty to examine the justification for the amount claimed or to apply judicial discretion to that question: *Cadbury Brothers Ltd* v *Thomas Mabon Ltd* 1962 S.L.T. (Sh. Ct.) 28 at 29 and *The Royal Bank of Scotland Ltd* v *Briggs* 1982 S.L.T. (Sh. Ct.) 46 at 48.

4. These principles were well established and had been recently re-affirmed by the Sheriff Appeal Court: *Cabot Financial UK Ltd* v *McGregor* 2018 S.C. (S.A.C.) 47 at paragraphs [33]-[39] and [49].
5. In the instant case, no issue of want of jurisdiction or incompetency arose. The court should accordingly grant decree as sought without further enquiry and, in particular, without reference to the terms of the contract between the parties.

Without prejudice to the foregoing submissions:

6. On a proper reading of clause 7.2.2, the word "immediately" in the sentence beginning "If we terminate this agreement you will have to pay to us immediately…" meant immediately upon termination of the agreement.
7. That sum could be determined immediately upon termination of the agreement. Its determination did not require to await the sale of the vehicle. That was why the words "the net proceeds of sale of the goods" were qualified by the words "(if any)". That was also consistent with the fact that the pursuer had the right, but not the duty, to take back the goods. The pursuer would accordingly be entitled to seek payment only, without waiting to recover the vehicle.
8. An interpretation which required the pursuer to await the recovery and sale of the vehicle before it could be given a decree for payment of sums due to it could give rise to absurd results. For instance, the vehicle might never be recovered for a variety of reasons. On the interpretation suggested in this paragraph, the pursuer would then never become entitled to a decree for payment of the sums due to it.
9. Decree as first craved in the initial writ was accordingly not premature.

10. Mr Tosh also made a submission to the effect that it was legitimate for the pursuer to enforce a decree in terms of crave 1 and to hold the money recovered under it as some sort of security for recovery of the vehicle.

Discussion and Decision

[8] I consider that when a party comes to court seeking a remedy the sheriff has a duty to see to it that the remedy that is granted is that (and only that) to which the party is entitled. This applies equally to an undefended action as it does to a defended action. I am not at all suggesting that there has been a lack of candour in this case but, as a generality, the other side of the coin is that the party coming to court has a duty to be candid. If there is a lack of candour and thereby a remedy is obtained to which a party is not entitled that could amount to a fraud on the court.

[9] The sheriff must consider the initial writ as a whole. This is what I did. As a result of the candour of the pursuer's averments I could see that it accepted that the amount to which it was entitled might ultimately be less than the sum specified in crave 1. This was because it averred that its intention was to apply the net sale proceeds of the vehicle, if found, in reduction of the sum for which it would hold decree in terms of crave 1. I could see that crave 1 did not stand alone and independently of the other craves. It was inextricably linked with the craves for recovery of the vehicle. In my view, it was perfectly legitimate for me to seek further information to satisfy myself that it was appropriate to grant decree in terms of crave 1 at this stage along with decrees in terms of craves 2, 3 and 4. It was also, in my view, legitimate for me to peruse the agreement that was supplied to me (and the relevant parts of which, perhaps, ought properly to have been incorporated into the

initial writ) to satisfy myself on that same point. I was not concerned to query the amount stated as due in terms of crave 1.

[10] I do not consider myself bound by any of the authorities cited by Mr Tosh. They are all distinguishable. Without exception, they involved final decrees in respect of stand-alone craves which were either dismissed or in respect of which a lesser amount than craved was granted. They each involved a claim in respect of which it could be readily taken that a failure to defend indicated an acceptance on the part of the defender that he was liable to pay the sum claimed and that the pursuer was therefore entitled to the remedy sought. None of the foregoing can be said about the present action.

[11] I cannot, in all conscience and having regard to the duty that I have identified, take the view that failure to defend this particular action signifies that the defender accepts that the pursuer is entitled to decree in terms of crave 1 at this point in time, at least not along with decree in terms of craves 2 to 4.

[12] On a proper construction of clause 7.2.2 the sum due by the defender is the amounts due under the agreement less, *inter alia*, the net proceeds of sale of the goods (if any) after deduction of the reasonable costs of finding the defender or the goods, recovery, refurbishment/repair, insurance, storage and sale. The amount due cannot be known until the goods have been recovered and sold and the defender has been found – or at least until reasonable steps have been taken, but have failed, to bring about that state of affairs. It is self-evident that the amounts to be deducted in the calculation of what is due cannot be ascertained immediately upon termination of the agreement. Thus, "immediately" must be read as meaning "immediately the sum due has been ascertained." Otherwise the clause would make little sense. No steps have yet been taken, or could have been taken without order of court, to recover the vehicle to enable its sale. It follows that it would be premature

to grant decree in terms of crave 1 at this stage. To the extent that the pursuer maintains a different interpretation of the clause then that is indicative of ambiguity which I think would entail reading the clause *contra proferentem.*

[13] The interpretation which I prefer is supported by the fact that there is no provision in the agreement requiring the pursuer to make a refund to the defender if it has secured payment of the full amount from the defender and has then recovered and sold the vehicle. If I were to grant decree for all of craves 1 to 4 at this point in time the pursuer would be entitled to have both the money and the vehicle. Were it to decline to make a refund to the defender the defender would have to raise separate proceedings for reimbursement. That, in my view, would be quite wrong.

[14] I have not dismissed crave 1. I have continued it for further consideration. There is, ultimately, no prejudice to the pursuer. It can come back for decree in terms of crave 1 for whatever sum turns out to be due once the vehicle has been recovered and sold if that is what transpires.

[15] Mr Tosh was concerned that the vehicle might never be found and might never be sold with the result that the pursuer might never be entitled to the sum first craved. I do not share that concern. If Mr Tosh were to come back to court and give an assurance, as an officer of court, that the vehicle could not be found despite all reasonable efforts then it would be appropriate at that point to grant decree in terms of crave 1.

[16] Finally, I was not persuaded that it is at all appropriate to grant decree in terms of crave 1 as some sort of security for recovery of the vehicle as suggested by Mr Tosh.

Permission to Appeal

[17] Mr Tosh advised me that the issue which has arisen in this case is one of considerable importance to the pursuer and to other financial organisations involved in this kind of lending. He sought permission to appeal which I am happy to grant.