SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2024] SC EDIN 9

EDI-A70-20

JUDGMENT OF SHERIFF O'CARROLL

in the cause

BANK OF SCOTLAND

Pursuer

against

ALEXANDER MORRISON

Defender

Pursuer: Roxburgh, Adv, instructed by DWF LLP
Defender: Paterson KC, instructed by Gilson Gray LLP

Edinburgh, 16 February 2024

The Sheriff, having resumed consideration of the cause repels the first, second and third pleas-in-law for the defender; remits the parties' averments to probation on a date to be fixed hereafter; fixes a pre-proof hearing at a date to be fixed hereafter; reserves meantime the question of expenses occasioned by the debate.

NOTE:

Introduction

[1] This is a claim for payment of £163,151.98 together with interest arising from a fixed sum loan agreement concluded in 2011 for the sum of £120,000. The agreement is regulated by the Consumer Credit Act 1974. The pursuer avers that the defender has only repaid £2,000 and is in breach of the agreement. The pursuer avers it served a default notice ("the

default notice") on the defender on 6 November 2019 seeking repayment of sums due under the loan agreement prior to raising this action. The defender says that the sums claimed are not due and so have not been paid. He also says that the default notice is defective in various ways (which is further explained below) and therefore ineffective. In addition he says the pursuer's pleadings are defective. The matter proceeded before me as a debate on the defender's pleas-in-law 1, 2 and 3, the defender seeking dismissal, the action being irrelevant and/or incompetent. The pursuer moved that the parties' averments be remitted to probation.

[2] In passing, it is of interest to note that is not the first such action between these parties in respect of this loan agreement. Default and termination notices have been served multiple times. Actions for payment concerning the same loan agreement were dismissed in 2015 and 2019 by another Edinburgh sheriff. The matter has not yet been to proof. However, neither party founded on this unfortunate history nor the Sheriff's latest judgment dated 20 August 2019, which is found in the pursuer's list of authorities. I therefore make no further reference to any of these matters.

[3] Counsel for the defender developed his arguments from his Rule 22 note. They may be summarised as follows. The pursuer's pleadings are incomprehensible at article 2 (page 2) where the pursuer avers the basis on which the outstanding capital balance of £118,000 has been explained and calculated. They ought not to be remitted to probation. However, the main thrust of his argument was that the default notice was defective in a variety of ways in that it did not comply with the applicable Regulations: Consumer Credit (Enforcement Default and Termination Notices) Regulations 1983, SI 1983/1561, ("the Regulations"). The defects are as follows. The statement in the notice that arrears of £96,000 are outstanding does not contain any kind of explanation as to how that sum has been

calculated. It is a bald unexplained figure which should include a breakdown so that the debtor is able to understand the basis for the calculation and to check it. Similarly, the amount of interest said to be due is given as a bald figure of £44,778.58 with no explanation as to how that figure was arrived at. Thus it is impossible to check. Moreover, that sum differs from the true figure albeit only by a matter of pence. In addition, the explanation given in the notice as to termination of the agreement is ineptly and confusingly expressed. It is a guddle. It is not on all fours with the way in which termination is expressed in the loan agreement itself. Moreover, the address given in the default notice is not the address of the debtor as at the date of service. It is the original address occupied by the debtor at the date of the agreement, but he had vacated that address years before the default notice was served. The pursuer knew this as it served the default notice by sheriff officers at the correct address of the debtor. Therefore there was further confusion. The parties are agreed that without proof of service of a default notice complying with the terms of the Act and Regulations, the action for payment cannot succeed and therefore the action must be dismissed. Reference was made to the following case law: *Citifinancial Europe plc* v *Rice* 2013 Hous LR 23 (a decision in the Sheriff Court); *Woodchester Lease Management Services Ltd* v *Swain & Co* [1999] 1 WLR 263;

[4] The defender's reply was as follows, in summary. The court was invited to repel the defender's pleas-in-law 1, 2 and 3, find the defender entitled to expenses and fix a proof. So far as the pleadings are concerned, they are perfectly comprehensible. They set out in a coherent form the various events that occurred, taking the reader from the starting point of £120,000 to £118,000. Any dispute as to the accuracy of those figures is a matter for proof. The error in the interest due is tiny, *de minimis* and in any event is in the debtor's favour. As regards the default notice, it fully complies with the Act and Regulations as regards content

and specification. The debtor recipient of the default notice would have been left in no reasonable doubt as to what the pursuer's claim was, why the pursuer claimed the debtor was in default, the amount claimed to be due and what the debtor required to do to retrieve the situation. A default notice is a statutory creation and its purpose needs to be understood in its statutory context: see section 88 of the Act and the terms of the Regulations. See also debtor rights to information on request and annual statements: section 77A of the Act as well as rights under the loan agreement to obtain information about the account on request. Not every error will lead to invalidity. The Regulations do not require a breakdown to be provided of the sums due, though they must be accurate. The other information in the default notice is clear, accurate and unambiguous. The address in the default notice was the old address of the debtor, contained in the loan agreement and did not cause any confusion or ambiguity. The termination information was clear and accurate. It was asserted that when considering whether a default notice complies with the statutory regime, the court should consider whether the debtor is materially prejudiced by any error in the default notice. Differently put, the test is whether on a fair reading of the whole default notice the debtor is being told fairly what is in issue. This default notice does that. Reference was made to *Citifinancial, supra, Guidi* v *Clydesdale Bank plc and Promontoria (Chestnut) Ltd* SCLR 417; *Legal and Equitable Nominees Ltd* v *Scotia Investments Ltd Partnership* [2019] SLT (Sh Ct) 193; *Rankine* v *American Express Services Europe Limited* [2008] C.T.L.C. 195.

The legislation

[5] Before I examine the submissions and explain the decision and reasons for it, I should set out the terms of the relevant legislation.

[6] Sections 87 to 89 of the 1974 Act provide, in part, as follows:

87.— Need for default notice.

(1) Service of a notice on the debtor or hirer in accordance with section 88 (a "default notice") is necessary before the creditor or owner can become entitled, by reason of any breach by the debtor or hirer of a regulated agreement,—

(a) to terminate the agreement, or
(b) to demand earlier payment of any sum, or
(c) to recover possession of any goods or land, or
(d) to treat any right conferred on the debtor or hirer by the agreement as terminated, restricted or deferred, or
(e) to enforce any security….

88.— Contents and effect of default notice.

(1) The default notice must be in the prescribed form and specify—

(a) the nature of the alleged breach;
(b) if the breach is capable of remedy, what action is required to remedy it and the date before which that action is to be taken;
(c) if the breach is not capable of remedy, the sum (if any) required to be paid as compensation for the breach, and the date before which it is to be paid.

(2) A date specified under subsection (1) must not be less than 14 days after the date of service of the default notice, and the creditor or owner shall not take action such as is mentioned in section 87(1) before the date so specified or (if no requirement is made under subsection (1)) before those 14 days have elapsed.

(3) The default notice must not treat as a breach failure to comply with a provision of the agreement which becomes operative only on breach of some other provision, but if the breach of that other provision is not duly remedied or compensation demanded under subsection (1) is not duly paid, or (where no requirement is made under subsection (1)) if the 14 days mentioned in subsection (2) have elapsed, the creditor or owner may treat the failure as a breach and section 87(1) shall not apply to it.

(4) The default notice must contain information in the prescribed terms about the consequences of failure to comply with it and any other prescribed matters relating to the agreement

(4A) The default notice must also include a copy of the current default information sheet under section 86A.

(5) A default notice making a requirement under subsection (1) may include a provision for the taking of action such as is mentioned in section 87(1) at any time after the restriction imposed by subsection (2) will cease, together with a statement

that the provision will be ineffective if the breach is duly remedied or the compensation duly paid.

89. Compliance with default notice.

If before the date specified for that purpose in the default notice the debtor or hirer takes the action specified under section 88(1)(b) or (c) the breach shall be treated as not having occurred.

[7] The Regulations in force at the relevant date, so far as is material provided, as follows:

Reg 2.—

(1) Any notice to be given by a creditor or owner in relation to a regulated agreement to a debtor or hirer under section 76(1) of the Act (which relates to the duty to give notice to the debtor or hirer (non-default cases) before taking certain action to enforce a term of an agreement) shall contain—

(a) a statement that the notice is served under section 76(1) of the Consumer Credit Act 1974;
(b) the information set out in paragraphs 1 to 5 of Schedule 1 to these Regulations; and
(c) statements in the form specified in paragraphs 6 to 8 of that Schedule.

(2) Any notice to be given by a creditor or owner in relation to a regulated agreement to a debtor or hirer under section 87(1) of the Act (which relates to the necessity to serve a default notice on the debtor or hirer in accordance with section 88 before taking certain action by reason of any breach of the agreement by the debtor or hirer) shall contain—

(a) a statement that the notice is a default notice served under section 87(1) of the Consumer Credit Act 1974;
(b) the information set out in paragraphs 1 to 3, 6 and 8 of Schedule 2 to these Regulations; and
(c) statements in the form specified in paragraphs 4, 5, 7, 8A and 9 to 11 of that Schedule.

[8] **Schedule 2**

FORM OF DEFAULT NOTICE BEFORE A CREDITOR OR OWNER CAN BECOME ENTITLED, BY REASON OF ANY BREACH BY THE DEBTOR OR HIRER OF A REGULATED AGREEMENT, TO TERMINATE THE AGREEMENT, DEMAND EARLIER PAYMENT OF ANY SUM, RECOVER POSSESSION OF ANY GOODS OR LAND, TREAT ANY RIGHT CONFERRED ON THE DEBTOR

OR HIRER BY THE AGREEMENT AS TERMINATED, RESTRICTED OR DEFERRED OR ENFORCE ANY SECURITY

1. A description of the agreement sufficient to identify it.

2.— (1) The name and a postal address of the creditor or owner.

(2) The name and a postal address of the debtor or hirer

3. A specification of—

(a) the provision of the agreement alleged to have been breached; and
(b) the nature of the alleged breach of the agreement, specifying clearly the matters complained of; and either
(c) if the breach is capable of remedy, what action is required to remedy it and the date, being a date not less than fourteen days after the date of service of the notice, before which that action is to be taken; or
(d) if the breach is not capable of remedy, the sum (if any) required to be paid as compensation for the breach and the date, being a date not less than fourteen days after the date of service of the notice, before which it is to be paid.

[*paragraphs 4 to 5 omitted]*

6. A clear and unambiguous statement by the creditor or owner indicating, if any action specified under paragraph 3(c) or (d) as required to be taken is not duly taken or if no such action is required to be taken, the action which the creditor or owner intends to take by reason of the breach by the debtor or hirer of the agreement—

(a) to terminate the agreement;
(b) to demand earlier payment of any sum;
(c) to recover possession of any goods or land;
(d) to treat any right conferred on the debtor or hirer by the agreement as terminated, restricted or deferred;
(e) to enforce any security;
(f) to enforce any provision of the agreement which becomes operative only on a breach of another provision of the agreement as specified in the notice, at any time on or after the date specified under paragraph 3(c) or (d), or, if no action is specified under that paragraph as required to be taken, indicating the date, being a date not less than fourteen days after the date of service of the notice, on or after which the creditor or owner intends to take any action indicated in this paragraph.

[*paragraphs 7 to 11 omitted*]

[9] The default notice dated 6 November 2019, redacted to remove unnecessary personal data, is reproduced as an appendix to this judgment.

Analysis

[10] *Legislation.* The nature of a default notice can readily be deduced from the legislation narrated above. Service of a default notice is mandatory in practically all cases where the creditor is proposing to take some form of enforcement action (whether the debtor is in breach or not) based on the creditor's rights under the regulated agreement (relating for example to loan, hire or credit). The effect of the legislation is radical: unless complied with, the creditor cannot enforce its contractual rights: so it has an important procedural effect. Unless service of a compliant default notice has been effected and can be proved, any attempt to enforce a contractual right (such as for payment, return of the loaned goods, recovery of possession of land) will fail, if the point is taken. The effect is not just procedural, it can produce a substantive effect on the parties' rights and obligations: see section 89. That is, where the remedial action specified in the default notice is timeously complied with, the breach of the agreement is treated as never having occurred.

[11] The purpose of a default notice is obviously manifold. It gives formal notice in clear terms to the debtor that in the creditor's view, the debtor has failed to comply with the terms of the contract, the regulated agreement between the parties. It tells the debtor why the creditor asserts non-compliance. If non-payment is the fault alleged (as it will be in the majority of cases) it tells the debtor how much is unpaid. It tells the debtor that s/he has 14 days to remedy the breach and exactly what the creditor has to do to remedy the breach (which in most cases will be to pay a specified sum in principal and interest to bring the account up to date). The default notice must include certain specified statutory information

including warnings in capitalised text. The default notice warns the debtor what may happen if the remedial action is not timeously taken by the debtor. That may include termination of the agreement, demand for earlier payment of the sums under the regulated agreement, recovery of possession etc.

[12] A great deal of other information which must be provided to the debtor containing warnings, advice about rights, information about Time Orders, advice about sources of help and assistance, an information leaflet from the Financial Conduct Authority under section 86A and so on. The legislation is conceived in the interests of the consumer. It is designed to provide the ordinary consumer some protection from powerful financial bodies when things have gone wrong. It shifts the balance between debtors and creditors in favour of debtors so debtors are fully informed as to their rights and responsibilities, so they can take advice on the contents and where the advice may be obtained. The debtor is told there are a minimum of 14 days to take action, failing which, the specified consequences may happen.

[13] What the default notice does not do is to provide advice as to how to pay the sums due, it does not provide a history of the relationship between the creditor and debtor, it does not enable the creditor to give details of offer fresh contractual arrangements (such as refinancing). It is a formal statutory notice with consequences for the debtor and its content is completely circumscribed by the legislation.

The authorities: case law

[14] Turning to the case law on the legislation, a useful starting point is the Court of Appeal decision in *Woodchester*, a case concerning a photocopier hire agreement where the default notice specified £879.90 as the sum required to remedy the breach whereas the true

sum was £634.30. The Court held that error invalidated the default notice. Observing (at pages 267F-H, 269 D), that the statute was enacted to protect consumers, that the contract is likely to be complex, that the lender has the ability and resources to say precisely what the debtor has done wrong and what the consumer needs to do to put matters right, if that is not done, the creditor cannot take the next step. If the default figure stated is more than the sum truly owing (*de minimis* errors might be ignored), the default notice is invalid. That is the scheme of the legislation.

[15] In *Rankine,* a decision of the Queens Bench Division, the claimants mounted a full frontal attack on the validity of credit agreements with Amex including a challenge to the validity of default notice. They were serial party litigants who made a cottage industry in such challenges, enabling consumers to run up debts and not pay. The court observed at paragraph 9 that the Act was introduced to protect the individual unsophisticated in financial affairs in contracts with unscrupulous and sophisticated financial institutions. It was not designed to help individuals make money out of financial institutions through exploiting undoubted technicalities, said the Court. The default notice in this case, concerning a credit card, specified the current balance (£5,978.66), the arrears (£347) and the credit limit (£5,800). The specified remedy was to make payment sufficient to clear the arrears and leave the balance within the credit limit. The court held that was sufficient, the breached term of the agreement was adequately identified looking at the default notice as a whole, that an overstatement of the sum owed by £10 was *de minimis* given the size of the debt and the amount to be repaid. Further, the claimant's evidence was that she could not pay the sum truly owed. The default notice was not in breach of the Regulations.

[16] In *Legal and Equitable Nominees Ltd*, a decision of the Sheriff Appeal Court, the pursuer sought declarator that the defenders had failed to comply with a calling up notice of

a standard security and that it was entitled to enter into possession of the subjects. The issue was the validity of the two calling up notices, creatures of statute: section 19 of the Conveyancing and Feudal Reform (Scotland) Act 1970. The errors were said to be: (i) the payments required, being stated in words and figures, differed by £100 (where the total sum claimed was well over £1.2M); (ii) the second notice was served both on the partner of the firm being the true owner and (without explanation and wrongly) on the firm itself; (iii) neither notice qualified the capacity of the recipient: only names and addresses were given. The Court refused the appeal (AS Holligan dissenting as to the result).

[17] As regards the law, the Court was taken to a large number of cases (various courts, English and Scottish, especially the sheriff court) dealing with notices of all kinds, some statutory, some contractual. Appeal Sheriff Holligan referring to *Kodak Processing Companies Ltd* v *Shoredale Ltd* [2010] SC 113, *Bencleuch Estates Ltd* v *Scottish Enterprise* [2008] CSIH 1, *Hoe International Ltd* v *Andersen* 2017 SC 313 determined that the correct approach when assessing the validity of statutory notices is one of statutory interpretation. Thus one needs to consider the words of the statute, the background, the purpose of the requirement to serve the notice, and the possible effect of non-compliance with the statutory provision on the parties. What did Parliament intend by the words enacted? Further, it should be assumed that Parliament intended a sensible result. The reasonable recipient test was not applicable in such cases. Following *Kodak* he held that the terms of the related contract are of no assistance in determining whether the legislation has been complied with.

[18] As regards the body of Scottish authorities at Sheriff Court level dealing specifically with the content of notices involving heritable securities, read together, Appeal Sheriff Holligan held that those decisions indicated that absolute compliance with the statutory code was not required. Trivial errors, errors of calculation and technical objections were not

good grounds of challenge. By contrast substantial errors, errors of magnitude were not excusable.

[19] Appeal Sheriffs McCulloch and MacFadyen agreed with the case law analysis of Appeal Sheriff Holligan, including his rejection of the reasonable recipient test, although differing as to the final result. The majority held that the three errors identified by the defender were not such as to invalidate the notices. The notices left no room for doubt, considering the whole terms of each notice including the narrative. There had been substantial compliance with the statutory requirements.

[20] *Guidi*, a decision of the Inner House concerned validity of deeds of assignations. The relevance of the decision was said to be found at paragraph [11] where the Court, observing that section 53(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970 allowed that the statutory wording specified in the Act for certain documents should conform "as close as may be" was a statutory approach which chimed with the wider jurisprudence. So, a document that does not conform to the prescribed wording is not necessarily invalid: the court must discern the intention of Parliament. Adopting dicta from the Court of Appeal, Lord Woolman stated that the question was whether the discrepancy is of critical importance in the context of the legislative scheme. The underlying theme of flexibility coincides with the interests of justice. Forms should be servants, not masters.

[21] Finally, *Citifinancial Europe Plc* v *Rice* 2013 Hous. L.R. 23 a decision in the Sheriff Court, in which the creditor pursuer sought recovery of possession of the security subjects secured by two separate loan agreements. The creditor served a single default notice. That notice did not distinguish between the two loan agreements in the single figure given for the arrears outstanding. That invalidated the default notice, the Sheriff held, because where there are two regulated agreements founded on and only one default notice, then within the

four corners of the default notice there must be separate compliance with each agreement. Further, even if the default notice had related to a single agreement, a bald statement of the total arrears would not have amounted to clear specification: the debtor is entitled to know how that sum has been calculated. Moreover, the default notice did not specify all the parties to the two agreements. These defects were fundamental in his view.

Conclusions on the case law

[22] I draw the following general conclusions from the case law as to the correct approach to take when considering whether a given default notice is compliant with the legislation, including the Regulations.

a. The correct approach is one of statutory interpretation: consider the words of the statute, background, purpose of notice, effect of non-compliance on parties; what was the intention of Parliament: *Guidi; Legal and Equitable Nominees Limited*.

b. Consumer credit legislation is conceived to protect the interests of the unsophisticated consumer against sophisticated financial institutions, to redress the imbalance that might otherwise exist: *Woodchester; Rankine.*

c. It should be assumed Parliament intended a sensible result: *Legal and Equitable Nominees Limited.*

d. The reasonable recipient test is inapplicable: *Legal and Equitable Nominees Limited.*

e. A document that does not conform to prescribed wording is not necessarily invalid; *Guidi*.

f. The whole terms of a statutory notice, including the narrative, have to be examined when considering compliance with the legislation: *Legal and Equitable Nominees Ltd.*

g. Where there is a discrepancy, the question is whether it is of critical importance in the context of the legislative scheme: forms should be servants not masters: *Guidi.*

h. Trivial errors, errors *de minimis* may be excused but substantial errors, including overstatement of the debt due by greater than a *de minimis* amount, will not be excusable: *Legal and Equitable Nominees Limited; Woodchester; Rankine.*

i. A single default notice may be used where there is a default on more than one regulated agreement; but if so, within the four corners of the default notice there must be separate compliance with each agreement: *Citifinancial Europe plc.*

j. The terms of the related contractual agreement is of no assistance in determining whether the legislative requirements have been complied with: *Kodak Processing Companies Ltd.*

[23] I do not agree with the *obiter* conclusion of the Court in *Citifinancial* that the legislation requires not only a statement of the sum due but also a breakdown of how that sum has been calculated. That is not what the Regulations state. What they require is a specification of the alleged breach specifying clearly the matters complained of and what remedial action is required. In a typical case alleging failure to maintain loan repayments, the specification of the breach will be a statement of the amount of the arrears, separating capital and interest due in a loan agreement case. The remedial action needed will typically be repayment of the arrears within 14 days. It will always be a matter of fact in in the

circumstances of any particular case whether the "matters complained of" have been specified clearly.

[24] If Parliament had intended the creditor to provide a breakdown of the sum due, such as a statement of account demonstrating how the arrears and interest had arisen, it would have said so. As I note above, at paragraph [6] to [12], the legislation, augmented over the years, specifies in considerable detail exactly what is required. It is unlikely in my view that Parliament intended that the Regulations would require a breakdown of some form, a statement of account, to be included in the body of the default notice, without making that, like everything else, explicit. It does not seem to me that such a statement of account is required for the default notice to perform its function as I understand it and have explained above. In my view the default notice, without a statement of account or breakdown engrossed within the default notice is capable of performing its function.

[25] Further, one must construe the default notice legislation in its statutory context. The Act makes a number of provisions for the supply of information to the debtor (including statements of account) in relation to sums due under regulated agreements: see for example sections 77A, 78, 78A, 79, 80, 86A, 86B, 86C. Section 86D provides, reading short, that where a creditor fails to provide notices relating to the sums in arrears under section 86B or 86C, the creditor is not entitled to enforce the agreement during the period of non-compliance. Thus, when enacting the Regulations, Parliament knew that the debtor would already have been entitled to receive a plethora of information prior to the default notice being issued. That might explain the absence of any requirement to include a breakdown of the arrears in the default notice. The *Citifinancial* decision, so far as the obligation to provide a breakdown of the arrears due is concerned, is not supported by any other decision of the English or

Scottish courts placed before me. I decline to follow it with great respect to the sheriff concerned.

Decision

[26] I turn now to apply the law to the facts of this case. In my view, it is plain that the default notice in this case does comply with the legislation and is competent. The notice contains an accurate statement of "the nature of the alleged breach of the agreement specifying clearly the matters complained of". The breach is very clearly expressed in a complete paragraph of 5 sentences. It refers to the loan agreement which is specified clearly and its terms. The breach contains a statement of the whole arrears due, distinguishing between the unpaid instalments and the amount of interest due, with a total figure said to be outstanding. The legislation does not require the default notice to do more than that or provide a further explanation of how it was calculated. Any discrepancy from the true sum due is a matter of pence which error is *de minimis* and can be ignored.

[27] The part of the default notice which explains the consequences of failing to make good the default is tolerably clear in the context of the notice as a whole. It states explicitly that if the action required by that notice is not taken (payment of £140,778.58) before the date shown (28 November 2019) the further action set out below may be taken against the debtor. That further action is stated to be termination of the agreement unless payment of that sum is made. It then explains that if the agreement is terminated, then £163,151.98 becomes payable. It states that termination will take effect on the date shown above unless the total specified arrears are paid by that date and that on or after the date shown above the creditor may take legal proceedings against the debtor.

[28] In my view, that part of the default notice does clearly express in intelligible unambiguous terms what the debtor is entitled under the Regulations to know: what he has to do, by when and the consequences of not doing so. While it was argued that stating variations of the due date being "on or after 28th November 2019" and "before the date shown" (being "by 28th November 2019") and that termination would take place "on the date shown" led to uncertainty, those arguments rather gave the impression of clutching at straws, by appealing to intricate textual analysis. That approach in my view has no place in construing a default notice. Neither is reference to contractual material of assistance in determining whether a default notice is compliant with the legislation. While perhaps the part of the notice concerned with the termination consequences could have been expressed even more clearly, there is in my view no doubt but that the notice does what it is required to do: there is no sensible ambiguity revealed and it is clear that the notice is compliant with the legislation in that regard. It is not a "guddle". The debtor is clearly put on notice that unless payment of £140,778.58 is made by 28 November 2023, the agreement may be terminated thereafter by the creditor resulting in the consequences which are spelt out in detail. The statutory purpose is performed.

[29] Finally, so far as the use of a previous address of the debtor in the default notice is concerned, that is in my view of no consequence. The legislation does not require that the debtor's current residential address is required to be inserted. Schedule 2(1) of the Regulations provides only that the name of the debtor and "a postal address of the debtor…" be provided. The address provided in the default notice is the address of the debtor at the time that the agreement was entered into. He subsequently changed his address. If the Regulations had intended that the creditor ensure that the address provided was the current residential address of the debtor, they would have done so. Instead, the

Regulations appear designed to allow for some flexibility. The Regulations also provide that the name and a postal address of the creditor is provided: again not necessarily the current address or registered office of the creditor.

[30] In my view the purpose of the provision is to see that the creditor and the debtor are identified and identifiable from the face of the default notice so the debtor can see that it is he or she that is being referred to. In this case, there is no doubt that the debtor is correctly identified in the default notice as being the debtor under the loan agreement which is itself clearly specified. The loan agreement was made when the debtor was resident at the address stated in the default notice. The debtor agrees. So the correct debtor is clearly and correctly identified and the purpose of that legislative provision is satisfied. Further, there is no dispute but that the default notice was correctly served on the debtor at his current residential address, so nothing turns on that. No confusion can reasonably be said to have occurred. Therefore, in my view, the default notice does properly comply with schedule 2(2) of the Regulations. Even if I were wrong on that, the error is minor and inconsequential, does not interfere with the purpose of the default notice and falls to be ignored.

[31] Thus considering the default notice as a whole against the background of the legislation and considering whether in respect of any of the alleged defects taken singly or in combination, the default notice can be said to be non-compliant with the legislation, I reject the defender's arguments. I find that the default notice is fully compliant and is competent.

[32] I turn now to the other limb of the defender's argument being an attack on the pursuer's pleadings so far as its explanation of how the outstanding capital balance of £118,000 is arrived at. I regret to say, examining carefully the terms of paragraphs 2 to 4 of his rule 22 note and the averments impugned, that I am unable to understand why it is said that the averments are "incomprehensible". It seems to me that the explanation of how that

sum has been calculated are straightforward and clear. The pursuer offers to prove that starting with the original drawn down amount of £120,000, through a series of debit and credit entries, a figure of £118,000 results. Whether the pursuer is correct and can prove that is a matter for proof. That is for another day and does not render the averments irrelevant. Moreover, there is no contradiction between those averments and the statement of account produced by the pursuer which is incorporated in the pleadings. In my view, that argument fails.

Conclusion

[33] It follows that I find for the pursuer in this debate. I repel the first, second and third preliminary pleas-in-law for the defender and remit the averments of the parties to probation by way of proof, not proof before answer.

[34] I was not addressed by the pursuer on the question of expenses. I expect that the parties will be able to agree on the question of expenses in the light of this judgment and if so, a note to my clerk within 14 days of publication expressing an agreed position will suffice for me to deal with that question without the necessity for a hearing. Otherwise, a hearing will be fixed to determine same. Meantime, I will reserve all questions of expenses occasioned by the debate. I will ask my clerk to liaise with the parties' agents with regard to fixing dates for the proof and pre-proof hearing.

[35] Finally I should like to express my appreciation to both counsel for their helpful and carefully considered submissions at the debate and the way in which they engaged with the bench all of which I found invaluable.

APPENDIX: DEFAULT NOTICE SERVED ON THE DEFENDER BY PURSUER:

(REDACTED)

BANK OF SCOTLAND [*address redacted*]

STRICTLY PRIVATE & CONFIDENTIAL

To: Mr Alexander Peter Morrison
[*Address redacted*]
Date: 6th November 2019
Dear Mr Morrison

IMPORTANT YOU SHOULD READ THIS CAREFULLY

DEFAULT NOTICE

This is a default notice served under Section 87(1) of the Consumer Credit Act 1974.

Fixed-Sum Loan Agreement between Bank of Scotland plc and Mr Alexander Peter Morrison Account Number formerly xxxxxxx and now xxxxxxxx

Agreement: Fixed-Sum Loan Agreement between Bank of Scotland plc of The Mound, Edinburgh EHI I YZ (the "Bank") and Mr Alexander Peter Morrison (the "Borrower") dated 26 July 2011 and 1 August 2011. We refer you to the above agreement (the "Agreement'). The Loan Amount under the Agreement is £120,000.00.

Breach: The Timing and amounts of Repayments clause of the Agreement provides' that you must pay each monthly instalment and interest payment in full on its due date. The clause requires you to make repayments of the Loan Amount by 120 monthly instalments of £1,000.00. The clause also requires you to make monthly payments of interest on the reducing balance of the Loan Amount. You are in breach of that clause because arrears amounting to £96,000.00 of the instalments and £44,778.58 interest payments are now due and outstanding. To remedy the breach you must pay to us the total arrears of £140,778.58 by 28th November 2019 (hereinafter referred to as the date shown).

IF THE ACTION REQUIRED BY THIS NOTICE IS TAKEN BEFORE THE DATE SHOWN NO FURTHER ENFORCEMENT ACTION WILL BE TAKEN IN RESPECT OF THE BREACH.

IF YOU DO NOT TAKE THE ACTION REQUIRED.BY THIS NOTICE BEFORE THE DATE SHOWN. FURTHER ACTION SET OUT BELOW MAY BE TAKEN AGAINST YOU,

Termination of the Agreement: The Agreement will be terminated on or after 28th November 2019 unless payment of the total arrears of £140,778.58 is made by that date. If the Agreement is terminated payment of the outstanding balance of the loan plus interest is required. Payments to be made on termination if the amount referred to above is not paid are:

Amount of Principal	**£118,000.00**

Unapplied interest to 27/11/19	**£45,151.98**
Accrued Charges	**£0.00**
Total amount to be paid	**£163,151.98**

Interest will continue to accrue at a charging rate of 4.5% over the Bank of England bank rate (currently 0.75%) until settlement. The daily accrual of interest will be £16.97 for the time being.

Termination of the Agreement will take effect on the date shown above unless the total arrears are paid in full before that date. On or after the date shown above we shall terminate the Agreement and require payment of the balance of your account as set out above.

On or after the date shown above we may take legal proceedings against you in respect of the outstanding balance of your account, including the enforcement of any security. You may be liable for future legal fees incurred.

You should be aware that if we take you to court and get a judgment against you requiring you to pay us the money you owe us under the Agreement, you may have to pay us both the amount of the judgment and interest under the Agreement on all the sums owed by you at the date of the judgment until you have paid these in full. This means that even if you pay off the whole amount of the judgment, you may still have a further sum to pay.

This notice should include a copy of the current Financial Conduct Authority Information Sheet on default. This contains important information about your rights and where to go for support and advice. If it is not included, you should contact us to get one.

IF YOU HAVE DIFFICULTY IN PAYING ANY SUM OWING UNDER THE AGREEMENT OR TAKING ANY OTHER ACTION REQUIRED BY THIS NOTICE, YOU CAN APPLY TO THE COURT WHICH MAY MAKE AN ORDER ALLOWING YOU OR ANY SURETY MORE TIME.

IF YOU ARE NOT SURE WHAT TO DO, YOU SHOULD GET HELP AS SOON AS POSSIBLE. FOR EXAMPLE YOU SHOULD CONSULT A SOLICITOR, YOUR LOCAL TRADING STANDARDS DEPARTMENT OR YOUR NEAREST CITIZEN'S ADVICE BUREAU.

Yours sincerely,

Xxxxxxxxxxx