

SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT KIRKCALDY

[2019] SC KIR 63

KKD-A47-19

JUDGMENT OF SHERIFF A G D THORNTON

in the cause

CLYDESDALE FINANCIAL SERVICES LIMITED T/A BARCLAYS PARTNER FINANCE

Pursuer

against

SEAN LAWRENCE

Defender

Pursuer: Tosh, DWF, Solicitors
Defender: (proceedings undefended)

Kirkcaldy, 12 June 2019

The sheriff, having resumed consideration of the pursuer's minute, number 8 of process, and having heard the submissions of the agent for the pursuer, grants decree in terms of craves 1, 2, 3, 4 and 5, and makes no finding of expenses due to or by either party.

Note

[1] This is an action concerning a conditional sale agreement in respect of a motor vehicle entered into between the parties. The pursuer has raised an action in terms of which they seek decree for payment of the total sum due and outstanding by the defender in terms of the agreement. The pursuer avers that the defender has fallen into arrears with his payments and has breached the agreement, and they say that following service on the defender of a default notice by them, they have terminated the agreement.

[2] The pursuer seeks decree for payment in respect of the total sum which they aver is due by the defender to them. The pursuer also seeks an order for recovery of possession of the motor vehicle on the basis that they are the owner of the vehicle, and the defender has no right to retain possession of it following termination of the agreement.

[3] Separately the pursuer seeks orders permitting them to enter premises occupied by the defender in order to recover possession of the vehicle, an order requiring the defender to deliver the vehicle to them, and warrant to officers of court to search premises occupied by the defender and to take possession of the vehicle and deliver it to the pursuer, and to that end to open shut and lockfast places. Finally, the pursuer seeks the expenses of the action but only in the event of opposition.

[4] The defender has failed to lodge a notice of intention to defend or an application for a time to pay direction or time order. Accordingly, the pursuer has lodged a minute for decree craving the court to grant decree in terms of all the craves of the writ. In view of the absence of opposition by the defender the pursuer asks the court to make no finding of expenses due to or by either party.

[5] I had certain misgivings about granting an undefended decree in respect of all the pursuer's craves. Those misgivings related to the possibility of injustice should the pursuer recover and sell the vehicle, but still have a decree for payment of the full sum in terms of crave 1 which could be enforced against the defender. I was aware that other sheriffs in other courts had had similar misgivings.

[6] Accordingly, I asked the pursuer's agent to address me in relation to the minute for decree. Mr Tosh did so on behalf of the pursuer on 12 June 2019, and helpfully referred me to a number of authorities.

[7] In light of the consideration of those authorities and Mr Tosh's submissions, I have come to the following conclusions:

- (i) The court has 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 fall into one of two categories: (a) where there is a very apparent want of jurisdiction, or (b) where there is a manifest incompetency in relation to the remedy sought (see *Terry v Murray*, 1947 SC 10 per Lord Mackay at page 15).
- (ii) The type of incompetency which warrants intervention by the court *ex proprio motu* is incompetency of remedy, expressed in a crave which the court has no power to grant (see *United Dominions Trust Ltd v McDowell* 1984 SLT SC 10 at page 15).
- (iii) The court has no right or duty to examine the justification for the amount claimed, or to apply judicial discretion to that question (see *Cadbury Brothers Ltd v Thomas Mabon Ltd* 1962 SLT SC 28 at page 29; and *Royal Bank of Scotland Ltd v Briggs* 1982 SLT SC 46 at page 48).
- (iv) These principles are well established and have recently been reaffirmed by the Sheriff Appeal Court in *Cabot Financial UK Ltd v McGregor* 2018 SC (SAC) 47 at paragraphs [33] – [39] and [49].

[8] I am satisfied that in the present case there is no issue of want of jurisdiction or incompetency which arises. Moreover, if there is any potential for unfairness to be suffered by the defender, it is for him to guard against that by taking steps to enter the process and defend the action. He has not done so, and in all these circumstances, it is appropriate that

the court should grant to the pursuer the decree sought in terms of the minute without further enquiry. That decree is hereby granted.