Murie McDougall Ltd v Sinclair
1994 SLT (Sh Ct) 74

SHERIFF COURT OF NORTH STRATHCLYDE AT DUMBARTON
SHERIFF J T FITZSIMONS
13 JUNE 1994

Loan - Consumer credit - Application for time order to reduce monthly payments due in respect of regulated agreement - Whether power to make order restricted to arrears - Whether just to make time order - Whether power to vary contractual interest rate - Consumer Credit Act 1974 (c 39), ss 129 and 136.

Section 129 of the Consumer Credit Act 1974 permits the court, "if it appears to the court just to do so", to make a "time order" providing for the payment of "any sum owed . . . by such instalments, payable at such times, as the court . . . considers reasonable". By s 136 the court may include in an order made by it under the Act "such provision as it considers just for amending any agreement or security in consequence of a term of the order".

After the debtor under a credit agreement ceased to make payments the creditor served a default notice and, the debtor having granted a standard security over property, raised an action of declarator and ejection. The debtor applied for a time order under s 129 of the Consumer Credit Act 1974. The creditor questioned the competency of the application, the debtor having failed to respond to a notice of default served in relation to the standard security.

The debtor claimed to have £163 per month free after meeting other commitments and sought a time order substituting £160 per month for the contractual instalments of £60 per week. Such instalments, given the contractual rate of interest of 27.1 per cent APR, would have taken over 40 years to pay off the loan. The debtor sought a further order under s 136 reducing the interest rate to 10.95 per cent, which he claimed was the average rate charged by High Street banks at the relevant time. The loan would then have taken 13 years to pay off as against the original four.

Held, (1) that the court had a wide discretionary power under s 129 and there were no time limits on applications for the exercise of such powers, and the application was therefore competent (pp 76L-77B); (2) that the pursuers having demanded payment of the whole sum due under the agreement, it was open to the court to treat that sum as "any sum owed" in terms of s 129 (p 79K-L); (3) that the repayment period which would be required by granting the application could not be regarded as just since the creditor would have to wait for payment of the debt for an inordinate period and the agreement might have extended beyond the debtor's lifetime (p 80E-F); (4) that s 136 could only come into play when a time order was made and could not be used to make a just order where one could not otherwise exist (p 80F-H); (5) that neither singly nor in combination did s 129 or s 136 give the court power to vary the contractual interest rate (pp 80L-81D); and application refused.

Opinion, (1) that the terms of s 129 (1) permitted a court to make a time order without the necessity of a specific application from the debtor (p 77A); and (2) that as the pursuers specialised in high risk lending, undertaking risks which banks would not, it would not have been just to reduce the interest rate to the figure contended for as the average rate of interest being charged by banks (p 81F and I).

Action of declarator and ejection Murie McDougall Ltd raised an action of declarator and ejection against John Sinclair. The defender applied for a time order under s 129 of the Consumer Credit Act 1974. The case came before the sheriff for a hearing. On 13 June 1994 the sheriff refused the application.

THE SHERIFF (J T FITZSIMONS). - This interlocutor relates to an application by the defender during the progress of an action raised by the pursuers under the Conveyancing and Feudal Reform (Scotland) Act 1970 (hereinafter referred to as the 1970 Act). In the action the pursuers seek declarator that the defender is in default in respect of payments due in terms of a standard security by him in favour of the pursuers dated 21 May 1992 and recorded in the

Land Register of Scotland on 25 May 1992. The heritable property concerned is situated at 18 Langfaulds Crescent, Faifley, within the jurisdiction of this court, and the pursuers seek a declarator that they are entitled to enter into possession of the said subjects, and an order ordaining the defender to vacate. The standard security is stated to have been granted in respect of a sum of money advanced to the defender by the pursuers in terms of a credit agreement, and the balance outstanding as at the date of raising of the action is stated to be £11,820.39.

The cause tabled on 15 April 1993, and was thereafter sisted for legal aid purposes. The sist was recalled on 12 August 1993, and defences ordered. On 9 November 1993 the defender lodged the present application. Following upon sundry procedure the application called before me for a hearing on 11 February 1994. Unfortunately due to pressure of court business the hearing required to be continued over a number of days, and submissions were not completed until 16 May 1994.

It is not in dispute that the pursuers and the defender entered into a credit agreement regulated by the Consumer Credit Act 1974 (hereinafter referred to as the 1974 Act). In terms of the agreement dated 21 May 1992, the defender agreed to repay to the pursuers the total sum of £12,480.00 (being an advance of £8,000.00, plus interest of £4,480.00) over a period of 208 weeks at the rate of £60.00 per week. The interest rate was fixed at 27.1 per cent APR (annual percentage rate), and the same rate of interest applies to arrears. In terms of cl 3 of the agreement the pursuers are entitled to demand earlier repayment of the balance of the loan in the event, inter alia, of any amount payable being overdue for more than 14 days. Earlier payment may be demanded by the service on the defender of a default notice in terms of the 1974 Act, and failure to comply with the terms of the notice results in the whole of the remaining balance becoming payable immediately.

Also on 21 May 1992 the defender granted a standard security over his property at 18 Langfaulds Crescent, Faifley, in favour of the pursuers "in security of all monies due by the Borrower to the Lender now or at any future time under any agreement between them". The said standard security was registered on 25 May 1992, subject to a prior charge relating to a standard security in favour of the National Home Loans Corporation plc, registered on 11 June 1991 (the first mortgage).

The defender maintained the payments initially, but by September 1992 he was in arrears and penalty interest was being applied. No payments have been made since 28 October 1992. Following upon correspondence with the Citizens' Advice Bureau, acting on behalf of the defender, the pursuers served a default notice under s 87 (1) of the 1974 Act, dated 17 December 1992. The notice required the defender to bring payments up to date together with penalty interest by 28 December 1992, failing which the pursuers intended inter alia to demand earlier payment of the sum of £8,753.83 (allowing for a rebate) by 31 December 1992. No action was taken by the defender and on 13 January 1993 the pursuers' solicitors wrote to the defender intimating that unless the outstanding balance of £11,820.39 was paid within 10 days an action of ejection would be raised. On 19 January 1993 the pursuers' solicitors served a notice of default on the defender under the 1970 Act. It is my understanding that the above matters were not in dispute.

In the defences to the action the defender takes issue with alleged defects in the setting up of the credit agreement and the standard security. In addition the solicitor for the defender in submissions on the application referred to certain alleged ambiguities relating to the content of the notices served on the defender under the 1970 and 1974 Acts. For the most part, however, these matters were not germane to the issue before me, and for the purposes of the present application it was accepted that the various documents were in proper form, and that the notices had been properly served.

The solicitor for the defender went on to explain that the defender had taken out the loan to repay existing debts. He had responded to an advertisement offering a loan designed to consolidate outstanding debts, and had made an error of judgment in not approaching his existing lender. At the time of the agreement he had been employed as a taxi driver, but had been made redundant around July 1992. Thereafter he was reliant upon state benefit in the form of income support plus payment of the interest on his first mortgage only. He had managed to maintain payments on the present agreement until around September 1992, but found that he could not afford to keep up the commitment apart from two further payments in October.

The defender's financial position improved however when he became a self employed taxi driver in May 1993, with a gross monthly income of around £1,200.00. I was informed that the

defender, a single man with no family, after deduction of tax, national insurance and all other essential outgoings including his first mortgage now had a net disposable income of £163.00 per month. He was willing to pay £160.00 per month to the pursuers in respect of the present agreement. A schedule giving the detailed figures of average monthly income and expenditure was produced. The pursuers did not dispute the figures.

These are the circumstances in which the present application has been brought. In terms of the application the defender asks the court to make a time order under s 129 of the 1974 Act reducing the monthly payments due in respect of the regulated agreement to £160.00 per calendar month. In addition the defender applies for an order under s 136 of the said Act to reduce the interest rate chargeable from an annual percentage rate of 27.1 per cent to 10.95 per cent. In the course of submissions I allowed the defender, there being no objection, to amend the crave of the application by insertion of a reference to s 127 of the 1974 Act.

However at the conclusion of the hearing the solicitor for the defender intimated that he was not at this stage of the action seeking any order in terms of s 127.

Competency of the application

At the outset of the hearing the solicitor for the pursuer raised a question regarding the competency of the application. He pointed out that the pursuers had raised the present action on the basis of a notice of default served on the defender in terms of s 21 of the 1970 Act. Once such a notice had been served the defender, as debtor, was entitled under s 22 to object to the notice by way of application to the court, if he considered himself aggrieved by any requirement of the notice. However s 22 (1) required that any such application be made within 14 days of service of the notice. If such an application had been made the pursuers would have been entitled to make a counter application seeking any of the remedies conferred on them as creditors by the 1970 Act. The court would then have had power to set aside the notice, in whole or in part, or vary or uphold it, or to grant any remedy to the pursuers as craved in the counter application. Thus the court would have been in a position to deal with the matter within a fairly short time span, due to the initial time limit imposed.

The solicitor for the pursuers recognised that the present application by the defender had been made under the 1974 Act, not the 1970 Act. Nevertheless, he submitted, the two Acts should be read together and the 1974 Act should not be regarded as overriding the time limit imposed by the 1970 Act for submission of applications following upon service of a notice of default. It was not disputed that the present application came well outside that time limit, and it should therefore be dismissed as incompetent.

In reply, the solicitor for the defender stressed that the pursuers had served two notices on the defender in the present case: a default notice under the 1974 Act dated 17 December 1992, and a notice of default under the 1970 Act, dated 19 January 1993. It was accepted that the defender had not responded to the latter notice, quite simply because he did not challenge the terms of that notice. The defender did not dispute that he was in default under the standard security, nor does he now dispute the sum claimed by the pursuers as being outstanding. The present application was not therefore made under s 22 of the 1970 Act, but was an application under s 129 of the 1974 Act.

Section 129 provides:

> "129. - (1) Subject to subsection (3) below, if it appears to the court just to do so - (a) on an application for an enforcement order; or (b) on an application made by a debtor or hirer under this paragraph after service on him of - (i) a default notice, or (ii) a notice under section 76 (1) or 98 (1); or (c) in an action brought by a creditor or owner to enforce a regulated agreement or any security, or recover possession of any goods or land to which a regulated agreement relates, the court may make an order under this section (a 'time order').
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> "(2) A time order shall provide for one or both of the following, as the court considers just - (a) the payment by the debtor or hirer or any surety of any sum owed under a regulated agreement or a security by such instalments, payable at such times, as the court, having regard to the means of the debtor or hirer and any surety, considers reasonable; (b) the remedying by the debtor or hirer of any breach of a regulated agreement (other than non-payment of money) within such period as the court may specify.
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> "(3) Where in Scotland a time to pay direction or a time to pay order has been made in relation to a debt, it shall not thereafter be competent to make a time order in relation to the same debt."

Having regard to those provisions, submitted the defender's solicitor, the application was competent, in that it was an application under s 129 (1) (c) made in an action which had been brought by the pursuers, as creditors, to enforce a regulated agreement secured by a standard security over the defender's home. The court was therefore empowered to make a time order under subs (1). In the present application the defender invited the court to do so, and to make provision under subs (2) (a) for the payment of all the sums outstanding by reasonable instalments other than those provided for in the agreement. No time limits for the making of such applications were specified in the 1974 Act, and the unqualified nature of the words "in an action" indicated that a time order could be applied for at any point during the progress of a cause.

Neither the 1974 Act nor the sheriff court rules make provision for specific procedures regarding applications for time orders. **However by way of guidance the solicitor for the defender referred me to a letter from the secretary of the Sheriff Court Rules Council published in SCOLAG, May 1991, Issue no 176**. **The letter in question expresses the view that an application for a time order may be made by motion in the course of an ordinary cause, by way of summary application where no cause has been raised, or by application post-decree provided no time to pay direction or time to pay order has previously been made** (cf subs (3)).

I find myself in full agreement with the observations in the said letter, and in my view the solicitor for the defender's submission is well founded. Section 129 of the 1974 Act serves in my view a much wider purpose than s 22 of the 1970 Act. The latter section allows the debtor to object to the notice of default within a specified time limit. Thus he can mount a challenge to the notice, and in the course of dealing with the challenge the court may *inter alia* vary the notice.

Section 129 is much wider in scope, and does not require the debtor to challenge the terms of any notice or to contest the sums claimed by the creditor as owing. The use of the words "just" and "reasonable" throughout the section makes it clear that the court is being given a wide discretionary power to allow payment of any sum owed by reasonable instalments. The debtor may well, as in the present case, accept fully that he is in default, yet invite the court to exercise he discretionary power in order to alleviate his current financially straitened circumstances. Time limits on applications for the exercise of such powers would in my view be inimical to the concept inherent in s 129. Indeed it seems to me that the very wide terms of subs (1) (a) and (c), when compared with subs (1) (b), indicate that the court may in cases such as the present make a time order without the necessity of a specific application from the debtor.

I am in no doubt that the time limit referred to in s 22 of the 1970 Act has no relevance to the application before me under the 1974 Act. It is not in dispute that the present action falls within the terms of s 129 (1) (c), and the court is being invited to make a time order of the type envisaged by subs (2) (a). In those circumstances the application is competently before the court by motion during the progress of the action.

Merits of the application

Turning to the merits of the application, the solicitor for the defender submitted that in view of the defender's current financial position he could not reasonably be expected, as was conceded by the pursuers, to pay any more than £160.00 by way of monthly instalments. Indeed this was the sum the defender was offering to pay despite his having only £163.00 per month surplus after covering all his essential commitments including his first mortgage. Section 129 (2) (a) required the court to have regard to the means of the debtor, and the defender was therefore in his current situation asking the court to make a time order substituting instalments of £160.00 per month for the contractual instalments of £60.00 per week.

On the other hand the solicitor for the defender recognised that s 129 did not empower the court to vary the contractual rate of interest, and that at the contractual rate of 27.1 per cent by far the greatest proportion of the monthly payment of £160.00 would go towards interest. In those circumstances it would take an inordinate length of time for the debt to be paid off, exceeding 40 years and very probably not in the debtor's lifetime. The solicitor for the defender readily conceded that it would be unjust and unreasonable for the pursuers to be required to wait for such an inordinate length of time for full repayment of the debt. It could not therefore be regarded as just for the court to make a time order in respect of the moneys

outstanding at the instalments requested, were that time order to stand on its own. However, submitted the solicitor for the defender, the time order need not stand on its own, because the court was given further powers by s 136 of the 1974 Act to amend any agreement in consequence of a term of a time order. Section 136 provides:

> "136. The court may in an order made by it under this Act include such provision as it considers just for amending any agreement or security in consequence of a term of the order."

This section, argued the solicitor for the defender, gave very wide power to vary a regulated agreement provided the variation was in consequence of a time order. In the present case, the defender sought such an order under s 136 to vary the agreement by substituting an APR of 10.95 per cent for the contractual rate of 27.1 per cent. If such an order were made, the outstanding debt would be paid off at £160.00 per month over a period of around 10.5 years beyond the contractual term of four years. In the context of a second mortgage, such periods for repayment were not unknown and not unreasonable.

The solicitor for the defender went on to indicate that the figure for APR of 10.95 per cent was being suggested because it represented the general level of interest rates which would have been charged by reputable banks on a second mortgage at around the time of the present agreement. In support of this contention he referred to three letters from well known banks in answer to a query by him as to the interest rate applicable in May 1992 on a second mortgage of £8,000.00 repayable over four years, and secured over a house in which the equity was well in excess of the amount being borrowed.

The Bank of Scotland indicated that their rate of interest would have been 10.69 per cent as of May 1992, provided they held the initial mortgage. Clydesdale Bank indicated that their APR would have been 10.95 per cent at that time. The TSB Bank could not supply figures for APR but indicated that the variable interest rate for mortgages would have been 10.65 per cent. These letters indicated, in the solicitor's submission, that the contractual rate of interest in the present case was nearly three times the average interest rate applying at the time. He was well aware that the pursuers, in search of their own funding, did not have access to the same financial markets as banks, and were justified in charging higher rates of interest in view of the higher risk involved. However in the present case the risk was diminished by the security on the defender's home, and it was reasonable that a rate of interest reflecting the average figure current at the time should now be substituted for the figure in the agreement.

The solicitor for the defender turned next, in anticipation of the pursuers' submissions, to the interpretation of the words "any sum owed" in s 129 (2) (a). In this context he referred me to a number of English cases dealing with the question as to whether the words in question restrict the powers available under s 129 to arrears actually owed by the debtor at the time of the application. Such a restrictive interpretation would, it was conceded, prevent the court from using s 136 to vary the interest rate applying to the agreement. The absurd situation would then arise in which the court might consider a time order to be justified, but if it were restricted to arrears the defender would in order to avoid repossession require to pay substantially increased monthly instalments in the form of payments towards the arrears in addition to the contractual monthly payments. Such a scenario was against the spirit of the legislation, and was easily obviated by a proper interpretation of the words "any sum owed". Those words meant the total amount outstanding, not only arrears but principal and contractual interest and penalty interest past and future. In support of his argument the solicitor prayed in aid the case of *Jenkins v Cedar Holdings Ltd*, Sheffield county court, 10 August 1987, unreported, in which HH Judge Cotton on appeal took the view that the powers in ss 129 and 136 were wide enough to allow the registrar to vary instalments and reduce the rate of interest in the agreement between the parties.

The solicitor for the defender also relied upon the final paragraph of Dillon LJ's judgment in *First National Bank plc v Syed* [1991] 2 All ER 250, in which he said: "Moreover the remedy of a time order under the section would seem to be directed at rescheduling the whole of the indebtedness under the regulated agreement, the principal which has become presently payable as a result of default as well as the arrears and current interest".
I was also referred to a number of cases which had taken a similar approach: *Cedar Holdings Ltd v Thompson* [1993] CCLR 7; *Cedar Holdings Ltd v Aguinaldo*, Bow county court, 25 March 1992, unreported; *Wimbledon and South Western Finance plc v Winning,* Oxford

county court, 19 June 1992, unreported; and *Premier Portfolio Ltd v Morris*, Bradford county court, 11 June 1993, unreported.

The solicitor for the defender also very properly referred me to a case which was against him, namely *Ashbroom Facilities Ltd v Bodley* [1992] CCLR 31, in which HH Judge Wooton held that a time order must refer to sums actually owing, that is arrears, at the time the matter came before the registrar. The only power was to make an instalment order relating to those arrears, and s 136 provided no authority for the rewriting of the agreement in such circumstances. Not surprisingly I was invited not to follow that reasoning, and to hold that s 136 was indeed available to vary the contractual rate of interest. That course would be justified in the present case, because the debtor was now in a position to make sizeable payments and to pay the debt within a reasonable time if the interest rate was reduced to a reasonable level. If the defender was not given this opportunity he would be rendered homeless. He was single, had no relatives, and the local authority would have no duty to provide housing since he was single and not in priority need. The defender had suffered bad luck and had made ill advised decisions, but the court was in a position to do justice to him by allowing him to retain his home while at the same time ensuring that the pursuers received an adequate return on their money.

The situation the defender now found himself in was just the type of situation envisaged by s 129, and the purpose of s 136 was to provide an overriding power to a court which considered a time order to be justified, to take such further action as it considered just to amend the agreement between the parties in order to give effect to the time order. In his reply on behalf of the pursuers their solicitor also referred me to a number of English cases. In addition *to Ashbroom Facilities Ltd v Bodley*, he relied on two cases in particular, *namely First National Bank plc v Colman*, Leicester county court, 6 October 1992, unreported and *First National Bank plc v Holgate*, Nelson county court, 30 October 1989, unreported.

Colman stressed the requirement to have regard to the interests of both creditor and debtor, and held that s 129 was designed to allow the court to go no further than allowing the debtor more time to pay. In Holgate the registrar specifically refused to follow Jenkins v Cedar Holdings and rejected the proposition that s 136 allowed the court to rewrite an agreement with respect to contractual interest. The same view was taken in *First National Bank plc v Shah and Fatima,* Rochdale county court, 21 May 1993, unreported, in which the court endorsed the commentary on s136 by the editors of Goode on Consumer Credit Legislation, at para 280-1.

This commentary and the line of cases made it clear, submitted the pursuers' solicitor, that what the defender in the present case was asking the court to do was not within the scope of s 129 or 136. He was not merely seeking relief in respect of payments due, but was asking the court to rewrite the agreement with the effect that the original four year agreement would continue for around 13 years, and at an unreasonably reduced rate of interest. The solicitor for the pursuers invited me to take the view that s 129 was intended to deal with the situation where there has been a build up of arrears, and the debtor seeks relief in that respect. The court may then provide that relief through a time order, by allowing payment of the arrears by reasonable instalments running alongside the contractual payments.

Alternatively the court might take the view that s 129 was not restricted to arrears. In that event the court would have power to regulate the amount and method of instalment payments in respect of the total sums outstanding, and s 136 could be used to extend the contractual period in consequence. It was going too far however to interpret s 136 as giving the court power to vary fundamental terms such as the agreed rate of interest under the agreement. This was particularly so since s 137 provided the court with a very wide power to reopen any credit agreement it found to be extortionate "so as to do justice between the parties", a power which the defender was not seeking to invoke, at this stage in the action at any rate. The power under s 136 must be viewed as merely an ancillary power to the powers contained in inter alia s 129, and did not provide the court with an unfettered discretion to rewrite agreements.

In the event that I was not with him on the interpretation of the legislation, the solicitor for the pursuers turned to the question of whether it would be just and reasonable to grant the orders sought. It was accepted that the defender could not reasonably be expected to pay more than the amount offered in view of his means. However justice had to be maintained between the parties, and it was entirely unjust to expect the pursuers to wait for around 13 years for their return on an agreement with an original four year span and in the end of the day also to receive a much reduced return. The solicitor for the defender had produced letters

regarding interest rates from three banks, only one of which referred to an APR. The pursuers were not prepared to accept these figures as indicating an average APR of 10.95 per cent at the time of the agreement. The solicitor for the pursuers suggested that the figure was more likely to have been around 15 per cent, although he produced no evidence in support.

Moreover, the pursuers' solicitor argued, the defender in producing such figures was not comparing like with like. If he had wished to obtain a loan based on bank rates, he could have approached a bank. He did not do so because he was aware that he was a high risk, and was consolidating other outstanding debts. Instead he sought a loan from the pursuers, who are lenders specialising in lending to high risk individuals. The solicitor described the pursuers as "lenders of last resort" for borrowers who are normally unable to obtain funds from other sources such as banks or building societies, or from what the solicitor referred to as "secondary tier lenders" such as First National Bank. The pursuers obtained their funds through brokers, and were required to fulfil their obligations to their sources of finance. The maintenance of those obligations was geared to their receiving the return through the expected payments coming from agreements such as that negotiated with the defender. The pursuers were engaged in high risk lending, and the rate of interest reflected that risk, the type of risk which banks would not contemplate. The defender had entered into the agreement freely, and it had not been shown in the present proceedings that it would be just to allow him to have that agreement rewritten for his benefit alone.

Conclusion

I am grateful to both solicitors for their very careful submissions, and full reference to English case law dealing with the interpretation of the statutory provisions. My own researches have confirmed the absence of any reported Scottish authority on the matter. The English cases referred to cannot be regarded as authoritative in any way, the majority having been decided at county court or district judge level, and are not in any event binding on me. *First National Bank plc v Seyd* was decided at Court of Appeal level, but the case was not concerned at all with the crucial issue in the present case, namely the construction of s 136 and its relationship with s 129. The passage referred to by the solicitor for the defender would appear to be no more than an obiter remark, but insofar as it indicates that s 129 is not necessarily restricted to arrears, and that it allows for rescheduling of payments I entirely agree, as will be explained below. However if the passage is intended to indicate that s 129 in itself contains the power to open up and rewrite an agreement, with regard for instance to the contractual interest rate, then I respectfully disagree.

I do not propose to rehearse the cases in detail, nor do I consider that anything is to be gained by attempting to distinguish the various cases on their facts, as the solicitor for the defender sought to do in his final reply to the solicitor for the pursuers. The English cases referred to are of value only insofar as they provide guidance on the interpretation of the statutory provisions, and although I do not follow the reasoning in any particular case in full I consider, as will be seen, that the line of cases relied upon by the pursuers most accurately reflect the proper principles to be applied in terms of the legislation.

Dealing first with the words "any sum owed", as used in s 129, one cannot in my view lay down as a matter of law that the phrase applies only to arrears accumulated under a regulated agreement. The phrase clearly relates to any sum owed at the time when the court is considering the matter, but what sums are owed at that time will depend on the circumstances of the particular case. There may well be cases in which arrears have accumulated, but the loan has not been "called in" by the creditor. In such circumstances the court might well take the view that only the arrears are owed at that particular time. An entirely different situation obtains however when, as in the present case, the creditor has served notices of default in respect of both the agreement and the standard security, and has thereafter raised an action for possession of the security subjects based on that default.

The initial writ in the present action specifies the "balance outstanding" as being the total sums due in terms of the agreement. In the course of his submission the solicitor for the defender made reference to alleged ambiguities and inconsistencies in the terms of the notices served on the defender under the 1970 and 1974 Acts. I fail to detect any inconsistencies such as would affect the issue before me. Be that as it may, whatever else is contained in the said notices the default notice under the 1974 Act specifies the pursuers' intended course of action in the event of the defender not bringing payments up to date, namely to demand payment of all the sums outstanding in terms of the agreement, less a rebate. By not making payments as required, the defender has now lost any entitlement to a

rebate, and the full outstanding sum referred to in the notice is now specified in the writ as the basis of the action. The pursuers have therefore in my view placed the whole indebtedness of the defender under the agreement before the court, and cannot now claim that any time order granted by the court must be restricted to arrears. The total sums outstanding on the agreement consisting of principal plus contractual and penalty interest, constitute the sums owed in the circumstances of this case and may therefore be made the subject of a time order in terms of s 129. As I understand the position the total sums outstanding are now in excess of £12,000.00.

I turn now to consideration of the making of a time order in the circumstances of the present case. Section 129 empowers the court to order payment by instalments, of such amounts and at such times, as are reasonable having regard to the means of the debtor. However that power may be exercised by the making of a time order only if it appears, or is considered, just to do so, and in deciding what is just in the context of any particular case the positions of both creditor and debtor must be taken into account by the court. Section 129 undoubtedly allows the court to exercise a wide discretion, but a discretion which must be exercised within the confines of the specific powers conferred on the court by the wording of the section. That wording is perfectly clear. The specific power is to provide for payment of the sums owed in terms of the agreement by instalments which are within the discretion of the court in respect of both amount and frequency. The section therefore allows for rescheduling of the payment of the debt, to allow the debtor more time to pay either at the contractual or reduced instalments.

A time order means what it says, and the section specifies what the court may do in respect of giving relief by allowing further time to pay. Section 129 however provides no power beyond that to amend or modify an agreement, and in particular does not allow the court to modify contractual interest rates under the agreement. As it was put in First National Bank plc v Colman: "Section 129 is mechanical. It provides a debtor with relief in that it suspends his obligation to make payments as and when required to do so contractually. It gives him more time. To that extent, but not otherwise, it alters the contractual rights and obligations between creditor and debtor."

I entirely agree that this is the type of relief contemplated by the section, and find myself in general agreement with the interpretation of s129 and its relationship with s 136, as expressed in the above case and in similar terms in First National Bank plc v Holgate and First National Bank plc v Shah and Fatima.

In the present case I am in no doubt that in view of the means and commitments of the defender he could not reasonably be expected to pay monthly instalments of more than the £160.00 being offered. If it were possible on the basis of such instalments to do justice to the parties by extending the repayment period I might well have been prepared to take such a course. However the repayment period required in such circumstances, standing the interest rate applying under the agreement, could not possibly be regarded as just. It could not be considered just that the pursuers be expected to wait for payment of the debt for the inordinate period which would be required to fulfil the agreement. Indeed it would not be in the interests of the defender in my view to allow the agreement to extend probably beyond his lifetime. As indicated above, this aspect of the case is not in dispute, and the solicitor for the defender conceded that it would not be just to make a time order in such circumstances without a further order under s 136 reducing the contractual interest rate.

In my view that concession, quite properly made in the circumstances, is fatal to the defender's application. Before a time order can be made it must be considered just, and an order which is not considered just, and cannot therefore be made, cannot be turned into a just order by reference to a section of the Act which can only come into play when a time order is made. An amending order under s 136 may be made only in an order made by the court under the 1974 Act, in the context of the present case under s 129. It seems to me to be entirely illogical for the defender to concede that a time order cannot be justified in terms of s 129, but then to proceed to invoke powers allegedly available under s 136 but powers which can be used by the court only in consequence of a term of a time order made under s 129. If such powers are available only in consequence of a time order, they cannot exist without an existing time order.

If my reasoning on this matter is considered to be flawed, I am in any event of the view that even were I to make a time order I would not under s 136 have the power contended for by the defender, to rewrite the agreement in respect of the contractual interest. In this context I refer to First National Bank plc v Holgate, in which it was said: "I am bound to say that it

seems to me to be an extraordinary situation that after a freely negotiated loan and mortgage, a defendant is allowed . . . to come along to a court and say 'I cannot now pay the amount I agreed to pay, but I would be able to pay something under the agreement provided the rate of interest was reduced to a figure which fitted my ability to pay' . . . there is no doubt whatever that the court could make an order whereby payment of the arrears could be made over a longer period of time commensurate with the means of the debtor and so extend the period of the agreement. I am being asked to go much further than this and, because the defendant cannot keep up with payments to meet the interest, vary the rate of interest. Section 136 however, in my opinion only gives me power to amend an agreement in consequence of the term of the order. The order I am being asked to make is a time order. How this can be extended to an order reducing the rate of interest I do not know, and I am bound to disagree entirely with those who decided the case of Cedar Holdings v Jenkins. Applications to vary the terms of the agreement in relation to interest are contained in the extortionate credit bargain sections of the Act. In those circumstances if a court found a credit bargain to be extortionate, it could reopen an agreement so as to do justice between the parties. One wonders if those provisions are completely and utterly irrelevant if a defendant can do what this defendant is asking me to do and as it were alter the entire terms of a freely negotiated agreement, by what I may describe as the 'back door'."

I quote this passage at length because I find myself in agreement with the reasoning contained therein. As indicated above, I am of the view that s 129 is intended to allow a debtor relief in terms of the amount, number and frequency of payments. It is not intended to deal with the fundamental rights or obligations under the agreement, and in particular it does not give the court power to reduce a debtor's liability as distinct from allowing him further time to settle that liability. Section 136 provides the court with no more than an ancillary power to amend the agreement, exercisable only in consequence of a term of the time order. It thus allows the court to give effect to the practicalities of the time order, by for instance amending the agreement in respect of the length of the contractual repayment period. The power under s 136 cannot however be utilised to reduce a debtor's liability under the agreement, since a time order itself cannot make such provision. To reduce the contractual rate of interest would be going far beyond, in my view, the intention of s 136, and would provide the debtor with a fundamentally different and supplementary form of relief from that contemplated by s 129. The debtor would be given not only an extension of time but a reduction in liability. In the present case the defender seeks a very substantial reduction in his liability under the agreement, and he attempts to reach that objective by arguing that s 136 allows such a course of action as result of a time order. However what he is really saying is that he requires an order under s 136 reducing his overall liability, not as a consequence of a time order but as a precondition since otherwise the time order could not be made. He is thereby in effect making the validity of the time order under s 129 dependent upon, and therefore a consequence of, an order under s 136, which seems to me to invert the relationship between the two sections. I reject the contention by the defender that s 136, in combination with a time order, allows the court to rewrite the agreement between himself and the pursuers by reducing the contractual rate of interest.

Finally, had I taken the view that I had the power to open up and rewrite the agreement to the extent desiderated by the defender, I would not on the information before me have considered it just to do so. I use the word "information" advisedly because I was being asked to decide the matter on the basis of ex parte statements not all of which were a matter of agreement. In particular the figures as to rates of interest provided by the defender in the form of letters from banks, and the inferences to be drawn therefrom, were in dispute. Had I considered the matter to be crucial to my decision I would have required a proof on that issue. However I do not consider that to be necessary, not only because of my interpretation of the legislation as given above, but because even taking the highest inferences contended for by the solicitor for the defenders, as to the average rate of interest being charged by High Street banks, I am not persuaded that it would be just to reduce the rate of interest to that figure or indeed any comparable figure and to extend the period of the loan in consequence. There is a world of difference between lenders of the status of banks and building societies, and lenders such as the pursuers who specialise in high risk lending. High risks inevitably entail high interest rates. The mortgage in the present case is not only a second mortgage but a second mortgage with a high risk, and the agreement was entered into in that knowledge. I have to assume for the purposes of the present application, despite certain matters alluded to in defences, that the agreement was entered into freely and in full knowledge of the rate of

interest applying. I am not dealing in this application with any allegations regarding an extortionate credit bargain, although it seems to me that the solicitor for the defender came perilously close to suggesting that when using the comparison of bank rates. His principal objective however, as I understand it, in using these comparisons was to demonstrate that the pursuers would receive a reasonable return on their money at the average rate of 10.95 per cent suggested in the application.

Section 136 amendments require to be based on what the court considers just, and I cannot regard the amendments proposed by the defender as doing justice between the parties. I fully appreciate the difficulties in which the defender finds himself, and accept the almost inevitable consequences to him of my decision as outlined by his solicitor. However I must have regard to, and try to balance, the interests of each party. I do not regard it as being just arbitrarily to reduce the rate of interest to coincide with what the defender can afford to pay, and that in essence is what I am being asked to do. I do not regard it as just on the information before me to force the lenders to wait for around three times the agreed period for their money while at the same time reducing the rate of interest to around one third of that originally agreed. It seems to me that the defender simply wishes to have a freely negotiated agreement changed to fit in with his ability to pay. If he wishes to claim that the agreement should be reopened on the basis of an extortionate interest rate, a remedy is available under s 137 etc. He cannot in my view by invoking s 136 obtain that remedy by the "back door". For all the reasons given I am not prepared to make any order in terms of s 129 or 136, as craved by the defender. I have therefore dismissed the application, and have continued the cause for consideration of further procedure, and to hear submissions on expenses.

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