SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2810] SC GLA 59

A796/17

JUDGMENT OF SHERIFF S REID

in the cause

PRA GROUP (UK) LIMITED

Pursuer

against

ANNE-MARIE REILLY

Defender

Act: R Anderson, Advocate, instructed by Brodies LLP, Glasgow
Alt: M Dailly, Govan Law Practice, Glasgow

GLASGOW, 30 January 2018. The sheriff, having resumed consideration of the cause, Repels the defender's preliminary plea (plea-in-law number 1); Allows parties a proof before answer of their respective averments, reserving the pursuer's preliminary pleas (pleas-in-law 2, 3 & 4), on dates to be hereafter assigned; meantime, Reserves the issue of the expenses of the diet of debate on 22nd January 2018; Appoints parties to be heard thereon, and on incidental issues of procedure, at a hearing in open court on 21 February 2018 at 2pm before Sheriff Reid; meantime, Appoints parties, within seven days, to provide to the sheriff clerk at Glasgow Sheriff Court lists of unsuitable dates for the said diet of proof before answer (of an estimated duration of two days).

NOTE:

Summary

[1] In this ordinary action, the pursuer seeks payment from the defender of the principal sum of £5,258.56. The alleged debt is said to arise from the defender's use of a credit card under a credit agreement.

[2] The preliminary issue in dispute between the parties is whether, on the pursuer's averments, the claim is time-barred.

[3] For the defender, it was submitted that any alleged obligation owed by her to make payment of the sum sued for has been extinguished by operation of the five year prescriptive period, in terms of the Prescription and Limitation (Scotland) Act 1973 (hereafter "the 1973 Act"), section 6(1) and schedule 2, paragraph 2(2)(a). The "appropriate date", from which the commencement of the prescriptive period began to run, was said to be July 2012. Since the action was served on the defender on 5 September 2017, it was submitted that any obligation to make payment had been extinguished.

[4] To the extent that English law was the applicable law of the contract, it was further argued for the defender that, nevertheless, in the context of a consumer contract such as this, the parties' choice of law could not have effect to deprive the defender (as "consumer") of the protection afforded to her by mandatory rules of Scots law (including, it was said, the Scottish rules relating to the short negative prescriptive period).

[5] For the pursuer, it was submitted that the parties' contract was governed by English law; that English law, as the applicable law, regulates *inter alia* the extinction of the defender's contractual obligations (including extinction by limitation); that, under English law, an action founded on an agreement, such as the parties' credit agreement, can be brought up to six years from the date on which the cause of action accrued; that, in the present case, the cause of action accrued on 14 November 2012 (when a termination notice was issued by the pursuer); and that, accordingly, the limitation period will expire on 14 November 2018.

[6] The pursuer advanced an alternative case. *Esto* the extinction of the defender's obligation was governed by the Scottish rules on prescription, the pursuer argued that the (Scottish) five year prescriptive period commenced on 14 November 2012 (not July 2012). Since the action was served on the defender on 5 September 2017, it was said that the claim was commenced timeously.

The pleadings

[7] The pleadings are brief.

[8] It is a matter of admission that, on or around 26 June 2005, the defender entered into a credit agreement with MBNA Europe Bank Limited ("the original creditor") in respect of a credit card account; the credit agreement is regulated by the Consumer Credit Act 1974; the defender fell into arrears under the credit agreement; the defender "last acknowledged" the sums due and outstanding by her under the credit agreement by making a payment of £137.82 towards the debt on or around 5 June 2012; on

31 October 2012, a default notice was issued by the original creditor to the defender; the defender failed to pay the arrears owed to the original creditor under the agreement in accordance with the default notice; on 14 November 2012, a termination notice was issued by the original creditor to the defender; the credit agreement was terminated; and, at the date of termination, the sum of £5,258.56 was due and outstanding by the defender to the original creditor (article 1 & answer 1).

[9] Separately, the pursuer avers that it acquired title and interest to the original creditor's rights against the defender under the credit agreement by virtue of a series of assignations; and that various demands were made of the defender for payment of the sum sued for prior to commencement of the proceedings. These averments are not admitted.

[10] We then come to the key issue in dispute at the debate. The pursuer avers that the credit agreement is governed by English law; that English law governs the extinction of the defender's obligation (including extinction by limitation); that, in accordance with the English law of limitation (principally as set out in the Limitation Act 1980) a six year limitation period applies to the defender's debt; and that the six year limitation period (under English law) commenced on 14 November 2012 (articles 6 & 7). On that analysis, the claim would not be time-barred (article 6).

[11] The pursuer advances an *esto* case to the effect that, even if the parties' contract is not governed by English law, on a proper interpretation of the parties' contract, and a proper analysis of the Scottish rules of prescription that would otherwise apply, the quinquennial prescription commenced on 14 November 2012; and that, since the present

action was served on 5 September 2017 (more than two months prior to expiry of the quinquennium), the defender's obligation to pay has not been extinguished by prescription (article 7).

[12] At debate, the defender insisted upon her preliminary plea (plea-in-law number 1) to challenge the relevancy of the pursuer's averments anent time-bar. (The defender's pleadings also have a peremptory plea-in-law (plea-in-law 3) to the effect that the defender's alleged obligation has been extinguished by prescription.)

[13] The pursuer's preliminary pleas to relevancy and specification (pleas-in-law 2, 3 & 4), while insisted upon, were not sought to be argued at the debate. Instead, I was invited to allow a proof before answer, reserving the pursuer's preliminary pleas. (Note: the defender avers that the prescriptive period commenced on 25 August 2017, being the date on which the action was warranted (answer 5). Again, this latter date was not advanced in submissions, and appears no longer to be insisted upon.)

Submissions for the defender

[14] At the outset, the defender's agent conceded that his submissions would depart from the terms of the defender's rule 22 note (number 9 of process) and note of arguments (number 12 of process) in respect that it was now conceded by him that, contrary to the basis upon which the rule 22 note and note of arguments had been drafted, EC Regulation number 593/2008 dated 17 June 2008 ("the Rome I Regulation") did not apply to the parties' contract. Instead, the parties' contract having been concluded prior to 17 December 2009, it was conceded that it was regulated by the

Contracts (Applicable Law) Act 1990 ("the 1990 Act") and the Convention on the Law Applicable to Contractual Obligations dated 19 June 1980 ("the Rome Convention"), as incorporated into UK law by section 2 & schedule 1 of the 1990 Act.

[15] In that new context, the defender's primary argument was as follows. The parties' contract was said to be a "consumer contract". In article 5 of the Rome Convention special provision is made for certain consumer contracts whereby, notwithstanding article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by "the mandatory rules" of the law of the country in which the consumer has his habitual residence (article 5.2, Rome Convention). The defender's agent characterised the Scottish rules relating to the short negative prescriptive period as "mandatory rules". They were said to be "mandatory" because they would have applied but for the parties' express choice of applicable law under article 3; and the parties could not otherwise have contracted out of the operation of the short negative prescriptive period if Scottish law had applied. Accordingly, notwithstanding that the contract may be governed by English law (which was not admitted), it was submitted that the defender could not be deprived of the protection afforded to her by the Scottish quinquennial prescription (by application of the lesser protection afforded to her under the English six year limitation period) by reason merely of the parties' choice of English law as the applicable law of the contract (article 5.2, Rome Convention).

[16] It was observed by the defender's agent that the law relating to contractual obligations (including debt) was devolved to the Scottish Parliament. It was said this

constitutional divergence could explain and justify a divergence in the protection available to consumers in Scotland (by virtue of the application of the shorter five year prescriptive period) in comparison with consumers in England (by virtue of the longer six year limitation period).

[17] The defender submitted that the "appropriate date" for the running of the short negative prescriptive period was July 2012, as determined by the 1973 Act, schedule 2, paragraph 2(2)(a) (see paragraph [18], below). Accordingly, in respect that the action was not served until September 2017, the defender's obligation was said to have prescribed.

[18] The defender's second argument was addressed to the pursuer's *esto* case. To explain, the pursuer's *esto* case on averment was that, even if the Scottish rules on prescription applied, the action had been served within the five year prescriptive period. This *esto* argument by the pursuer was predicated on the argument that the "appropriate date" for prescription purposes was determined by the 1973 Act, schedule 2, paragraph 2(2)(b) (there being, allegedly, no stipulation in the parties' contract in respect of the date of payment); and the consequential averment that the five year prescriptive period commenced on 14 November 2012 (being the date when the termination notice was issued to the defender) (article 7). The defender's agent challenged the relevancy of those averments on the basis that, upon a proper interpretation of the parties' contract, the "appropriate date" for the commencement of the Scottish quinquennial prescription was determined by the 1973 Act, schedule 2, paragraph 2(2)(a) (there being, allegedly, a stipulation in the contract in respect of the date of payment); that since, according to the

pursuer's own pleadings, the defender's last payment was made on 5 June 2012, it could be inferred that the defender had failed to pay the monthly "minimum payment" in July 2012, from which date the whole balance must have become due in terms of clause 8F of the contract (item 5/9 of process); and that, accordingly, the "appropriate date" was July 2012. While the defender's agent acknowledged that sections 87 to 89 of the Consumer Credit Act 1974 provided additional protection to the consumer by curtailing the pursuer's contractual rights to enforce the contract, he submitted that these provisions did not affect the identification of the "appropriate date" for the purposes of prescription.

[19] For the foregoing reasons, I was invited to sustain the defender's preliminary plea (plea-in-law number 1) and to dismiss the action.

Submissions for the pursuer

[20] The pursuer's primary submission was that, by virtue of sections 23A(1) of the Prescription and Limitation (Scotland) Act 1973 (as inserted by the Prescription and Limitation (Scotland) Act 1984), the extinction of the parties' obligations was regulated by the parties' chosen applicable law (in this case, English law), explicitly to the exclusion of any corresponding Scottish rules of prescription; and that, according to English law, the relevant limitation period was six years. It was submitted that the only circumstance in which this express statutory provision could be elided would be if the application of the relevant foreign rule of law (in this case, the Limitation Act 1980) would be "incompatible with the principles of public policy" applied by the Scottish

court (1973 Act, section 23A(2)). The pursuer's counsel submitted that it was inconceivable that the application of the English rules on limitation could be regarded as "incompatible with the principles of public policy" applied by the Scottish courts. The mere fact that the Scottish (five year) short negative prescriptive period and the English (six year) limitation period were different did not *per se* render the English limitation period incompatible with any principles of public policy. Reference was made to *Deutsche Bahn AG* v *MasterCard Ink* [2017] Bus LR 63 (at paragraphs 60, 65-68) and *McParland, The Rome 1 Regulation on the law applicable to contractual obligations.*

[21] Besides, counsel submitted that it was not open to the defender to rely upon section 23A(2) in circumstances where there were no averments seeking to invoke it; there were no averments of the relevant "principles of public policy" that were said to be engaged; and there were no averments of the manner in which the applicable English law was said to be "incompatible" with any such principles of public policy.

[22] Counsel observed that section 23A of the 1973 Act did not apply where the law of a country other than Scotland fell to be applied by virtue of any choice of law rule contained in the Rome I Regulation or the Rome II Regulation (1973 Act, section 23A(4)). He acknowledged that, oddly perhaps, no like reference was made to the disapplication of section 23A of the 1973 Act in circumstances where the Rome Convention applied. Nevertheless, it was submitted that section 23A(1) made explicit and unequivocal provision for the situation that had arisen in the present case.

[23] If, contrary to that primary submission, article 5.2 of the Rome Convention (as incorporated into UK law by the 1990 Act) was applicable at all, counsel submitted that

the Scottish rules on prescription could not properly be characterised as "mandatory rules", in the sense in which that term appeared in the Rome Convention. (I was referred to no authority as to the meaning of that term). In any event though, counsel submitted that the defender was, again, precluded from advancing an argument based upon article 5.2 of the Rome Convention because the defender had failed properly to engage that article. There were no averments (and, indeed, no submissions) to explain which of the qualifying pre-conditions in article 5.2 was said to be applicable in the present case.

[24] Finally, even if the Scottish rules of prescription were applicable, the pursuer's counsel submitted that the action had been commenced timeously. In seeking to identify the "appropriate date" (being the date on which the Scottish quinquennial prescription started to run in the present case), the pursuer's counsel submitted that paragraph 2(2)(b) of schedule 2 of the 1973 Act would apply because, on a proper interpretation of the parties' credit agreement (item 5/9 of process), the contract contained no stipulation making provision with respect to the *date* on which the sum sued for was to be repaid. Instead, the contract merely referred to an *event* (namely an obligation to pay a monthly minimum amount as stated on the monthly statement) – but did not specify the *date* on which that sum was repayable. For that reason, by default, paragraph 2(2)(b) of schedule 2 of the 1973 Act was said to apply. Counsel sought to buttress that interpretation by reference to the Consumer Credit Act 1974, sections 87 to 89 which expressly curtailed the ability of the pursuer to demand payment until certain further events occurred (namely, service of the default and termination notices). The pursuer identified the "appropriate date" (from which the short negative prescriptive

period started to run) as 14 November 2012. On that analysis, the pursuer's action was commenced within the quinquennium, and the claim was not time-barred.

[25] Lastly, the defender's counsel offered an alternative analysis whereby the monthly "minimum payment" due by the defender under the contract might be said to fall within paragraph 2(2)(a) of schedule 2 to the 1973 Act (because the date of payment of that minimum sum might be said to be provided for by contractual stipulation), but that the remaining balance would still be regulated by paragraph 2(2)(b) of schedule 2 to the 1973 Act (because the parties' contract contained no stipulation as to the date, as opposed to an event, on which that balance was to be paid). On that alternative analysis, the obligation to pay the monthly "minimum payment" due in July 2012 might be found to have prescribed, but the obligation to pay the whole remaining balance would remain extant.

[26] I was invited to repel the defender's preliminary plea and to allow a proof before answer, reserving the pursuer's preliminary pleas. It was acknowledged that the defender's (peremptory) third plea-in-law remained at large to be determined after proof.

Discussion

[27] In my judgment, the pursuer's submissions are to be preferred. I explain my reasoning as follows.

Is article 5.2 of the Rome Convention applicable?

[28] The pursuer avers that, in respect that the contract is governed by English law (a matter which remains in dispute), the English (six year) rule on limitation applies.

[29] In response, the defender's primary position is that even if the applicable law of the contract is English law, the contract, being a "consumer contract" in terms of article 5 of the Rome Convention), the defender cannot, by virtue of the parties' choice of law, be deprived of the protection afforded to her by the "mandatory rules" of the law of Scotland (where she habitually resides); and that the Scottish rules concerning the short negative prescriptive period are an example of such "mandatory rules".

[30] In my judgment, the proper analysis is as follows. A contract is governed by the law chosen by the parties (article 3.1, Rome Convention; schedule 1, Contracts (Applicable Law) Act 1990). However, article 5 of the Rome Convention confers some protection on a consumer in the context of "*certain* consumer contracts" (my emphasis). The protection does not apply to *all* consumer contracts: it only applies to *certain* consumer contracts (see the heading of article 5). The particular consumer contracts to which the protection extends are defined in the indented paragraphs in article 5.2 (namely in circumstances where the conclusion of the contract was preceded by specific invitation addressed to the consumer, or by advertising in the consumer's home country, and the consumer had taken in that country all the steps necessary on his part to conclude the contract; or if the other party or his agent received the consumer's order in the consumer's home country; or if the contract is for the sale of goods and the consumer travelled from his home country to another country and gave his order,

provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy). In the context of those particular consumer contracts, notwithstanding the parties' choice of law under article 3, the consumer is not deprived of the protection afforded to him by "the mandatory rules" of the law of the country in which he has his habitual residence.

[31] Against that background, in my judgment the defender's primary submission fails for three reasons.

[32] Firstly, the defender has failed to aver (and failed to explain in submission) that the contract in the present case falls within the scope of article 5 (as one of the defined consumer contracts to which protection is extended). In other words, the defender has failed to bring herself (by averment or submission) within the ambit of article 5. Specifically, no explanation is offered (in averment or submission) to determine whether the defender claims that the contract in the present case was preceded by a specific invitation addressed to her, or by advertising, in Scotland, and that she took in Scotland all the steps necessary on her part for the conclusion of the contract; or whether the original creditor or its agent received the defender's order in Scotland. (The final qualifying criterion, in the third indented paragraph of article 5.2, is plainly not applicable to the present contract.) In short, standing the defender's pleadings (and submissions), article 5 is not engaged at all. Put another way, the defender is not entitled to advance the argument that article 5 applies because there is neither an averment nor submission to the effect that the present contract satisfied one or other of the three criteria to qualify as a protected "consumer contract".

Are the Scottish rules on prescription "mandatory rules" in terms of article 5.2 of the Rome Convention?

[33] Secondly, even if article 5 had been engaged, in my judgment the Scottish rules on prescription (specifically, those governing the short negative prescriptive period in the 1973 Act, section 6, schedule 2) are not of the nature of "mandatory rules" within the meaning of that term in article 5.2 of the Rome Convention.

[34] Although I was referred to no case law or commentary on the subject, I would understand the term "mandatory rules" to refer to rules of law (whether statutory or otherwise) which can properly be regarded as so fundamental in their nature or purpose as to justify over-riding the policy objective of the Rome Convention. What is required is an analysis, and comparison, of the competing rationales and objectives of, on the one hand, the Rome Convention, and, on the other hand, of the domestic rules that are said to be "mandatory". A qualitative judgment is then required to determine whether the domestic rule founded upon is so fundamental in its nature and purpose as to justify over-riding the conflicting rule (and policy objective) of the Rome Convention. Examples might include over-riding legal rules in the fields of employment law (for example, rules protecting against discrimination on grounds of race, sex, religion or other protected characteristics); consumer protection; implementation of international conventions (including ECHR rights); or fundamental illegality (*Dicey & Morris*, The Conflict of Laws, 32-129 to 32-140).

[35] Thus, a primary objective of the Rome Convention was to impose a uniform approach to the determination and recognition of the proper (or applicable) law of contractual obligations (see preamble, Rome Convention), as part of a continuing unification of laws in the field of private international law. The principle of freedom of choice (article 3.1) can be seen to be paramount, subject only to discrete exceptions. The desired international uniformity extended to the "scope" of the chosen applicable law. That chosen law was to govern, among other things, "the various ways of extinguishing obligations, and prescription and limitation of actions" (article 10.1(d)).

[37] In contrast, the underlying policy or rationale of the Scottish domestic rules anent the short negative prescriptive period are to prevent the subsistence and enforcement of stale obligations, in order to allow the timeous completion and closure of accounts, and to avoid evidential difficulties caused by the passage of time. That objective is, of course, laudable in itself. However, it is not easily characterised as a fundamental tenet of Scots law. Nor is it necessarily a policy or rationale that is so intrinsically worthy as to justify over-riding or "trumping" the equally admirable objective of cross-border harmonisation sought to be achieved by the Rome Convention, specifically to bring uniformity to disparate conflicting international approaches in the determination and recognition of the proper law of contractual obligations.

[36] Besides, the explicit inclusion of "prescription and limitation of actions" within scope of the applicable law is significant. It indicates, perhaps, that domestic rules on prescription are not readily to be regarded as mandatory rules in the context of article 5.2. It is well-known that many of the signatories to the Rome Convention have

differing domestic rules concerning time-bar periods. If the differing Scottish, French, German or Italian rules anent prescription or limitation are each to be regarded as "mandatory rules", which automatically oust inconsistent corresponding provisions of the parties' chosen foreign law, such a conclusion may tend to undermine a primary principle and objective of the Rome Convention, namely freedom of choice and uniformity of application across the signatory states. In my judgment, something more is required to make a domestic rule of prescription a "mandatory rule" within the meaning of article 5.2, having effect to oust the parties' chosen applicable law.

[37] In short, in my judgment the Scottish rules anent prescription (*a fortiori* the short negative prescriptive period) are just not important enough to justify the non-application of articles 3 & 10 of the Rome Convention.

[38] In reaching that conclusion, I do not discount the possibility that, in some exceptional circumstance, some aspect of the Scottish law of prescription might well justify over-riding an incompatible provision of the parties' chosen applicable law. But this is not such a case.

Section 23A of the Prescription & Limitation (Scotland) Act 1973

[39] Thirdly, and in any event, in my judgment section 23A of the Prescription and Limitation (Scotland) Act 1973 provides a complete answer to the defender's primary submission.

[40] Section 23A(1) provides that where the law of a foreign country falls to be applied as the applicable law governing an obligation, the Scottish courts must apply

any relevant rules of that foreign law relating to the extinction of the obligation or the limitation of time within which proceedings may be brought to enforce the obligation *to the exclusion of any corresponding rule of Scots law.* This provision, promulgated in a statute from the Westminster Parliament, is unequivocal.

[41] The defender's agent sought to argue that section 23A(1), which pre-dated the incorporation of the Rome Convention into UK law by virtue of the Contracts (Applicable Law) Act 1990, was impliedly repealed (or at least abrogated) by the 1990 Act. It was an attractive argument. One is left with the nagging feeling that the Rome Convention should perhaps, by subsequent amendment, have been included within the scope of section 23A(4) of the 1973 Act. But, in the event, it was not. The Rome I and Rome II Regulations are explicitly afforded a degree of hierarchical superiority; the Rome Convention is not. That omission does not necessarily lead to an incongruous result. The effect of section 23A of the 1973 Act is to put beyond doubt that Scottish domestic rules on prescription and limitation do not prevail over the corresponding rules of a foreign law chosen by the parties (so far as determined by the Rome Convention). This fortifies my earlier conclusion that Scottish rules on prescription were simply not considered important enough by the legislature to oust corresponding rules of foreign law chosen by the parties.

[42] Therefore, if the parties' contract in the present case is indeed governed by English law, it follows (by virtue of articles 3 & 10 of the Rome Convention, and section 23A(1) of the 1973 Act) that the English rules of limitation will apply to regulate the period of time within which proceedings must be brought to enforce obligations

thereunder, explicitly to the exclusion of corresponding Scottish rules of prescription and limitation.

[43] For present purposes, there are two possible exceptions to that rule. These exceptions appear in section 23A(2) of the 1973 Act and in article 5 of the Rome Convention (as incorporated by the 1990 Act).

[44] Firstly, according to section 23A(2) of the 1973 Act, a Scottish court could decline to apply the relevant foreign rule of law (relating to extinction of the contractual obligation), if the application of that foreign law would be "incompatible with the principles of public policy" by the Scottish court. Secondly, it would, in theory, be open to a party, such as the defender, to seek to resist the application of the chosen foreign law by virtue of article 5.2 of the Rome Convention (incorporated by 1990 Act). It seems to me that both "exceptions" can exist independently and can operate in parallel. That is because the first exception (under section 23A(2) of the 1973 Act) applies generally (and is not restricted to specified consumer contacts); whereas the second exception (under article 5.2 of the Rome Convention) applies only to a narrow category of cases, namely to "certain consumer contracts" as therein defined.

[45] For the reasons explained above (see paragraph [32], above), the defender cannot found upon article 5.2 of the Rome Convention; and, even if she could, the article is not engaged.

[46] As for section 23A(2) of the 1973 Act, the defender's agent did not seek to argue that it applied. In my judgment, he was right not to do so. Again, in the first place, there is no explanation (in averment) as to the alleged "principles of public policy" which

might be said to be offended by the application of the English limitation rules, nor how English limitation rules would be "incompatible" with any such principles. In the second place, apart from that technical deficiency, in my judgment it is inconceivable that a Scottish court could justify the conclusion that the application of the English (six year) limitation rule would be incompatible with "principles of public policy" applied by the Scottish courts. I draw support for that conclusion from the dicta in *Deutsche Bahn AG* v *MasterCard Ink, supra.* The mere existence of a difference between the Scottish quinquennial prescription (of five years) and the English limitation period (of six years) is not, of itself, sufficient to justify the conclusion that the English rule is incompatible with any principles of public policy applied by the Scottish courts. The periods may be different, but they are not so strikingly different – and the English rule is not so offensive to the rationale underlying the Scottish rule – as to justify the conclusion that "principles of public policy" are affronted. Different legal systems operate different periods of prescription and limitation. Absent something more, the mere existence of such a difference does not, of itself, justify the conclusion that section 23A(2) of the 1973 Act is engaged.

[47] For these reasons, the defender's primary challenge to the relevancy of the pursuer's averments anent English law, and the applicability of the English law of limitation, fails.

What is the "appropriate date" from which the Scottish prescriptive period would run?

[48] The pursuer advanced an *esto* position in averment. It avers that, *esto* the parties' contract is not governed by English law, nevertheless the action is not time-barred because it was commenced within the (five year) short negative prescriptive period under Scots law (article 7). For this purpose, the pursuer avers that the Scottish five year prescriptive period commenced on 14 November 2012.

[49] The defender challenged the relevancy of these averments. The defender submitted that the five year prescriptive period would start to run from July 2012.

[50] The issue in dispute here concerns the "appropriate date" for the purposes of prescription. This turns upon the proper construction of the parties' contract and the proper interpretation of the Prescription and Limitation (Scotland Act 1973, section 6, schedule 2, paragraph 2. (The parties' legal representatives were agreed that we were concerned here with a contract of loan as referred to in paragraph 2.)

[51] Unfortunately, the factual position is rather murky. The problem is that it is not entirely straight-forward to determine how the sum sued for (namely £5,258.56) is said to have accrued or when it first became payable. The pursuer has lodged, and adopted *brevitatis causa*, a statement of account (article 4; item 5/8 of process), but it is not clear from that statement of account when or how the sum sued for accrued, and the pursuer's counsel explicitly refrained from placing any reliance on the statement or offering any submission as to whether the sum sued for had been incurred before or after the last acknowledged minimum payment (in June 2012). That said, he submitted that enough had been averred to justify inquiry at proof.

[52] I agree. The pursuer offers to prove (and, indeed, it is a matter of admission) that the parties entered into a credit agreement relating to the operation of a credit card; that the defender fell into arrears; that the agreement was terminated; and that a loan balance of £5,258.56 was outstanding. The terms and conditions applicable to the parties' contract (item 5/9 of process) do not expressly define a fixed term or date for repayment of the loaned funds. Indeed, it is difficult to discern from the terms and conditions any specific date for repayment. Instead, repayment appears to be linked to specified occurrences or *events* (e.g. failure to pay a minimum payment specified in a monthly statement), which may occur at any time, or not at all, rather than to specific *dates* or time-scales.

[53] As a result, I am inclined to the preliminary view that, if the English limitation rules do not apply, then, for the purposes of the Scottish rules of prescription, the "appropriate date" in relation to the obligation of the defender is determined by reference to paragraph 2(2)(b) of schedule 2 to the 1973 Act. That is because, on the face of the parties' credit agreement, the contract does not appear to contain any stipulation which makes provision with respect to the *date* (as opposed to the *events*) on which repayment of the sum is to be made. In those circumstances, in my preliminary view paragraph 2(2)(a) of schedule 2 to the 1973 Act does not apply; instead, paragraph 2(2)(b) appears to apply. That means that the appropriate date is the date when a written demand for repayment is made.

[54] On that analysis, the first occasion on which the written demand for repayment could be made was 14 November 2012, being the date on which the statutory

termination notice was allegedly issued to the defender. Prior to that date, the pursuer was, by statute, not entitled to demand earlier payment of any sum due, or indeed to terminate the agreement by reason of any alleged breach by the defender of the agreement (sections 87(1)(a) & (b), 1974 Act). In other words, by virtue of section 87 of the 1974 Act, the pursuer was not entitled to treat the non-payment of any minimum monthly payment as a breach of the credit agreement by the defender and, accordingly, the pursuer was not entitled to seek payment of the whole balance then outstanding, until the statutory notices had been served.

[55] That said, I do not express a final view on this issue. While the pursuer has averred sufficient to justify inquiry at proof, the factual position remains sufficiently unclear that it would be inappropriate to express a concluded view as to the date on which the Scottish five year prescriptive period (if it is applicable at all) would begin to run in the circumstances of this particular contract. The matter is best determined following proof.

[56] It is sufficient to record that the defender's challenge to the relevancy of the pursuer's averments in this respect also fails, though the defender's peremptory plea (plea-in-law 3) regarding extinction of the debt remains at large for the purposes of the proof.

Decision

[57] For the foregoing reasons, I repel the defender's preliminary plea (plea-in-law number 1) and allow parties a proof before answer of their respective averments,

reserving the pursuer's preliminary pleas (pleas-in-law numbers 2, 3, and 4). (I am conscious that, on one view, pleas-in-law 3 & 4 may not be habile, in their terms, to survive the allowance of a proof. I was not addressed on the subtleties of this technical pleading point so I shall err on the side of caution and reserve those pleas meantime.)

[58] Meantime, the issue of expenses is reserved.

[59] I shall assign a separate hearing to determine expenses and incidental aspects of procedure. In order to progress matters, I have taken the liberty of appointing parties to intimate to the sheriff clerk, prior to the forthcoming procedural hearing, lists of unsuitable dates for a two day diet of proof before answer.