SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 1
A391/17

Lord Justice Clerk
Lady Paton
Lord Drummond Young

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the cause

(FIRST) THE FIRM OF BARRY AND SUSAN PEART; (SECOND) BARRY PEART and (THIRD) SUSAN PEART

Pursuers and Respondents

against

PROMONTORIA (HENRICO) LIMITED

Defender and Reclaimer

Pursuers and Respondents: G Reid; MBM Commercial LLP
Defender and Reclaimer: Ower; Addleshaw Goddard LLP

21 December 2017

[1] The summons in this case was signetted on 24 November 2017. At the same time, the respondents enrolled a motion for *interim* interdicts. A caveat having been lodged, the Keeper informed the reclaimer of the date and time for the hearing in terms of RCS 23.9, and the reclaimer took the opportunity to be represented and to oppose the motion. On

28 November 2017 the Lord Ordinary pronounced an interlocutor granting the interdicts sought and made an award of expenses against the reclaimer, with decerniture.

[3] The summons has not been served, and has thus not been lodged for calling.

[4] RCS 38.2(4) provides that certain interlocutors may be reclaimed against, without leave, within 14 days after the date of the interlocutor. An interlocutor granting, refusing, recalling, or refusing to recall, *interim* interdict or *interim* liberation is one such (RCS 38.2(5)(e)).

[5] On 12 December, within the reclaiming period the reclaimer enrolled a motion for review of the Lord Ordinary's interlocutor, and for urgent disposal. On 14 December the respondents lodged a Note of Objection to the competency of the reclaiming motion. The procedural judge before whom the case was to call referred the matter to a bench of three judges (RCS 38.12(7)) for disposal of the objection.

[6] Section 28 of the Court of Session Act 1988 provides:

> "Any party to a cause initiated in the Outer House either by a summons or a petition who is dissatisfied with an interlocutor pronounced by the Lord Ordinary may, except as otherwise prescribed, reclaim against that interlocutor within such period after the interlocutor is pronounced, and in such manner, as may be prescribed."

"Party" is not defined in the statute. The RCS provide for both the period and manner of reclaiming, and also provide a definition of "party" in RCS 1.3 which states:

> "(1) In these Rules, unless the context otherwise requires-
>
> "party" means a person who has entered appearance in an action or lodged a writ in the process of a cause (other than a minuter seeking leave to be sisted to a cause); and "parties" shall be construed accordingly;
>
> "writ" means summons, petition, note, application, appeal, minute, defences, answers, counter-claim, issue or counter-issue, as the case may be."

[7] Echoing section 28, RCS 38.1 provides:

> "(1) This Chapter applies subject to any other provision in these Rules or any enactment.
>
> (2) Any party to a cause who is dissatisfied with an interlocutor pronounced by—
>
> (a) the Lord Ordinary;
>
> (b) the Lord Ordinary in Exchequer Causes; or
>
> (c) the vacation judge,
>
> and who seeks to submit that interlocutor to review by the Inner House shall do so by reclaiming within the reclaiming days in accordance with the provisions of this Chapter."

[8] The nub of the respondents' argument was that, for the purposes of reclaiming, the reclaimer was not a "party to a cause" in terms of this rule, when read with RCS 1.3, as they had neither entered appearance nor lodged a specified writ. The respondents' argument was supplemented by reference to *Scottish Ministers* v *Mirza* 2015 SC 334 where the Lord Ordinary held that a company, cited as respondent in a petition, was not a party since it had neither entered appearance nor lodged answers.

[9] We were unable to accept the respondents' submissions, which in our view fail to take account of two important qualifications. The first is that the definition in RCS 1.3 is prefaced by the words "unless the context otherwise requires". The second is that RCS 38.1 makes it clear that chapter 38 applies "subject to any other provision in these Rules or any enactment". The simple answer to the respondents' submission is that RCS 1.3 cannot apply to a cause at any stage before the summons has been lodged for calling, since its terms are incapable of being met until after that point. In other words, the fact that the summons had not called means that the context requires "party" to mean something other than the definition in RCS 1.3.

[10] The case of *Scottish Ministers* v *Mirza* deals with an entirely different situation. The summons had been served, and had called. One of the respondents had lodged answers; the other had not. They had not entered appearance. After a hearing, at which those respondents were not represented, the Lord Ordinary made the order sought, one for recovery of property. Only after all this had occurred did they seek to enter the process in order to reclaim: unsurprisingly, it was held incompetent for them to do so.

[11] In any event, the purpose of allowing a person to lodge a caveat is to ensure that they are advised of any application to which the caveat relates, and given an opportunity to be heard in opposition thereto. For this purpose a person to whom intimation of a motion requires to be made under the Rules, or by the court, is a "party" (RCS 23.1). This is part of the background against which RCS 1.3 must be read to determine whether the "context otherwise requires" party to be give some different meaning.

[12] The respondents' argument would be productive of absurdity and injustice. It would mean that a person adversely affected by an *interim* order made prior to calling, which might have severe and immediate financial consequences, quite apart from the question of expenses, would have no way of challenging that order, other than on a change of circumstances when they would be entitled to enrol a motion for recall. An unscrupulous pursuer could avoid or delay serving the summons or lodging it for calling, thus actively preventing the defender from having a remedy against the effect of the order. Even allowing for the probability of Protestation by the defender, the process could easily be delayed by several months.

[13] It is impossible to countenance such a consequence. As was observed in *Semple Cochrane PLC* v *Hughes* 2001 SLT 1121, (Lord Carloway), para 10:

> "The rules of court are devised to regulate litigation and, in that regard, to assist both the parties and the court in arriving at a just conclusion in accordance with the law as expeditiously as is reasonable in all the circumstances."

[14] We accordingly repelled the Note of Objection and ordered that the reclaiming motion should proceed, granting the application for urgent disposal.