EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

2021 CSIH 1
A375/17

OPINION OF LORD DOHERTY

in the reclaiming motion

by

M W (AP) FE

Pursuer and Reclaimer

against

B W, as the continuing attorney of M R W in her personal capacity and as executrix nominate of the late T B W

Defender and Respondent

Pursuer and Reclaimer: Party
Defender and Respondent: Welsh; MBS Solicitors

7 January 2021

Introduction

[1] The late T B W ("the deceased") died testate on 11 June 2001. He had executed a will dated 20 May 1988 ("the will"). M R W ("Mrs W") is the widow of the deceased. The pursuer is one of their three sons. The other sons are the defender, who lives in Japan, and SW, who lives in Eastbourne. The deceased and Mrs W had lived together in a substantial four storey townhouse ("the house") in Glasgow. Each of them owned a one-half *pro indiviso* share of the house. The will nominated Mrs W as executor on the deceased's estate,

and she obtained confirmation. Mrs W continues to reside in the house, but she wishes to sell it and move to live in more suitable accommodation nearer to S W. She is 89. The defender maintains that Mrs W suffers from increasing physical and mental frailty, and that her continued residence in the house gives rise to concerns for her personal safety.

[2] The defender also maintains that the pursuer has done everything in his power over many years to prevent Mrs W from selling the house. Following his father's death the pursuer has pursued a succession of Court of Session litigations against his mother. In 2012 he raised an action (A463/12) seeking *inter alia* (i) reduction of the will and (ii) proving the tenor of a document dated 26 February 2000 which he maintained was a later will of the deceased. That document purported to provide that the pursuer should receive a liferent of any interest the deceased may have in the house "or any property representing such interest in said house following a sale after my death". That action was settled by the parties. They entered into Heads of Agreement dated 19 May 2015 ("the Heads of Agreement") and a Joint Minute dated 20 May 2015 ("the Joint Minute"), and on the latter date the court interponed authority to the Heads of Agreement and the Joint Minute and pronounced decree of absolvitor. In terms of the Heads of Terms it was agreed that in turn for the pursuer agreeing to discharge his right to claim legal rights from the deceased's estate (a) there would be held in liferent trust for him (i) the sale proceeds of the deceased's one-half share in the house; and the (ii) manuscripts, compositions and materials of the deceased's musical archive and the related intellectual property rights; and (b) ownership of the deceased's Steinway grand piano would be transferred to him.

[3] In 2017 the pursuer raised the present action, which concluded for (1) declarator that the pursuer had been induced to enter into the Heads of Agreement by misrepresentation by Mrs W; (2) reduction of the Heads of Agreement, the Joint Minute, and the decree of 20 May

2015. The gist of the case made was that, unknown to the pursuer, at the time the Heads of Agreement were entered into Mrs W had been in breach of an undertaking which she had given during the course of the action that she would not intromit with the deceased's estate. The pursuer maintained that while an undertaking was in place Mrs W had granted certain authorisations to third parties to make use of some of the deceased's music. Mrs W denied that there had been any material breach of the undertaking.

[4] A four day diet of proof before answer was set down for June 2019. In early June 2019 the present defender was sisted in room of Mrs W. On the first day of the proof the pursuer's motion for it to be discharged was refused. On the second day of the proof it was discharged on the joint motion of the parties to allow a mediation to take place. However, the mediation did not resolve the dispute. On 26 July 2019 the court ordered that a further four day diet of proof before answer should take place on 24 September 2019 and the three following days, the suitability of the dates having been agreed between the parties. On 23 August 2019 the court refused the pursuer's motion to discharge that diet. A further motion by the pursuer to discharge the diet was refused on 11 September 2019. On the first day of the proof the pursuer moved again for a discharge, relying on this occasion on soul and conscience letters from Dr M Cameron, Consultant Psychiatrist and Dr Willens (respectively dated 18 September 2019 and 28 August 2019). Both doctors opined that the pursuer was not fit to prepare for a proof to be heard on 24 September 2019. In light of the soul and conscience letters Lord Brailsford granted the motion for a discharge. On 9 October 2019 the court ordered that the diet of proof should take place on 17 December 2019 and the three following days. On the first day of that proof the pursuer's senior counsel abandoned the action on the pursuer's instructions by lodging a minute of abandonment in terms of rule of court 29.1. Senior counsel indicated the pursuer's intention to seek decree of dismissal in

terms of rule 29.1(1)(b). The court allowed the minute of abandonment to be received and found the pursuer liable to the defender in the expenses of process.

[5] In 2018 the pursuer brought petition proceedings (P26/18) seeking to interdict Mrs W from selling the house. The basis of those proceedings largely replicated the grounds of the present action. At that time the pursuer continued to instruct solicitors and counsel to act on his behalf. The Lord Ordinary refused interim interdict. The defender maintains that the Lord Ordinary indicated that he was not satisfied that the pursuer had a *prima facie* case, and that in any case the balance of convenience did not favour the grant of interim interdict. The pursuer took no further steps to pursue those proceedings, but he did not abandon them and they remained pending. However, on 26 March 2020 he lodged a further petition (P812/20), on this occasion as a party litigant. That petition is in the same terms as the 2018 petition. On 6 May 2020 Lord Brailsford granted the pursuer leave to proceed with the petition without obtaining the signature of counsel or of another person having a right of audience. Thereafter there was no further procedure in that petition for several months. The pursuer has not instructed legal representation in relation to it. On 3 December 2020 Lord Brailsford granted the defender's opposed motion for urgent disposal of the petition. He appointed the parties to be heard by order on Monday 11 January 2021 for the purpose of identifying an appropriate date for a substantive hearing and to determine the conduct of that substantive hearing.

[6] An account of expenses was prepared by the defender in the present action and was taxed by the Auditor of the Court of Session. An Auditor's report taxing the expenses at £52,590.70 was issued and intimated to the parties on 2 September 2020. On the same date the defender's solicitors intimated to the pursuer's solicitors that if the expenses were not paid within 28 days the defender would seek decree of absolvitor. On 8 September 2020 the

Auditor intimated that the taxed expenses were in fact less than originally intimated (because the defender had been in receipt of a legal aid certificate for part of the litigation). The revised report intimated to the parties on 8 September 2020 found the pursuer's liability in expenses to be £50,084.70. The pursuer did not settle that account within 28 days of 8 September 2020. The defender moved the court to pronounce decree of absolvitor, and the court pronounced that interlocutor on 13 October 2020.

[7] On 9 November 2020 the pursuer enrolled the following motion:

> "On behalf of the Pursuer that the reclaiming print be received and the defender and her attorneys cease proceeding (sic) with the sale of the Pursuer's home and the removal and or sale of his belongings, the defender and her attorneys having (sic) been informed of this application and having accepted service of a Petition seeking interdict (sic) and interim interdict which is awaiting the defender's answers."

[8] The defender lodged a note of objections to the competency of that motion. In the event of the reclaiming motion not being refused as incompetent, the defender seeks urgent disposal. On 18 November 2020 the court appointed the parties to be heard on those matters at a hearing on the Single Bills before a procedural judge on 15 December 2020, and it ordered them to lodge notes of argument in terms of Rule of Court 38.12(6) by 27 November 2020. On 20 November 2020 the pursuer enrolled motions (i) to extend the time for lodging his note of argument until "the Hilary term"; (ii) to sist the reclaiming motion until "the Hilary term". The extension and the sist were said to be for the purpose of enabling the pursuer to obtain advice and representation and to allow the petition proceedings to be completed. Following receipt of the motions the court advised the pursuer that he should come to the hearing on 15 December 2020 prepared to respond to the defender's competency objections. The defender duly lodged a note of argument by the appointed date. The pursuer did not lodge a note of argument.

The hearing on 15 December 2020

The parties' submissions

[9] Counsel for the defender, Mr Welsh, opposed the pursuer's motions. The pursuer should not be permitted to delay matters any further. There had been a tortuous history of protracted litigation with the pursuer doing everything within his power to impede the sale of the house. However, in terms of paragraph 1 of the Heads of Terms it had been agreed that Mrs W should expose the house for sale until it was sold. The pursuer had no right or claim to the house but, as he well knew, the existence of the litigations had a deadening effect on the prospects of obtaining a sale. Mrs W is 89 and in declining physical and mental health. Living in a four storey house alone is difficult and dangerous for her. In support of these factors Mr Welsh referred to a report from Mrs W's general medical practitioner, Dr Peter Dawes, dated 9 March 2020, and emails from neighbours of Mrs W (Anthony Deutsch and Barbara Deutsch) also dated 9 March 2020. Unless Mrs W is able to sell the house she would not be able to move to live in more suitable accommodation near her son in Eastbourne.

[10] Mr Welsh submitted that the reclaiming motion should be refused as incompetent.

[11] First, the motion which the pursuer had enrolled was not a reclaiming motion. It did not comply with the terms of rule 38.5 (1):

> "**Method of reclaiming**
>
> 38.5.—(1) A party who seeks to reclaim against an interlocutor shall mark a reclaiming motion by enrolling a motion for review in Form 38.5 before the expiry of the reclaiming days."

The form stipulated in Form 38.5 is:

> "On behalf of the pursuer for review of the Lord Ordinary's interlocutor of [date]."
> Rule 1.4 provides:

"**Forms**
1.4. Where there is a reference to the use of a form in these Rules, that form in the appendix to these Rules, or a form substantially to the same effect, shall be used with such variation as circumstances may require."

The form of the pursuer's motion was not in accordance with Form 38.5, nor was it in a form substantially to the same effect. It did not seek review of any interlocutor, let alone a specified interlocutor.

[12] Second, even if the motion was in a valid form, it had not been enrolled within the reclaiming days as required by rule 38.5 (1). The reclaiming days had expired on 4 November 2020. The motion had been enrolled on 9 November 2020. It had not included an application in terms of rule 38.10 to allow a motion for review to be received outwith the reclaiming days and to proceed out of time.

[13] Third, the pursuer had abandoned the action in terms of rule 29.1(1) and sought decree of dismissal. Rule 29.1 provides:

"**Abandonment of actions**

(1) A pursuer may abandon an action by lodging a minute of abandonment in process and-
(a) consenting to decree of absolvitor; or
(b) seeking decree of dismissal.

(2) The court shall not grant decree of dismissal under paragraph (1)(b) unless-
(a) full judicial expenses have been paid to the defender, and to any third party against whom the pursuer has directed any conclusions, within 28 days after the date of intimation of the report of the Auditor on the taxation of the account of expenses of that party; …

(3) If the pursuer fails to pay the expenses referred to in sub-paragraph (a) of paragraph (2) to the party to whom they are due within the period specified in that sub-paragraph, that party shall be entitled to decree of absolvitor with expenses."

The pursuer had not paid the taxed expenses to the defender within 28 days of intimation of the Auditor's report on 8 September 2020 (indeed, some of those expenses were still outstanding at the date of the hearing). In those circumstances the defender was entitled to

obtain decree of absolvitor in terms of rule 29.1(3), and the Lord Ordinary had required to grant that decree. He had had no power to do otherwise. Reference was made to *Cobb* v *Baker Oil Tools* 1984 SC 60 where the court had considered an analogous sheriff court rule. Accordingly the reclaiming motion against the interlocutor of 13 October 2020 was incompetent.

[14] Fourth, in effect, the pursuer was seeking to reclaim an interlocutor which proceeded from his own motion to abandon. It was well established that a party could not reclaim an interlocutor which had been obtained at his motion or with his consent: *Watson* v *Russell* (1894) 21 R 433; *McGuinness* v *Bremner Plc* 1988 SLT 340.

[15] Finally, if the reclaiming motion was not refused as incompetent the court should grant urgent disposal because no relevant ground for attacking the interlocutor had been disclosed and there was a need for the house to be sold and for Mrs W to be relocated as soon as possible.

[16] The pursuer reminded the court that he is now a party litigant and that allowance ought to be made for that. In that connection he said that the Equality and Human Rights Commission's report "Inclusive justice: a system for all" noted the challenges faced by courts when unrepresented parties appear before them. He submitted that due account should be taken of his medical conditions. He is registered as disabled. He is prescribed a number of medications. He referred the court to a soul and conscience letter dated 10 December 2020 from his general practitioner, Dr Marni Willens. The letter stated:

> "My patient has requested that I provide an updated soul and conscience letter regarding his fitness to attend a whole day hearing on 15th December 2020…
>
> Due to his chronic spinal condition this proposal would make it impossible for the patient to participate without severe pain and discomfort, increasing over the course of the day, even with comfort breaks built in. As a result he would need to take

> strong painkillers which would have a negative effect on his cognition and concentration and this would put him at a disadvantage at the hearing.
>
> I therefore support his appeal that the hearing should be split over at least two days to allow this information to be taken into account…"

The pursuer also drew my attention to the earlier soul and conscience letter dated 18 September 2019 prepared by Dr M Cameron which had been obtained by the pursuer to support his motion for a discharge of the diet of proof due to commence on 24 September 2019. At that time Dr Cameron had indicated that he did not think that the pursuer was mentally fit to conduct a proof beginning on 24 September 2019, and that if he were required to do so within that timescale the resulting stress would represent a grave risk to his mental and physical health.

[17] The pursuer indicated that he had tried to obtain legal representation but without success. The Covid-19 pandemic made it harder to instruct a solicitor. Many offices were closed, with staff working from home.

[18] The pursuer explained that after intimation of the Auditor's report on 8 September 2019 he had requested his solicitors to ask for time to pay the taxed expenses. He submitted that since there was to be a substantive hearing in the petition proceedings the reclaiming motion should be postponed or sisted until the petition proceedings were completed. He maintained that the purpose of the reclaiming motion was to allow the court the opportunity to decide when it was that the deceased had prepared his last will and what the terms of that will were.

[19] Midway through his submissions the pursuer made a motion in terms of rule 2.1 to be relieved from the consequences of his failures to comply with the rules of court. He explained that the reclaiming print had been revised on a number of occasions before it had been accepted by the general department. It would be unfair not to relieve him from the

consequences of his failures. He was a party litigant who was litigating during a pandemic, and he had sought the advice of court staff in doing what he had done.

[20] The pursuer suggested that it was not necessary for Mrs W to sell the house or to relocate. He did not accept that the information provided by Dr Dawes and by Mr and Mrs Deutsch was correct. In his view Mrs W could live safely on the ground floor of the house. There was suitable accommodation for her there. If necessary, she could obtain home care assistance.

[21] The court called upon Mr Welsh to respond to the pursuer's motion that he should be relieved from his non-compliance with the rules. Mr Welsh indicated that while the pursuer had mentioned only the general dispensing power in rule 2.1, rule 38.10 made specific provision for the circumstances in which a late reclaiming motion might be permitted to proceed. However, similar considerations arose under both of those rules. The pursuer ought not to be relieved from the consequences of his non-compliance. If he had indeed conferred with the general department in relation to the form of the reclaiming motion it seems very unlikely that his attention was not drawn to rule 38.5 (1) and Form 38.5. No adequate explanation had been advanced to explain the incorrect form of the motion; or why it had been enrolled after the expiry of the reclaiming days; or why the motion for relief was made for the first time at the hearing. There was no proper legal basis for the reclaiming motion. It was wholly lacking in merit. In those circumstances it was in the interests of justice that the pursuer's motions should be refused and that the reclaiming motion should be refused as incompetent.

Decision and reasons

Introduction

[22] Due to the current Covid-19 emergency the hearing was a remote hearing rather than an in-person hearing. A video-conference hearing had been offered to the parties, but the pursuer indicated that the computer facilities which he possessed did not enable him to participate in a video-conference. Accordingly, the hearing was by telephone conference.

[23] I make allowance for the fact that at this stage in the action the pursuer is a party litigant. I also recognise and take account of the pursuer's medical disabilities. In that regard, the letter of 18 September 2019 from Dr Cameron is not of material assistance. It concerned the pursuer's medical condition 15 months ago rather than at the present time; but, more importantly, it related to the question whether at that time the pursuer was fit to prepare for and conduct the proof which was due to begin less than a week later.
Dr Willens' letter of 10 December 2020 is recent. However, Dr Willens appears to have been under the erroneous impression that the hearing before me was to be for a full day; and her reference to the pursuer's fitness "to attend" a hearing may suggest that she understood that the pursuer would have to attend at court rather than participate in a telephone conference hearing while within his home. In fact, the hearing had been set down for 30 minutes. It was due to commence at 10.00am but the pursuer appeared to have difficulty phoning in. The court waited for him. He managed to phone in eventually and the hearing commenced at 10.39. Mr Welsh completed his submissions at 11.20. At that point the pursuer requested a short comfort break. About 8 minutes later he indicated that he was ready to resume. His submissions lasted approximately 55 minutes, after which Mr Welsh's response took about 5 minutes. The pursuer did not suggest that he was unable to participate fully in the hearing before me. My clear impression was that he was able to. During his submissions and all

discourse with him my impression was that he was courteous and alert, and astute to ensure that his position was properly understood by the court. He was apologetic about the delay and inconvenience which had been caused between 10.00 and about 10.30, and he thanked the court for its patience throughout the hearing.

[24] About 2 hours after the hearing had concluded the pursuer emailed the clerk of court to draw the court's attention to a matter he had omitted to mention at the hearing. He repeated his apology for the delay at the start of the hearing and he thanked the clerk for "rescuing the situation and allowing the hearing to proceed" and for his "generous and patient assistance". The defender's solicitor commented by email later that day on the contents of the pursuer's email. The pursuer and the defender's solicitor emailed further comments for the attention of the court over the next few days. In the particular circumstances of this case I allowed the pursuer to supplement his oral submissions in this way after the hearing had ended, and I have considered his emails and the defender's responses. It is unnecessary to narrate the contents of the exchange because in my opinion most of the issues discussed are not material to the matters which I require to decide. What is noteworthy, however, is the pursuer's explanation for the reclaiming motion:

> "The purpose of the reclaimer's application is to finally allow the Court the opportunity to consider and decide a single issue, namely, when did the deceased write his last will and what did it say."

[25] On the basis of the material before me I am satisfied that Mrs W is elderly and that she suffers from increasing physical and mental frailty. I also accept that living alone in her present accommodation is difficult for her; that it presents risks to her personal safety; and that it is desirable that more suitable provision for her accommodation and care is made for her elsewhere. However, the extant litigations make selling the house very difficult.

[26] The litigations have been protracted and costly. The pursuer now appears on his own behalf, but when the action was abandoned by him he was represented by solicitors and senior counsel. At times during the present action the defender has instructed counsel and solicitors and at other times he has represented himself (see the interlocutors of 7, 11, and 12 June and 27 July 2019).

Competency

[27] In my opinion the reclaiming motion is incompetent.

[28] I agree with Mr Welsh that the motion which the pursuer enrolled on 9 November 2020 does not comply with the requirements of rule 38.5 (1). It is neither in the form set out in Form 38.5 nor is it in a form substantially to the same effect (rule 1.4). The essence of the defect is that the motion does not seek review of a specified interlocutor. In order to comply with the rule it is essential that a motion should do that. In my opinion the failure to comply with the rule is a material matter. It is not a mere formal or technical point. It is matter of some importance.

[29] I also agree that in any event the motion is incompetent because it was not enrolled until 5 days after the reclaiming days had expired.

[30] However, I am not convinced that Mr Welsh's third and fourth arguments on competency are well-founded.

[31] While in my opinion it is correct that the Lord Ordinary was obliged to grant decree of absolvitor in the circumstances, strictly speaking I doubt if that *per se* makes the reclaiming motion incompetent. The rules of court do not provide that a decree of absolvitor pronounced by reason of a defender's application under rule 29.1 (3) may not be reclaimed. In my opinion the better view may be that had the pursuer enrolled a motion which

complied with rule 38.5 (1), technically the motion would have been competent in terms of the rules, but there would have been be no relevant legal grounds to review the interlocutor of 13 October 2020. Be that as it may, where decree of absolvitor has been granted following a minute of abandonment and a failure by the pursuer to pay the taxed expenses within 28 days of intimation of the Auditor's report, normally the court ought not to countenance granting a reclaiming motion which seeks review of the interlocutor which granted decree of absolvitor (*cf McCue* v *Scottish Daily Record and Sunday Mail Ltd* 1998 SC 811, at p 824D-F (see *infra*)).

[32] I turn to Mr Welsh's fourth argument. In *Jongejan* v *Jongejan* 1993 SLT 595 Lord President Hope observed at p 595C-E (delivering the Opinion of the Court):

> "The submission of counsel for the respondent that the reclaiming motion was incompetent was based on principles which are well established and were not seriously in dispute. There is no doubt that it is incompetent for a party to reclaim against an interlocutor which has been pronounced on his own motion. In *Watson* v *Russell* it was held to be incompetent for a party to reclaim against an interlocutor pronounced of consent with a view to submitting a prior interlocutor to review. The reclaimer founded on s 52 of the Court of Session Act 1868, the provisions of which are now to be found in rule 262 (c) of the Rules of Court. Lord President Robertson noted that no other argument was advanced in support of the proposition that a party is entitled to reclaim against an interlocutor pronounced on his own motion, and added that 'good sense forbids the idea'. Decisions to the same effect, in regard to interlocutors pronounced of consent, are to be found in *Paterson* v *Kidd's Trs* [(1896) 23 R 737] and *Barton* v *Caledon Shipbuilding and Engineering Co Ltd* [1947 SLT (notes) 12]. The principle is that a party cannot seek the recall of an interlocutor which has been granted on his own motion or with his consent, because his own actings exclude the appeal."

That statement of the law was followed and applied by the First Division in *Prospect Healthcare (Hairmyres) Ltd* v *Kier Build Ltd* 2018 SC 155, per the Opinion of the Court delivered by Lord President Carloway at para [25]. In that case the court was referred to and considered the full bench decision of *McCue* v *Scottish Daily Record and Sunday Mail Ltd*,

supra, where the Opinion of the Court delivered by Lord Justice-Clerk Cullen had opined (at p 824D-F):

> "It remains for us to say that in so far as the opinions in the decisions dealing with the actings of parties after a prior interlocutor have indicated that subsequent review was excluded as not being 'competent', those observations are disapproved, for the reasons which we have already given. The true question in such cases is not one of competency but of whether the court should exercise the power of review which is available. During the course of the discussion our attention was drawn to cases in which it was held that it was incompetent to reclaim against an interlocutor pronounced on the reclaimer's motion with a view to submitting a prior interlocutor to review (*Watson* v *Russell*; *McGuiness* v *Bremner plc*). Once again it does not appear to us that the true objection to a reclaiming motion against an interlocutor pronounced on the reclaimer's motion or of consent is that it is not competent. It is that the court should not normally countenance it."

However, the court in *Prospect Healthcare (Hairmyres) Ltd* v *Kier Build Ltd* concluded:

> "[25] It is clear that, despite some variation in stance (*supra*), the defenders moved at the bar for the court to 'dismiss' their third-party notice upon payment by them of the third parties' full judicial expenses. The defenders stated in terms that they did not challenge that part of the interlocutor of 15 June 2016 which made that decerniture expressly 'on the unopposed motion of the defender'. Since that part of the interlocutor was ultimately made upon their own motion, it is not competent for the defenders to seek to review it (*Jongejan* v *Jongejan*, Lord President (Hope), delivering the opinion of the court, at 597, following *Watson* v *Russell*, Lord President (Robertson), p 434). It follows that the third parties' objection to the reclaiming motion will be sustained in so far as it relates to a challenge to that part of that interlocutor. In reaching the conclusion, the court has not overlooked the dictum in *McCue* v *Scottish Daily Record and Sunday Mail (No 1)* (p 824) that there may be abnormal features which would allow the court to review an interlocutor pronounced on the motion of a reclaimer. No such features are present in this case."

[33] In the present case the motion for decree of absolvitor was neither the pursuer's motion nor a joint motion. It was the defender's motion. The motion was not opposed by the pursuer, but he did not mark consent to it. In those circumstances in my opinion the pursuer's actings do not fall within the ambit of the principle described in *Jongejan*. However, since the basis upon which the pursuer abandoned the action was that he would only be entitled to decree of dismissal if he paid the expenses within 28 days of intimation of the Auditor's report, and that if he did not pay them within that period the defender would

be entitled to absolvitor, in my opinion there are no relevant grounds for reclaiming. In any case, in my opinion the pursuer has not articulated even an arguably relevant ground. In the whole circumstances it is highly unlikely that the court would countenance granting a reclaiming motion.

Relief of the pursuer's failures to comply with the rules?

[34] Rules 2.1 and 38.10 provide:

> "**Relief for failure to comply with rules**
>
> 2.1.- (1) The court may relieve a party from the consequences of a failure to comply with a provision in these Rules shown to be due to mistake, oversight or other excusable cause on such conditions, if any, as the court thinks fit.
>
> …
>
> **Reclaiming out of time**
>
> 38.10.—(1) In a case of mistake or inadvertence, a procedural judge may, on an application made in accordance with paragraph (2), allow a motion for review to be received outwith the reclaiming days and to proceed out of time on such conditions as to expenses or otherwise as the judge thinks fit.
>
> (2) An application under paragraph (1) shall be made by motion included in the motion for review made under rule 38.5(1)."

[35] The pursuer seeks relief from the failure to comply with the requirement of rule 38.5(1) that a reclaiming motion should be "a motion for review in Form 38.5" (or in substantially the same form). I am not satisfied that the pursuer's failure to comply with that requirement may be said to have been due to mistake, oversight or other excusable cause. The terms of the requirement are clearly specified in the rule and it is very difficult to see how the pursuer could have misunderstood them.

[36] Where a party asks the court to allow a motion for review to be received outwith the reclaiming days and to proceed out of time, the relevant rule is rule 38.10 rather than the

general dispensing power in rule 2.1, because rule 38.10 makes specific provision for that situation. On the basis of the material before me I am not persuaded that the late marking of the motion was due to excusable mistake or inadvertence. Moreover, contrary to rule 38.10(2), no application under rule 38.10(1) was included in the motion which was enrolled on 9 November 2020. The application to allow the reclaiming motion to be received late was not made until the hearing on 15 December 2020, more than 5 weeks after 9 November 2020 and almost 6 weeks after the expiry of the reclaiming days. I am not convinced that the pursuer's failure to comply with rule 38.10(2) was due to mistake, oversight or other excusable cause.

[37] Even if I had been persuaded that the pursuer's failures to comply with the rules were due to mistake or oversight or the like, I would not have exercised the court's discretion to relieve the pursuer from the consequences of his failures. In the whole circumstances I do not consider that it would have been in the interests of justice to do so. The interests of justice involve consideration of the interests of both of the parties and of the interests of the court. Among the factors which I take into account is that the pursuer requires to seek relief in respect of not just a single failure, but of three failures (*viz* that the motion did not seek review of a specified interlocutor; that it was made outwith the reclaiming days; and that no motion for the reclaiming motion to be received outwith the reclaiming days and for it to proceed out of time was included in the motion of 9 November 2020). I have regard to the history of the litigations, and to the need for finality. Most important of all in my opinion is the fact that no relevant legal ground for a reclaiming motion has been articulated. Rather, the pursuer now seeks to revisit the underlying merits of the action notwithstanding that the action was abandoned by him. Had he wished to keep open the possibility of the court adjudicating upon those merits in another process he

required to pay the taxed expenses within 28 days so that the decree disposing of the action would be a decree of dismissal and not a decree of absolvitor. He did not do that. The defender was entitled to decree of absolvitor and the Lord Ordinary had no option but to grant it. If the court allowed the reclaiming motion to proceed in my opinion it would be bound to fail. The obtaining of legal advice and representation would not change that. In my judgment it would be unjust to the defender to grant the pursuer the relief which he seeks in order to allow the reclaiming motion to proceed. Moreover, the court's valuable resources would be wasted on what would be bound to be a fruitless exercise.

Extending the period for a note of argument and the motion for a sist

[38] Given the conclusions which I have reached on the questions of competency and relief, and having regard in particular to the fact that the reclaiming motion has no merit, I am not satisfied that the court should grant the pursuer's motions for extending the period for receipt of a note of argument or for sisting the action. In my opinion it is in the interests of justice that those motions should be refused.

Conclusion

[39] In the whole circumstances I am satisfied that the interests of justice are best served (i) by refusing the pursuer's motions; and (ii) by refusing the reclaiming motion as incompetent.

[40] Had I been persuaded (i) that the court ought to relieve the pursuer from the consequences of his non-compliance with the rules, and (ii) that the reclaiming motion was competent, I would have granted the defender's motion for urgent disposal.

Disposal

[41] I shall refuse the pursuer's motions. I shall sustain the objection to the competency of the reclaiming motion and refuse it as incompetent.