FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 46
CA27/17

Lord President
Lady Paton
Lord Malcolm

OPINION OF THE COURT

delivered by LORD MALCOLM

in the cause

TARMAC TRADING LIMITED

Pursuers and Respondents

against

MRS MARJORY GRAHAM DARE SIMPSON or HAMILTON, as the executrix of the late ROBERT SCOTT HAMILTON

Defender and Reclaimer

Pursuers and Respondents: Mure QC, Massaro; Shepherd & Wedderburn LLP
Defender and Reclaimer: R Dunlop QC, Burnet; Davidson Chalmers LLP

4 July 2018

[1] The issue in this reclaiming motion is whether the failure by an English process server to sign a form 13.7 citation rendered the service of the form and a copy summons incurably invalid, or whether relief might be available under the court's general dispensing power contained in rule of court 2.1. The matter is of key importance in that the service took place shortly before the expiry of the five year prescriptive period. The proposed action concerns a seven figure claim relating to the cost of restoring a quarry.

The decision of the commercial judge [2017] CSOH 146

[2] A commercial action was raised by Tarmac Trading Limited (the defenders in the proposed ordinary action) against Mrs Marjory Hamilton (the pursuer in the action) seeking declarator that the summons had not been validly served; reduction of the certificate of service which had been lodged in process; and interdict against the lodging of the summons for calling. By interlocutor of 13 December 2017 the commercial judge granted declarator, reduction and interdict. He did so on the basis of the terms of the Citation Act 1592 c 59, which contains a single section in the following terms:

> "That the Copies of lettres or chargis be subscryvit be the executor thairof
>
> 1. It is statute and ordanit that in all tyme cuming all copys of summoundis and lettres quhilkis salbe deliuerit to ony pairtie be subscryuit be the officiar executour thairof."

[3] The judge noted that in *Blackfriars (Scotland) Limited* v *Shetland Salmon Co's Trustee* 2001 SLT 315 Lord Penrose stated that the 1592 Act "remains the source of the requirement for signature of the citation of the defender in an ordinary action" (page 317). It is well established that the expression "copys of summoundis" in the Act is a reference to the schedule of citation (paragraph 23 of the commercial judge's opinion). Regular citation is an essential step in the initiation of a litigation, and it is implicit in the statute that an unsigned citation is a nullity. The judge observed that none of that was contradicted by Lord Macfadyen's decision in *Colley* v *Celtic Pacific Ship Management (Overseas) Limited* 2001 SLT 320. Given that the source of the requirement for a signature is the 1592 Act, not the rules of court, it followed that the court's power to dispense with a failure to comply with the rules could not be exercised. "The general dispensing power in rule 2.1 is available only to relieve a party from the consequences of failure to comply with provisions of the rules

themselves", thus non-compliance with the statute "cannot be vanished away" (paragraph 27). The judge issued an equivalent interlocutor in the ordinary action refusing to exercise the dispensing power.

The reclaiming motion

[4] Mrs Hamilton reclaimed (appealed against) both interlocutors and has asked this court to exercise the dispensing power in her favour. At the hearing attention was drawn to the Citation Act 1686 c 5 which provides that, amongst other things, unsigned citations shall be "null and void". It was submitted on Mrs Hamilton's behalf that the requirement to serve a citation rests upon rule of court 13.7. If an unsigned citation is a nullity, it does not exist, and the decision in *Colley* is applicable. *Blackfriars* was wrongly decided. In any event, a purposive approach to the statutory provisions is required; the purpose being to give the defenders due notification of the action. This was achieved by service of a signed summons which told Tarmac all they needed to know and do to protect their interests. If the commercial judge's decision stands, Tarmac will enjoy a windfall benefit in that Mrs Hamilton will lose her claim against them through the operation of prescription. She would have no easy or clearly identifiable right of relief against a party with the ability to meet the claim.

[5] Tarmac submitted that the commercial judge's decision and that in *Blackfriars* were both correct. The unsigned citation is a fundamental nullity and the dispensing power is not available to the court. Reference was made to a number of authorities including *Izatt* v *Robertson* (1840) 2 D 476; *McLaren* v *McLaren* 1956 SLT 324; *The Scottish Eastern Investment Trust Limited and others, Petitioners* 1966 SLT 285; and Maclaren *Court of Session Practice* 321/2. In any event, if the dispensing power is available, it should not be exercised given the

importance of regular citation and the risk taken by the pursuer in leaving service until the end of the prescriptive period. Tarmac should not be deprived of the prescription plea. Alternative remedies could be pursued by Mrs Hamilton based upon the ineffective citation.

Decision

[6] In our view the reclaiming motion should be allowed and the dispensing power exercised in favour of the reclaimer, thus allowing the ordinary action to proceed as if there had been no defect in the form 13.7 served upon Tarmac. The essential flaw in the reasoning of the commercial judge (and of Lord Penrose in *Blackfriars*) was to proceed upon the basis that signature of the citation by the server was a requirement of only the 1592 Act (and now it can be noted also of the 1686 Act). Such a signature is also a requirement of the rules of court – see rules 1.4, 13.7 and form 13.7; the form clearly indicating that it is to be signed. Having regard to the terms of rule 2.1, there was a failure to comply with a provision in the rules, which, if it can be characterised as a mistake or oversight, allows the court to relieve Mrs Hamilton from the consequences of that failure. The consequence here was that the form of citation was not compliant with the Acts of 1592 and 1686 and thus, on any view, the citation was irregular, or, as put in the latter Act, null and void. If exercising the dispensing power, rule 2.1(2) gives the court power to pronounce such interlocutor as it thinks fit "to enable the cause to proceed as if the failure to comply with the provision (in the rules) had not occurred". In the present circumstances that would mean an interlocutor allowing the cause to proceed upon the basis that it is as if the form had been signed, in which event the statutory objection flies off.

[7] On behalf of Tarmac it was submitted that this analysis affords insufficient weight to, first, the need for a valid citation and, secondly, the primacy given to statutory provisions as

opposed to rules of procedure. There is nothing in the first point; rule 2.1 can be and commonly is used to excuse mistakes in important matters. As to the second submission, the Act of Sederunt (Rules of the Court of Session 1994) 1994 (SI 1994 No 1443) repealed certain statutes (see schedule 4) but not the 1592 and 1686 Acts. No doubt this was on the basis that there is nothing inconsistent between them and the provisions in the rules. In effect, the statutory requirements were incorporated into the rules governing the service of a summons. It would have been appreciated that an unsigned citation would be not only a breach of the rules but also of the statutes. It does no violence to the statutory provisions if the dispensing power enables the court, in an appropriate case, to afford relief from the consequences of an unsigned citation. It would be surprising if an unsigned citation form was in a different category from other procedural defects, many of which might, on the face of it, be more serious. Furthermore, given that the Acts of 1592 and 1686 only come into play if and when a citation is served upon the defenders, it would be bizarre if the dispensing power was available in the absence of a form (as in *Colley*) but not where a form was served but unaccompanied by a signature (which no doubt will often be unintelligible). The failure to sign the form still has consequences – the requirements of the statutes have not been "vanished away". There will require to be a decision to exercise the court's dispensing power; a power introduced to ensure that procedural requirements are not used unfairly to thwart the interests of justice (*R* v *Secretary of State for the Home Department ex p Jeyeanthan* [2000] 1 WLR 354).

[8] For the above reasons we are satisfied that both reclaiming motions should be allowed and that it is open to this court to entertain the invitation to exercise its dispensing power. The absence of a signature at the foot of the form caused no prejudice to or difficulty for Tarmac. They were given the service copy of the summons which informed them of the

nature of the action and as to what they had to do to enter appearance. In the hope of taking advantage of the subsequent expiry of the prescriptive period, Tarmac relied upon the most technical of objections. We consider that this is a clear example of the kind of case for which the dispensing provisions were designed. Echoing the terms of rule 2.2, we shall pronounce an interlocutor in the ordinary action enabling the cause to proceed as if the citation form had been signed.

[9] The court adds that it has reservations as to the practice adopted in *Colley* and in the present ordinary action whereby a party in the position of Tarmac was allowed to make submissions to the court based upon objections as to irregularities in the execution of service or intimation of a document. This is difficult to reconcile with the terms of rule 16.11, a rule which confirms that such defects do not fall into the fundamental nullity category contended for by Tarmac. The court's reservations extend to the form of this commercial action whereby the court is asked to pronounce an order for reduction of an *ex facie* valid certificate of service and to interdict a procedural step, namely the calling of a summons. Both requests are inconsistent with the terms of rule 2.1 and again are designed to circumvent rule 16.11; a rule which has the beneficial consequence of discouraging purely technical objections of no inherent merit, which, if upheld, would thwart rather than further the interests of justice.

[10] In this commercial action we shall allow the reclaiming motion; quash the interlocutor of 13 December 2017; sustain the pleas-in-law for the defender and repel those of the pursuers; assoilzie the defender from the conclusions of the summons; and reserve meantime all questions of expenses. In the related ordinary action at the instance of Mrs Hamilton we shall allow the reclaiming motion; quash paragraphs 2 and 3 of the interlocutor of 13 December 2007; exercise the power contained in rule of court 2.1 and 2.2

by declaring that the cause will be allowed to proceed upon the basis that the form 13.7 served on the defenders is deemed to be valid and effective in terms of the rules of court and the requirements of the Citation Acts of 1592 and 1686; and meantime reserve all questions of expenses.