

**SHERIFFDOM OF LOTHIAN AND BORDERS
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT**

[2020] SC EDIN 5

PIC-PN3221-19

NOTE OF SHERIFF KENNETH J. McGOWAN

in the cause

IAIN GARDINER

Pursuer

against

ABELLIO SCOTRAIL LTD

Defender

**Pursuer: Brophy; Thompsons
Defender: No appearance**

Edinburgh, 8 January 2021

Introduction

[1] An unopposed motion for the pursuer in this case was dropped by the court since it appeared not to have been made in compliance with the Ordinary Cause Rules (“OCR”). The pursuer’s agents were unhappy with that decision, so they were offered and accepted the opportunity to be heard on it.

The Rules

[2] For the most part, motions business in this court is transacted under Chapter 15A, OCR.

[3] The form of motion is prescribed: Form G6A, as appended to the OCR.

[4] Rule 15A.1(1) provides that in Chapter 15A, “court day” means a day on which the sheriff clerk’s office is open for civil court business; “court day 1” means the court day on which a motion is treated as being intimated under rule 15A.4; “court day 3” means the second court day after court day 1; and “court day 4” means the third court day after court day 1.

[5] There are two methods of making a motion, namely orally with leave of the court during any hearing; or by lodging it in accordance with Chapter 15: Rule 15A.3 (1) (a) and (b), respectively.

[6] The procedure for bringing motions before the court is as follows:

- i. Court day 1 – motion intimated by solicitor for party making motion (“the lodging party”) by sending by email a completed Form G6A to solicitor for other parties to the cause (“the receiving party/ies”): rr. 15A.1(1) and 15A.4(1);
- ii. any receiving party who wishes to oppose the motion must send by email a completed Form G9A to the solicitor for the lodging party not later than 5pm on Court day 3: r. 15A.5(1);
- iii. the lodging party then sends the Forms G6A (and G9A if the motion has been opposed) to the court by not later than 12:30pm on Court day 4: r. 15A.8(2);
- iv. on receipt of an unopposed motion by the court, it is checked, processed and an interlocutor is prepared and signed.

The sequence of events

[7] Edinburgh Sheriff Court holidays (at the relevant time) were on Friday 25 and Monday 28 December 2020; and Friday 1 and Monday 4 January 2021. The sheriff clerk’s

office was open for civil court business on all other weekdays during the Christmas and New Year period, making them “court days”.

[8] In this case, the action having been sisted, the sist was to expire on Wednesday 23 December.

[9] Where a sist has not been recalled or renewed, then towards the end of the sist period, an email reminder is issued to parties’ agents by the sheriff clerk’s office. I understand that was done on about 21 December in this case. At about the same time, a hearing is fixed for a court date roughly two weeks after the date of expiry of the sist. This date is also published in the court rolls. In the present case, a hearing was fixed for 5 January 2021.

[10] In most cases, these reminders trigger a response and the cause is either enrolled for further procedure or re-sisted.

[11] According to the Form G6A ultimately lodged (see further below) the pursuer’s agents intimated to the defenders a motion to discharge that notional hearing and to issue a new timetable on 21 December 2020.

[12] The Form G6 also indicated that any opposition to the motion required to be intimated to the pursuer’s agents by 31 December 2020.

[13] On 5 January 2021, the pursuer’s agents lodged the motion which the court declined to process.

Submissions

[14] The motion in this case (and motions in 17 other cases) had been lodged with the court on 5 January 2021 but had been dropped. The court’s decision on the motions had been placed on hold pending the outcome of this hearing.

[15] It was accepted that the OCR had not been followed.

[16] A number of motions had been intimated by Ms Brophy's firm on 21, 22 and, 23 December 2020. The result was that they were due to be lodged when Ms Brophy's firm's offices were closed for Christmas and New Year holidays. Accordingly, nobody in the Court Department was available to ensure that they were lodged timeously.

[17] Since the inception of the personal injury court, motions had always been intimated and lodged on the basis done in this case during the Christmas and New Year period. No objection had been taken by other parties to the actions concerned or by the court. The method adopted here was done without objection in the Court of Session.

[18] All the motions were unopposed and accordingly there was no prejudice to any party. It was thought best to proceed with the motions to ensure compliance with the court timetable.

[19] If the court was not prepared to allow the motions to be processed, that would lead to 18 motions being dropped and then having to be enrolled which would create more work for all concerned, including the court.

[20] On that basis, I was invited to exercise my discretion under OCR, rule 2.1.

[21] It was accepted that the situation had arisen from Ms Brophy's firm's policy of closing for holidays on court days, which was a commercial decision was taken by them.

Decision

The requirements of OCR

[22] It was quite properly accepted by Ms Brophy that the procedure followed in this case and in a number of others did not comply with Chapter 15A, OCR.

[23] The procedure for making motions begins with the intimation of completed Form G6A. That form, at para. 11, must contain the date by which opposition requires to be intimated to the lodging party by the receiving party. Read along with rule 15A.4 (1) and (3), the date must be Court day 3, unless a shortened period of notice has been allowed by the court.

[24] A motion which has been intimated, if it is to be proceeded with and whether opposed or not, must be lodged by 12:30pm on Court day 4: rules 15A.7(2) and 15A.8(2).

[25] In the present case, the motion was intimated on Monday, 21 December (Court day 1). The deadline for any opposition should have been Wednesday, 23 December (Court day 3), but instead the Form G6A said that date was Thursday, 31 December (which, following the convention in the rules, was Court day 8).

[26] Furthermore, the motion should have been lodged with the court on Thursday 24 December (Court day 4) but it was not in fact lodged until Tuesday, 5 January (Court day 9).

[27] In my opinion, the requirements in Chapter 15A are mandatory. It is not within the power of a lodging party to unilaterally vary the timescales required by them.

[28] To allow that would not only be a breach of those requirements, but would be a recipe for uncertainty where certainty is necessary. In addition, a decision by one practitioner to not have staff available to deal with court business which might require attention on a court day cannot be allowed to constrain the business of other practitioners or the court itself.

[29] Accordingly, on the substance of this matter, I am in no doubt that the court's decision to treat the motion enrolled in this (and the other cases similarly affected) as not having been competently made, and thus to decline to process them, was correct.

OCR Rule 2.1

[30] The court's dispensing power is framed in the following terms:

“(1) The sheriff may relieve a party from the consequences of failure to comply with a provision in these Rules which is shown to be due to mistake, oversight or other excusable cause, on such conditions as he thinks fit.

(2) Where the sheriff relieves a party from the consequences of a failure to comply with a provision in these Rules under paragraph (1), he may make such order as he thinks fit to enable the cause to proceed as if the failure to comply with the provision had not occurred.”

[31] The situation arising in this and the similarly affected cases arose from a deliberate strategy, adopted in an ill-fated attempt to elide the problems created by the pursuer's solicitors' policy of closing their office on court days and thus not having staff available to process the lodging of motions timeously. In my view, that cannot be described as a mistake or oversight.

[32] I am not in a position to comment on the procedure adopted or permitted in the Court of Session. On the other hand, Ms Brophy did say that the approach taken was one which had been used before in this court without difficulty. I am clear that it has never been the policy of this court to grant motions where the procedure followed in this case has been utilised. On the other hand, I cannot say that such motions have never been granted in the past. It may be that the pattern of court days and holidays has meant that the issue has not arisen so acutely.

[33] In these circumstances, I accept that the pursuer's agents may have come to believe (wrongly) that the procedure followed here had the imprimatur of the court. So on this occasion only, I shall treat what has happened as arising from an excusable cause under OCR 2.1(1) and direct that the motion lodged by the pursuer's agents and in the other cases mentioned by Ms Brophy be processed and granted.

[34] I should make it clear that this decision applies to these cases and on this occasion only. The rules are there to be complied with, not breached. In relation to motions business, the key factor is “court days”, determined according to whether the sheriff clerk’s office is open for civil business. If practitioners decide to organise their business in a way which means they are not in a position to deal with matters which require to be dealt with or otherwise arise on court days, they do so at their peril. Such business decisions cannot impinge on the work of other practitioners or the court; and the rules cannot be bent out of shape to accommodate them.