SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS AT ABERDEEN

[2025] SC ABE 27

ABE-A372-23

NOTE OF SHERIFF ANDREW MILLER

in the cause

SCREWFIX DIRECT LIMITED t/a TRADE UK

Pursuer

against

(1) THE FIRM OF NORTHDEKO
(2) MR RENARS SPROGIS
(3) MR TOMS PURIS

Defenders

Act: Mr Foyle, Solicitor Advocate
Alt: No appearance

ABERDEEN, 29 April 2025

[1] This is an action for payment in respect of building and construction materials and related products supplied by the pursuer to the defenders. The first defender is described in the initial writ as a partnership. The second and third defenders are each sued as partners in the firm and as individuals. The pursuer's single crave seeks decree against the defenders, jointly and severally, for payment of: (1) the sum of £4,954.53, being the outstanding balance due in respect of the materials supplied, with interest; (2) £247.73, being an administration fee claimed by the pursuer under its terms of business in respect of costs incurred in recovering the principal sum; and (3) the sum of £70.00, which the pursuer

claimed in terms of the late payment of Commercial Debts (Interest) Act 1988, with expenses.

[2] None of the defenders lodged a notice of intention to defend. The pursuer eventually lodged a minute for decree. This note explains in detail my reasons, summarised at the time of my decision, for refusing to grant the pursuer's minute for decree in relation to the first and second defenders.

[3] The writ was warranted on 24 October 2023, on a period of notice of 21 days in relation to each defender. A certificate of intimation subsequently lodged by the pursuer confirmed that the action was served on the first and second defenders by post on 17 November 2023, the papers being delivered on 18 November. The pursuer had difficulty tracing the third defender and, according to the certificate of intimation subsequently lodged in relation to him, postal service was not effected upon him until 10 September 2024, with the papers delivered to him on 16 September. None of the defenders lodged a NID. On 25 February 2025 the pursuer's solicitors lodged with the sheriff clerk (by email) a minute seeking decree in absence against all three defenders, under deduction of a sum paid to account. Despite not being lodged until 25 February 2025, the minute for decree was dated 25 October 2024.

[4] Thus, the only steps in procedure which involved the court during this procedural chronology were on 24 October 2023, when the action was warranted, and on 25 February 2025, when the pursuer's minute for decree was received by the sheriff clerk.

[5] Following receipt of the minute for decree, a concern arose as to its competency so far as the first and second defenders were concerned, given that the minute was not lodged with the sheriff clerk until over a year and a day after the expiry of the period of notice relating to those defenders. Having regard to the chronology set out above, I sought

clarification from the pursuer's solicitors, by email via the sheriff clerk, of the basis for the pursuer's motion for decree in absence against the first and second defenders. This elicited a helpful email from the pursuer's solicitors dated 21 March 2025, after which I assigned a hearing on the matter, which called before me via Webex on 15 April 2025. Mr Foyle appeared on behalf of the pursuer. There appeared to be no authority directly in point. Having heard Mr Foyle, I granted decree in absence in respect of the third defender but declined to grant the pursuer's minute for decree in respect of the first and second defenders.

[6] The concern in this case arose from the long-standing common law rule that an undefended action falls if it is not 'called' within the period of a year and a day after the expiry of the period of notice (Macphail, *Sheriff Court Practice*, 4th edition, paragraph 7.06; *McKidd* v *Manson* (1882) 9 R 790), even if some incidental procedure (such as a motion for interim interdict) has occurred prior to the expiry of the period of notice (*McCulloch* v *McCulloch* 1990 SLT (Sh Ct) 63). For these purposes the 'calling' of the case may be constituted by the lodging of a minute for decree or by any other procedural step on the part of the pursuer which invokes or calls for some response from the court, such as a motion for decree in absence which is refused due to the absence of proof of intimation (*Royal Bank of Scotland Plc* v *Mason* 1995 SLT (Sh Ct) 32).

[7] Where an action is raised against multiple defenders, some of whom enter appearance and some of whom do not, it is open to the pursuer to minute for decree in absence against the non-compearing defender(s) and to continue the action against the compearing defender(s), although in such circumstances it is open to the court to decline *in hoc statu* to grant decree in absence against the non-compearing defender(s) if that might result in prejudice to the remaining defender(s) (Macphail, paragraph 7.09; *Morrison* v

Somerville & Others (1860) 22D 1082; *Symington, Son & Company Limited* v *Larne Shipbuilding Company Limited & Others* 1921 2 SLT 32).

[8] In the present case the pursuer took no steps to seek decree in absence against the first and second defenders or to otherwise invoke any decision or response from the court in respect of those defenders, or indeed in respect of the third defender, for a period in excess of a year and a day between the expiry of the period of notice relating to the first and second defenders in early December 2023 and the lodging of the minute for decree in relation to all three defenders on 25 February 2025. At the hearing before me Mr Foyle observed that the issue really resolved to the question of whether, given that the action had been raised against three defenders jointly and severally, there was only one process against all three defenders or whether there were three separate processes which were capable of separate analysis. Mr Foyle adopted the position set out in the pursuer's solicitors' email of 21 March 2025, namely that all three defenders had a common interest and that it made logical sense for the period of a year and a day to run from the expiry of the period of notice relating to the last defender to receive intimation, ie from the date upon which it could be said that all of the defenders had the action brought to their attention and were placed in a position to defend it, if they wished to do so. As a matter of policy it would be undesirable for a situation to arise in which the action could fall against two of the defenders but remain live against the third, with the result that decree in absence was granted against him alone. Such an outcome may be regarded as prejudicial to the third defender and may also result in a multiplicity of actions arising from the same subject matter.

[9] Mr Foyle was unable to point to any authority which directly supported his position but he founded on the sheriff's observation in *RBS* v *Mason* (p. 32K) that the rule demanded

that "the minute for decree required to be endorsed within one year and a day of the last period of notice otherwise the action would fall" (emphasis added). However, Mr Foyle recognised that the sheriff's comments were obiter because that case turned on different issues from the present case and did not involve the same factual background. The sheriff's decision in *RBS* v *Mason* was successfully appealed on the basis that the pursuer's unsuccessful motion for decree in absence against the second defender in that case during the period of a year and a day following the expiry of the period of notice relating to that defender was sufficient to invoke the court's response (namely, refusal *in hoc statu* to grant the minute due to the absence of a certificate of intimation) and therefore to interrupt the period to which the rule relates and to initiate a 'depending process' in relation to that defender (p. 33H-I). That is a circumstance which does not feature in the procedural history of the present case. Further, both the reasoning of the sheriff at first instance in *RBS* v *Mason* and the opinion of the sheriff principal on appeal appear to focus solely on the procedural history of the case in relation to the second defender. The report records that the first defender had initially defended the action before consenting to decree against him in terms of a joint minute. Thus, there were clearly striking differences between the procedural history of *RBS* v *Mason* and that of the present case. Neither the sheriff's reasoning nor the sheriff principal's opinion address the issue which arises in the present case. In my view the sheriff's comment on which Mr Foyle founded was obiter and, considered in context, does not bear the interpretation for which Mr Foyle contended.

[10] It was clear to me that this longstanding rule applied to this case. I was not referred to, and did not find, any reported case in which the court considered the application of the rule to the circumstances of this case, in which multiple defenders receive intimation of a writ on dates separated by a significant gap and none enters appearance. Whatever the

historical origins of the rule, it seems to me that its application serves to provide some measure of certainty and finality to the legal position of a non-compearing defender, who can expect the pursuer, if intending to seek decree in absence against him, to take practical steps to do so within a reasonable time after the end of the period of notice relating to him, calculated according to the date on which the action was served on him. I recognise the practical attraction of the pursuer's argument in a case such as this, which was raised against a number of defenders jointly and severally. Against that the pursuer's approach would mean that the application of this rule to a defender who has received intimation and elects not to defend the action would be entirely dependent upon the success and timing of the pursuer's efforts to locate and effect service upon the other defender(s). In a case involving multiple defenders in which one defender receives intimation of the initial writ and elects not to lodge a NID, the period of a year and a day in relation to that defender for the purposes of this rule would commence on the expiry of the period of notice relating to that defender if the pursuer is never able to, or elects not to, effect service on the other defender(s). However, if service of the writ is subsequently effected on another defender or defenders, the period of a year and a day in relation to the original non-compearing defender would not commence until the expiry of the period of notice relating to the last defender to receive intimation. Where, as in this case, the pursuer has difficulty in tracing and effecting service on the final defender, the application of this rule to the original non-compearing defender could potentially remain uncertain for a very significant period.

[11] It appears to me to be most consistent with the underlying significance of this rule for its application to be considered separately in relation to each non-compearing defender, according to the date of expiry of the period of notice relating to that defender. This approach is consistent with the practical guidance given in Macphail, paragraphs 7.06

and 7.09, to the effect that it is open to a pursuer to minute for decree in absence against a non-compearing defender even where the action continues against another defender and that it is regarded as a prudent course for the pursuer's solicitor to minute for decree in absence as soon as possible after the expiry of the period of notice, not least to minimise the scope for circumstances to arise which might compromise the pursuer's ability to seek or enforce a decree in absence against a non-compearing defender. This approach is also consistent with the approach of the sheriff and the sheriff principal in *RBS* v *Mason*, both of whom appear to have focussed solely on the procedural history of that case so far as it related to the second defender, who did not defend the action, without the necessity of analysing the significance (for the second defender) of the procedural history relating to the first defender in that case, who did initially defend the action before consenting to decree against him.

[12] For these reasons I reached the view in the present case that the action, so far as directed against the first and second defenders, had fallen a year and a day after the expiry of the period of notice applicable to them (*McCulloch* v *McCulloch* at p. 64F; *Cringean* v *McNeil* 1996 SLT (Sh. Ct.) 136 at pp 137F and 138J-K). In these circumstances I refused the pursuers' minute for decree in relation to the first and second defenders and, following the approach of the sheriff principal in *Cringean* v *McNeil*, I made no further order in relation to those defenders. I granted the pursuer's minute for decree in relation to the third defender.

[13] Nothing turned on this particular point but it seems clear to me that, so far as the application of this rule in the circumstances of the present case is concerned, the date which appeared on the pursuer's minute for decree (25 October 2024) was of no significance. The significant date was the date on which the minute for decree was lodged with the sheriff clerk (25 February 2025), since it was only then that an action or response by the court was

sought or, to use the language of the sheriff principal in *RBS* v *Mason*, 'invoked' (*Hughes, Petitioner* (1940) 56 Sh. Ct. Rep. 176).