



SHERIFF APPEAL COURT

**[2025] SAC (Civ) 26
PER-CA16-24**

Sheriff Principal A Y Anwar KC

NOTE

delivered by SHERIFF PRINCIPAL AISHA Y ANWAR KC

in respect of an application for a prospective lay representative to conduct proceedings on
behalf of a non-natural person

in the appeal in the cause

COLIN ANTHONY FISHER HASTINGS,

as liquidator of CLOUDSTREAM TECHNOLOGY LTD (IN LIQUIDATION)

Pursuer and Respondent

against

DAY 41 LTD (formerly MACLELLAN PROPERTY LTD)

Defender and Appellant

**Pursuer and Respondent: S. Chesney, solicitor; Burness Paull LLP
Defender and Appellant: I. MacLellan, prospective lay representative**

5 August 2025

Introduction

[1] On 12 May 2023, the Advocate General for Scotland, on behalf of the Commissioners for HM Revenue & Customs, lodged a petition at Dunfermline Sheriff Court for an order to wind up Cloudstream Technology Ltd (“Cloudstream”). The sole director, secretary and shareholder of Cloudstream, at the point the winding up petition was lodged, was Ian MacLellan. Mr MacLellan is also the sole director, secretary and shareholder of Day 41 Ltd, the defender and appellant in this commercial action.

[2] The sheriff issued an interlocutor on 26 July 2023 which: (i) ordered that Cloudstream be wound up; and (ii) nominated and appointed Colin Hastings to act as the interim liquidator of Cloudstream.

[3] Subsequently, a meeting of the creditors of Cloudstream took place online on 19 September 2023. The parties dispute a number of decisions made at that meeting. First, during the meeting, Day 41 submitted a claim as a creditor of Cloudstream to the interim liquidator. Its position was that Cloudstream owed it the sum of £2,290,535. That claim was refused at the meeting; Day 41 contends that the decision to refuse was not validly made. Had the claim been allowed, Day 41 alleges that it would have materially altered the outcome of the vote on the appointment of the permanent liquidator. As a consequence, the second dispute between parties is as to whether Colin Hastings was properly appointed the permanent liquidator of Cloudstream.

[4] Further to the creditors meeting, a number of court proceedings have been raised by both the liquidator and Day 41 in relation to the petition to wind up Cloudstream. This is one of those actions; it was raised at Edinburgh Sheriff Court. The liquidator seeks repayment of the sum of £625,518.96 paid by Cloudstream to Day 41; he alleges this

payment was a gratuitous alienation and/or unfair preference to the other creditors of Cloudstream. The action was remitted to the commercial court of Tayside, Central and Fife in 2024. The liquidator sought and obtained an inhibition upon the dependence of the action against Day 41. On 16 December 2024, the sheriff refused Day 41's motion to recall the inhibition, in part. Day 41 appeals against that refusal.

[5] Day 41's solicitors withdrew from acting in this appeal on 11 July 2025. A peremptory diet was fixed for 28 July 2025. In advance of that diet, on 23 July 2025, Day 41 lodged an application for permission for a lay representative to conduct the proceedings on its behalf. The prospective lay representative was Ian MacLellan.

[6] Although the deadline to oppose the application had not yet passed by the time of the hearing, as all parties were present, I determined to hear the application at the peremptory diet.

Legislation

[7] The following sections of the Courts Reform (Scotland) Act 2014 apply in the determination of an application for lay representation for a non-natural person in civil proceedings:

"97. Lay representation in other proceedings

- (1) This section applies in civil proceedings (other than a simple procedure case) to which a non-natural person is a party.
- (2) A lay representative may, if the court grants permission, conduct the proceedings on behalf of the non-natural person.
- (3) The court may grant permission if satisfied that –
 - (a) the non-natural person is unable to pay for the services of a legal representative to conduct the proceedings,
 - (b) the lay representative is a suitable person to conduct the proceedings, and
 - (c) it is in the interests of justice to grant permission.

- (4) For the purposes of subsection (3)(b), a lay representative is a suitable person to conduct the proceedings if –
 - (a) the lay representative holds a relevant position with the non-natural person,
 - (b) the responsibilities of the lay representative in that position do not consist wholly or mainly of conducting legal proceedings on behalf of the non-natural person or another person,
 - (c) the lay representative is authorised by the non-natural person to conduct the proceedings,
 - (d) the lay representative does not have a personal interest in the subject matter of the proceedings, and
 - (e) the lay representative is not the subject of an order such as is mentioned in section 98(2)(f).
- (5) In subsection (4)(d), ‘personal interest’ means an interest other than one that anyone holding the position that the lay representative holds with the non-natural person would have.
- (6) For the purposes of subsection (3)(c), in deciding whether it is in the interests of justice to grant permission, the court must have regard, in particular, to –
 - (a) the non-natural person's prospects of success in the proceedings, and
 - (b) the likely complexity of the proceedings.
- (7) Subsection (2) is subject to provision made by an act of sederunt under section 98.
- (8) In this section –
 - ‘civil proceedings’ means civil proceedings in –
 - (a) the Court of Session,
 - (b) the Sheriff Appeal Court, or
 - (c) the sheriff court,
 - ‘the court’, in the case of proceedings in the sheriff court, means the sheriff.

98. Lay representation: supplementary provision

- (1) The Court of Session may, by act of sederunt, make further provision about –
 - (a) the granting of permission under section 97, and
 - (b) the conduct of proceedings by lay representatives by virtue of this Chapter.
- (2) Provision under subsection (1) may include, in particular, provision –
 - ...
 - (f) enabling the court to make an order preventing a lay representative from conducting any proceedings before any court on behalf of non-natural persons,...

[8] The following provisions within the Act of Sederunt (Lay Representation for Non-Natural Persons) 2016 are also relevant in setting out certain requirements for any such application:

“2. Interpretation

In this Act of Sederunt—

...

‘authorisation document’ means a document executed by a non-natural person of a type mentioned in column 1 of the following table authorising an individual holding the relevant position mentioned in the corresponding column 2 to act as its lay representative—

Type of non-natural person	Relevant position
a company	a director or a secretary of the company
a limited liability partnership	a member of the limited liability partnership
any other partnership	a partner in the partnership
an unincorporated association of persons	a member or office holder of the association

‘the court’, in the case of proceedings in the sheriff court, means the sheriff; and ‘lay representative’, ‘legal representative’ and ‘non-natural person’ have the meanings given by section 95 of the 2014 Act.

3. Applications

- (1) An application under section 97(2) of the 2014 Act for permission for a lay representative to conduct proceedings on behalf of a non-natural person is to be made in the Form set out in the schedule of this Act of Sederunt.
- (2) The application must be accompanied by an authorisation document.
...”

Submissions for the proposed lay representative

[9] Mr MacLellan submitted that he would receive no personal gain by acting on behalf of Day 41. He was seeking to comply with the fiduciary duty that he owed as the director of Day 41 and was also trying to look out for the best interests of the creditors of Cloudstream.

Even if Day 41 was successful in its defence to this action, no dividend would be paid. The only benefit in the event of success would be the avoidance of the claim by the liquidator of a gratuitous alienation and/or an unfair preference payment having been made to Day 41. That benefit would be far outweighed by the legal costs that Day 41 had incurred in connection with the defence to the action.

[10] In respect of the previous refusal by the sheriff at Edinburgh Sheriff Court to allow him to act as a lay representative, he submitted that the sheriff did not have access to the processes in the other actions ongoing before Dunfermline Sheriff Court; the sheriff's decision might have been different had he had access to those processes.

[11] As for the contempt of court by Mr MacLellan reported in *Pinnacle Cloud Solutions Limited v MacLellan Property Limited* [2014] CSOH 155, Mr MacLellan submitted that, although that finding had been made by the Lord Ordinary, it was an injustice. He submitted that the undertaking was said to have been given while he was present in court; he was not. The undertaking was given without his authority.

Submissions for the respondent

[12] The liquidator opposed the application on three grounds.

[13] First, this was not the first occasion that an application had been made by Day 41 to appoint Mr MacLellan as lay representative. A previous attempt had been made in an application made to the sheriff at Edinburgh Sheriff Court. On 7 February 2024, the sheriff refused that application. The sheriff's reasoning of 7 February 2024 remained applicable now; as the sole director and shareholder of Day 41, Mr MacLellan had a plain interest in the proceedings.

[14] Second, Mr MacLellan was not a suitable person to represent Day 41. In *Pinnacle*, Mr MacLellan failed to obtemper an undertaking that he had given to the court; the Lord Ordinary held that this amounted to a contempt of court: *Pinnacle* at para [39].

[15] Third, paragraph 3(1) of the 2016 Act of Sederunt created a requirement that any application for a lay representative to conduct proceedings on behalf of a non-natural person be made in the form set out in the schedule of that act. That form includes a declaration at paragraph 3 that the applicant is unable to pay for the services of a legal representative. Day 41 had lodged a form with that declaration; however, the liquidator submitted that Day 41 was not in a position to make that declaration to the court.

[16] The liquidator pointed out that Day 41 had consigned the sum of £20,000 with the commercial court of Tayside, Central and Fife as a consequence of the sheriff's interlocutor of 28 April 2025 in one of the other proceedings ongoing between the parties. The liquidator had also lodged a motion with this court on 6 May 2025 for Day 41 to be ordained to find caution in the sum of £12,000 for the purposes of this appeal. In opposing the liquidator's motion for caution, Day 41's counsel submitted that the company could meet both its own legal costs, as well as those of the liquidator in the event the company was not successful in its appeal. A letter was lodged from the accountant of Day 41, which provided its present balance sheet. It purported to show that Day 41 had a net asset position in excess of £1 million. The liquidator's motion was refused *in hoc statu* by the procedural appeal sheriff on 27 May 2025 on the basis of the information from Day 41's accountant. However, less than 2 months later, Day 41's position was that it was now unable to pay for a legal representative. The position put forth by Day 41 at the peremptory diet was entirely at odds with what it had submitted to the procedural appeal sheriff on 27 May 2025.

[17] The liquidator had made repeated offers to Day 41's previous solicitors to try to assist the company in dealing with the inhibition upon the dependence granted over the company's heritable assets. None of those proposals had been acceptable to Day 41.

[18] In the event the application was refused, the liquidator moved the court to continue consideration of the outstanding motions previously made by Day 41 to allow it an opportunity to instruct alternative legal representation.

Further submissions for the proposed lay representative

[19] In a brief response, Mr MacLellan advised that the sums consigned by way of caution had been obtained by way of loan and repeated that Day 41 was unable to fund legal representation.

Decision

[20] Prior to the enactment of the Courts Reform (Scotland) Act 2014, non-natural persons, such as limited companies, partnerships and associations, required to be represented by either counsel or a solicitor in civil proceedings: *Tritonia Ltd v Equity and Law Life Assurance Society* 1943 SC (HL) 88; *Secretary of State for Business, Enterprise and Regulatory Reform v UK Bankruptcy Ltd* [2010] CSIH 80; 2011 SC 115; and *Apollo Engineering Ltd (In Liquidation) v James Scott Ltd* [2012] CSIH 4; 2012 SC 282.

[21] The Explanatory Notes to the 2014 Act (at p.19) set out the rationale for the representation of non-natural persons to be reformed:

"105. The Inner House of the Court of Session ruled in *Apollo Engineering Ltd (in liquidation) v James Scott Ltd* ([2012] CSIH 4) that limited companies must have legal representation by a solicitor or counsel. This case is one of a series which continues the position that non-natural persons may not be represented by a lay person. This position has grave consequences for small business. A small company defending or

pursuing a claim must incur irrecoverable legal costs when disputing a claim, whereas an individual need not instruct a solicitor and can appear as a party litigant at no cost. Small companies, partnerships and unincorporated associations may be disadvantaged by this restriction, particularly in simple procedure cases, because the cost of legal representation may be disproportionate to the value of the claim.”

[22] To avoid those consequences for small business, the Scottish Parliament enacted sections 95 to 98 of the 2014 Act that make provision for a lay representative to act for a non-natural person in civil proceedings if the court grants permission. Those sections came into effect on 28 November 2016; the 2016 Act of Sederunt, likewise, came into force on the same date.

[23] In civil proceedings, other than simple procedure, the court must grant permission before a lay representative can act for a non-natural person: section 97(2). In deciding whether to grant permission, the court must apply the test set down at section 97(3).

[24] Following submissions from the parties, I refused the application for Mr MacLellan to act as lay representative for Day 41. The principal reason for refusing Mr MacLellan’s application was that I was not satisfied that he was a suitable person to conduct the proceeding on behalf of Day 41; however, I considered that none of the three requirements contained in the test at section 97(3) were met.

Section 97(3)(a) – is the non-natural person unable to pay for the services of a legal representative to conduct the proceedings?

[25] Day 41 was ordained, in separate proceedings it has initiated against the liquidator within the petition process, to lodge caution in the sum of £20,000 with the commercial court of Tayside, Central and Fife by interlocutor dated 28 April 2025. Day 41 duly consigned that sum with the commercial court by 19 May 2025.

[26] Meanwhile, on 1 May 2025, the liquidator lodged a motion with this court seeking an order to ordain Day 41 to lodge caution in the sum of £12,000 in respect of the expenses of the appeal were Day 41 to be unsuccessful. Day 41 opposed that motion on 8 May 2025 in the following terms:

“The Appellant does have sufficient funds to cover expenses in respect of the ongoing appeal. The appeal is in relation to removal of inhibitions and the appellant’s position is that the recurring requests for caution are overly prejudicial to the appellant and contrary to their access to justice.”

[27] In advance of the hearing on the opposed motion for caution, Day 41 lodged a letter from its accountant, Bruce & Greig Ltd. It stated that, as of 31 March 2025, Day 41 had a net asset position of £1,016,430.58. Based on that information and submissions from the parties’ respective counsel, the procedural appeal sheriff refused the motion for caution *in hoc statu*.

[28] In its application to this court for Mr MacLellan to be appointed lay representative, Day 41 has formally made the declaration, required of it, that it is unable to pay for legal representation. No financial information has been provided to this court to vouch that position which sits in stark contrast to the information provided two months earlier by Day 41’s accountant to support its opposition to the motion for caution; no satisfactory explanation was provided for this sudden collapse of its financial position. In these circumstances, I was not persuaded that Day 41 was unable to pay for the services of a legal representative to conduct the proceedings.

Section 97(3)(b) – is the applicant a suitable person to be a lay representative?

[29] A proposed lay representative is a suitable person if they meet the criteria set out at section 97(4). The most important criterion for the purposes of this application was section 97(4)(d): did Mr MacLellan have a personal interest in the subject matter of the

proceedings? Personal interest is defined, at section 97(5), as an interest other than one that anyone holding the position that the lay representative holds with the non-natural person would have.

[30] As was noted by the liquidator's solicitor, this is not the first occasion upon which Mr MacLellan has applied for permission to act as the lay representative for Day 41 in this process. The company had previously lodged an application seeking to have him appointed as its lay representative. The application was refused by the sheriff on 7 February 2024:

"I have seen and considered the written application by Mr Ian MacLellan to be [Day 41 Limited's] representative. I had refused that application for two reasons. First, a company must be legally represented in an action of this kind. Secondly, and in any event, Mr MacLellan has a financial interest in these proceedings: as he acknowledges, he is the sole shareholder in the company, as well as the sole director. Even more significantly in context, he is also the defender in a parallel action in Dunfermline Sheriff Court."

[31] While the sheriff incorrectly stated "that a company must be legally represented in proceedings of this kind", he noted Mr MacLellan's financial interest in the outcome of the proceedings. Day 41 was accordingly aware that an application by Mr MacLellan to act as its lay representative had previously been refused. Mr MacLellan has a clear interest in the subject matter of these proceedings; he is the defender in separate proceedings at the instance of the liquidator relating to the same payments made by Cloudstream to Day 41. The liquidator seeks payment from Mr MacLellan in terms of section 212 of the Insolvency Act (Scotland) 1986. The outcome in the present proceedings will have a material effect upon the outcome in the proceedings at the instance of the liquidator against Mr MacLellan personally. Separately, Mr MacLellan is a shareholder of Day 41; he has a personal and financial interest in the financial position of Day 41.

[32] In addition, this court was made aware of the finding of contempt of court made by the Lord Ordinary (Tyre) in *Pinnacle* at paragraph 39. Lord Tyre noted that Mr MacLellan

had been present at court when undertakings were provided by him, as director, on behalf of Day 41 during those proceedings for interim interdict. Those undertakings were recorded in the minute of proceedings: *Pinnacle* at para [5]. It is noteworthy that at the subsequent diet of proof in relation to the minute for contempt, there was no suggestion that the minute was opposed on the basis that Mr MacLellan had not been present when the undertakings were provided to the court nor that those instructed by him had acted outwith his instructions. The suggestion that Day 41's counsel and solicitors gave an undertaking on Mr MacLellan's behalf without instruction is a serious allegation. I was not persuaded that there was any basis for the court to attach any weight to that suggestion. Similarly, I was not persuaded that there was any basis for this court to look beyond the clear terms of Lord Tyre's opinion, which described a breach of undertaking solemnly given to a court in order to avoid the granting of an order for interim interdict as "a serious and highly reprehensible act".

[33] Accordingly, having regard to: (i) Mr MacLellan's personal interest in these proceedings; and (ii) the finding on contempt of court in *Pinnacle*, I am not satisfied that he is a suitable person to act as lay representative for Day 41.

Section 97(3)(c) – is it in the interests of justice to grant permission?

[34] In deciding whether it is in the interests of justice to grant permission, the court may have regard to the non-natural person's prospects of success in the proceedings and the likely complexity of the proceedings: section 97(6). The interests of justice also require that the court is mindful of the effect of granting permission upon the need for the efficient progress of the proceedings and the prejudice any delays may cause to the other party(s).

[35] I was not addressed on the prospects of success; however, actions at the instance of a liquidator for the recovery of sums which are claimed to be a gratuitous alienation and/or unfair preference raise complex issues of fact and law. They benefit from the expertise provided by a legally qualified representative. I take account of the fact that Mr MacLellan is the director of Day 41 and was the director of Cloudsteam and thus can be expected to be well versed in the facts, if not the law. Ordinarily, the appointment of a director as lay representative would be granted by the court, if they can demonstrate they do not have a personal interest in the subject matter of the proceedings; however, having regard to: (i) the contradictory information provided to this court regarding Day 41's financial position; and (ii) the previous finding of contempt in relation to Mr MacLellan, I do not regard it as being in the interests of justice to grant permission allowing him to act as lay representative for Day 41. The court requires to be satisfied that it can rely upon the information provided by a lay representative.

[36] For these reasons, the application was refused.