

SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY AT
DUMFRIES

[2019] SC DUM 20

DUM-B259-18

NOTE BY SHERIFF GEORGE JAMIESON

in the cause

GENERAL ASSET MANAGEMENT LTD TRADING AS ACCREDO

PursuerS

against

MS CATHERINE MARY GERALDINE RUANE OR PRISIC

Defender

Act: Fairgreave

Alt: Watt

Introduction

[1] On 14 February 2019, I made avizandum on the competency of the defender's minute of recall of decree granted on 13 December 2018 in the pursuer's application to the court under section 24(1B) of the Conveyancing and Feudal Reform (Scotland) Act 1970 ("the Act"). On 26 February 2019, after considering parties' written submissions *anent* the competency of granting this minute, I pronounced an interlocutor recalling the decree. This Note explains my reasons for recalling the decree and, in doing so, distinguishing this case from *NRAM v Cordiner* 2017 SLT (Sh Ct) 217. This involves some detailed background information before I move on to the parties' submissions and the reasons for my decision.

The Recall of decree granted in an application to the court under section 24(1B) of the Act

[2] There is no general provision in summary application procedure for recall of a decree in absence. Section 24D of the Act is intended to function as the equivalent of a reponing note in connection with a decree in absence granted in an application under section 24(1B) where “the debtor did not appear and was not represented in the proceedings in the application under section 24(1B)” (section 24D(2)(b)).

The decision of the Sheriff Appeal Court in NRAM v Cordiner

[3] The Sheriff Appeal Court held that reference to the debtor not having “appeared” as mentioned in section 24D(2)(b) of the Act was to “the debtor who had not appeared at all, such as to bring about liticontestation, rather than to a debtor who has appeared but was not present at the hearing at which decree happened to granted, regardless of what procedure had taken place in the meantime”(2017 SLT (Sh Ct) 217 at page 224, paragraph [25]).

Procedural history of the current case

[4] The defender was cited to answer the summary application on 25 October 2018. There is no record of her appearing on that date, but the interlocutor records that she was represented by an employee of Citizens Advice Scotland (CAS) on that date. That employee sought a continuation of the first calling of the summary application to allow the defender to explore whether an insurance policy available to her covered legal representation for these proceedings.

[5] The pursuer’s local agent moved for decree. It was apparent to me that neither the local agent nor the CAS employee had instructions to address the court on whether it would be reasonable to grant decree in terms of section 24(5)(b) of the Act.

[6] I therefore *ex proprio motu* continued consideration of the pursuer's motion for decree to a further hearing on 22 November 2018 for submissions on the reasonableness of granting decree.

[7] On that date, the pursuers were legally represented and the defender's partner came to the hearing and sought leave, which I refused, to act as her lay representative. There were a number of reasons for that decision, but one was that the general rules for lay representation in summary applications (discussed later in this Note) required that he had to appear *along with* the defender the hearing. He could not therefore on that ground alone be approved to act as her lay representative at the hearing.

[8] I was therefore left with no option but to again continue the hearing *ex proprio motu* to a further hearing on 13 December 2018. I ordained the defender to appear at that hearing and directed that both the pursuer and defender were to address the court on the reasonableness of granting decree in terms of section 24(5)(b) of the Act.

[9] In the event, the defender did not appear at the hearing on 13 December 2019. The pursuer's principal agent appeared, made submissions in terms of section 24(5)(b) of the Act, which satisfied me, at that stage, it was reasonable to grant decree. I accordingly did so. It is that decree which the defender sought to recall. She has been represented by a solicitor throughout the recall procedure.

Pursuers' submissions

[10] The pursuer's solicitor submitted it was not competent to recall the decree granted on 13 December, under reference to the decision of the Sheriff Appeal Court in *NRAM v Cordiner*, as the defender had been represented by CAS at the first calling of the summary

application on 25 October 2018. Reference was made to section 24D(2)(b) of the Act which precluded recall of decree if the defender either appeared or was represented at that hearing.

Defender's submissions

[11] The defender's agent drew attention to the fact that although the CAS employee had purported to represent the defender at the hearing on 25 October 2018, she had not, in fact been approved by CAS as an approved lay representative in terms of The Lay Representation in Proceedings Relating to Residential Property (Scotland) Order 2010 (SSI 2010 No. 264) ("the Order") made by the Scottish Ministers under section 24E of the Act (lay representation in section 24(1B) proceedings). This fact was acknowledged by CAS in an email to the court dated 19 February 2019. It was therefore argued on her behalf that the defender "was not formally represented and therefore the minute for recall is competent and should be granted".

The Order

[12] The Order sets out the conditions whereby a person may be approved to act as a lay representative in section 24(1B) proceedings by one of a number of approving organisations, including CAS. This approval includes an assessment by that organisation of *inter alia* the applicant's "knowledge and understanding of – (i) Scottish legislation and common law in so far as they relate to housing and repossession; and (ii) court procedure and rules, in particular those relating to summary applications in the Sheriff Court" (articles 3(d) and 6(1)(a)).

Lay representation for party litigants in summary applications

[13] Lay representation is available in respect of most summary applications in accordance with rule 1A.2 of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc) 1999 (“SAR 1999”).

[14] However, by virtue of rules 1A.1(1) and 1A.2(1), read together, this general provision does not apply where any enactment makes provision for a party to a particular type of case before the sheriff to be represented by a lay representative.

[15] Where lay representation is possible under rule 1A.2 of the SAR 1999, the sheriff may, at the request of a party litigant, permit a lay representative to appear, along with the litigant, at a specified hearing for the purpose of representing the litigant at that hearing (emphasis added) (rule 1A.2(1)).

[16] The application must: (a) be made orally on the date of the first hearing at which the litigant wishes a named representative to represent him; (b) be accompanied by a document, signed by the named individual in Form A1 (rule 1A.2(2)). The sheriff may grant the application only if of the opinion that it would be in the interests of justice to do so (rule 1A.2(3)).

Reasons for recalling the decree

[17] In my opinion, a litigant can only be regarded as being represented at any hearing in proceedings under section 24(1B) of the Act if the person appearing on the debtor’s behalf had the right to act in that capacity before the court. While solicitors and advocates have an automatic right of audience before the court in proceedings under section 24(1B) of the Act (as they are not “lay representatives” – see rules 1A.1(2)(a) and (b) of the SAR 1999), employees of CAS have no similar privilege.

[18] In my opinion, CAS employees are not entitled to represent debtors in applications by creditors under section 24(1B) of the Act, unless they are approved lay representatives in terms of the Order above mentioned. This includes appearing to move for a continuation of the application (as happened in this case).

[19] As it transpires that the CAS employee in this case was not an “approved lay representative”, I therefore consider she had no authority to appear on behalf of the defender at the hearing on 25 October 2018.

[20] In these circumstances, I further consider that, notwithstanding the purported representation of the defender by CAS at the hearing on 25 October 2018, the defender, who appears not to have appeared before the court on that date, was not to be regarded as “represented” at the hearing for the purposes of section 24D(2)(b) of the Act. Accordingly, I agreed with the submission made by the defender’s agent that the minute of recall of decree was in fact competent and should be granted.

Postscript 1

[21] Having had the opportunity to consider the Order in some detail, it appears to me the intention of the Scottish Parliament was that debtors in applications under section 24(1B) of the Act must only be represented by solicitors, advocates, or suitably qualified lay representatives.

[22] This is reflected in the Order’s requirement that applicants for approval as a lay representative must demonstrate knowledge and understanding of repossession law and summary application procedure.

[23] Also, as there is specific legislation governing lay representation in these proceedings, namely section 24E of the Act and the Order made thereunder, this rules out

lay persons not approved under the Order from representing debtors in applications under section 24(1B) of the Act.

[24] If this is so, it is therefore not open to the sheriff to approve any other lay person to act as the debtor's representative at any hearing of a section 24(1B) application, irrespective of whether or not that person appears alongside the debtor at the hearing.

Postscript 2

[25] A section 24(1B) application usually includes a crave for warrant for summary ejection of the debtor, applied for under section 5(2) of the Heritable Securities (Scotland) Act 1894.

[26] That was the situation in this case.

[27] All that is written above applies equally to section 5(2) applications: see, in particular, sections 5A(5)(b), (6) and (7) (provisions as to reasonableness of granting decree); 5E (recall of decree); and 5F (lay representation) of the 1894 Act. The Order also applies to section 5 applications (article 2).