

## CHAPTER 38

### RECLAIMING

#### Interpretation of this Chapter

**38.1.** In this Chapter, "reclaiming days" means the days within which an interlocutor may be reclaimed against.

#### Reclaiming

**38.2.** Subject to any other provision in these rules or any other enactment, any party to a cause who is dissatisfied with an interlocutor pronounced by-

- (a) the Lord Ordinary,
- (b) the Lord Ordinary in Exchequer Causes, or
- (c) the vacation judge,

and who seeks to submit that interlocutor to review by the Inner House shall do so by reclaiming in accordance with the provisions of this Chapter.

#### Reclaiming days

**38.3.**-(1) This rule applies subject to any other provision in these Rules or any other enactment.

(2) An interlocutor disposing, either by itself or taken along with a previous interlocutor, of-

- (a) the whole subject matter of the cause, or
- (b) the whole merits of the cause whether or not the question of expenses is reserved or not disposed of, may be reclaimed against, without leave, within 21 days after the date on which the interlocutor was pronounced.

(2A) Where an interlocutor which reserves or does not dispose of the question of expenses is the subject of a reclaiming motion under paragraph (2)(b), any party to the cause who seeks an order for expenses before the disposal of the reclaiming motion shall apply by motion to the Lord Ordinary for such an order within 14 days of the date of enrolment of that reclaiming motion.

(3) An interlocutor disposing of the merits of an action and making an award of provisional damages under section 12(2)(a) of the Administration of Justice Act 1982(a) may be reclaimed against, without leave, within 21 days after the date on which the interlocutor was pronounced.

(4) An interlocutor-

- (a) disposing of part of the merits of a cause,
- (b) allowing or refusing proof, proof before answer or jury trial (but, in the case of refusal, without disposing of the whole merits of the cause),
- (c) limiting the mode of proof,
- (d) adjusting issues for jury trial,
- (e) granting, refusing, recalling, or refusing to recall, interim interdict or interim liberation,
- (f) in relation to an exclusion order under section 4 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981(b);
- (g) granting, refusing or recalling a sist of execution or procedure,
- (h) loosing, restricting or recalling an arrestment or recalling in whole or in part an inhibition used on the dependence of an action or refusing to loose, restrict or recall such arrestment or inhibition,

---

(a) 1982 c.53.

(b) 1981 c.59; section 4 was amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c.73), section 13(5).

- (i) granting authority to move an arrested vessel or cargo,
- (j) deciding (other than in a summary trial) that a reference to the European Court should be made,

may be reclaimed against, without leave, within 14 days after the date on which the interlocutor was pronounced.

(5) An interlocutor (other than a decree in absence or an interlocutor mentioned in paragraph (2), (3) or (4) of this rule) may be reclaimed against, with leave, within 14 days after the date on which the interlocutor was pronounced.

#### **Leave to reclaim etc. in certain cases**

**38.4.**-(1) An interlocutor granting or refusing a motion for summary decree may be reclaimed against only with the leave of the Lord Ordinary within 14 days after the date on which the interlocutor was pronounced.

(2) In the application of section 103(3) of the Debtors (Scotland) Act 1987(a) (appeals on questions of law arising from making, variation or recall of time to pay directions)-

- (a) leave to appeal shall be sought within 14 days after the date of the decision of the Lord Ordinary appealed against; and
- (b) an appeal shall be made by motion to the Inner House within 14 days after the date on which leave was granted.

(3) An interlocutor pronounced under rule 43.24 (diet roll in optional procedure cases) which does not, either by itself or taken along with a previous interlocutor, dispose of the whole merits of the action whether or not the question of expenses is reserved or not disposed of, may be reclaimed against, only with the leave of the Lord Ordinary, within 14 days after the date on which the interlocutor was pronounced.

(4) An interlocutor, other than an interlocutor determining the application, pronounced under Chapter 58 (applications for judicial review) may be reclaimed against only with the leave of the Lord Ordinary within 14 days after the date on which the interlocutor was pronounced.

(5) The decision of the Lord Ordinary on a note of objection to the report of the Auditor under rule 42.4 may be reclaimed against only with the leave of the Lord Ordinary within 7 days after the date on which the decision was made.

(6) An interlocutor granting or refusing a motion under rule 47.10(1) (appointing action to be a commercial action) may be reclaimed against only with the leave of the commercial judge within 14 days after the date on which the interlocutor was pronounced.

(7) An interlocutor pronounced on the Commercial Roll, other than an interlocutor which makes such disposal as is mentioned in rule 38.3(2), may be reclaimed against only with the leave of the commercial judge within 14 days after the date on which the interlocutor was pronounced.

---

(a) 1987 c.18.

### **Applications for leave to reclaim**

**38.5.**-(1) An application for leave to reclaim against an interlocutor shall be made by motion.

(2) A motion under paragraph (1) shall be brought-

- (a) before the Lord Ordinary who pronounced the interlocutor;
- (b) where that Lord Ordinary is, for whatever reason, unavailable, before another Lord Ordinary; or
- (c) before the vacation judge.

(3) Where a motion under paragraph (1) is brought before a judge under paragraph (2)(b) or (c), that judge shall-

- (a) continue the motion until the Lord Ordinary who pronounced the interlocutor is available; or
- (b) where the matter is of such urgency that a continuation would not be appropriate, grant or refuse leave, as the case may be.

(4) Any period during which a motion under paragraph (1) is continued by virtue of an order under paragraph (3)(a) shall not be taken into account in calculating the reclaiming days under rule 38.3(5) (reclaiming days with leave) or rule 38.4 (leave to reclaim etc.in certain cases).

(5) In granting leave to reclaim, the Lord Ordinary may impose such conditions, if any, as he thinks fit.

(6) The decision of the Lord Ordinary or the vacation judge to grant or refuse leave to reclaim shall be final and not subject to review.

(7) Leave to reclaim against an interlocutor shall not excuse obedience to or implement of the interlocutor unless by order of the Lord Ordinary, the Inner House or the vacation judge.

### **Method of reclaiming**

**38.6.**-(1) A party who seeks to reclaim against an interlocutor shall mark a reclaiming motion by enrolling a motion for review in Form 38.6 before the expiry of the reclaiming days.

(2) On enrolling a motion for review under paragraph (1), the claimer shall lodge a reclaiming print which complies with rule 38.18.

### **Leave to reclaim out of time**

**38.7.**-(1) In a case of mistake or inadvertence, the Inner House may, on an application to it, allow a motion for review to be received outwith the reclaiming days and to proceed out of time on such conditions as to expenses or otherwise as the court thinks fit.

(2) An application under paragraph (1) shall be made by motion included in the motion for review made under rule 38.6(1).

### **Required application for early disposal of certain reclaiming motions**

**38.7A.** Where a party reclaims against an interlocutor mentioned in paragraph (4) or (5) of rule 38.3, he shall, under rule 38.13(1)(a), seek early disposal of the reclaiming motion.

### **Effect of reclaiming**

**38.8.**-(1) Subject to paragraph (2), a reclaiming motion shall have the effect of submitting to the review of the Inner House all previous interlocutors of the Lord Ordinary or any interlocutor of the Lord Ordinary in a motion under rule 38.3(2A), not only at the instance of the party reclaiming, but also at the instance of any other party who appeared in the cause, and without the necessity of any counter-reclaiming motion.

(2) Where an interlocutor, either by itself or taken along with a previous interlocutor, has disposed of the whole merits of the cause, a reclaiming motion against a subsequent interlocutor dealing with expenses shall have the effect of submitting to review only that interlocutor and any other interlocutor in so far as it deals with expenses.

(3) After a reclaiming motion has been enrolled, the claimer shall not be at liberty to withdraw it without the consent of the other parties who have appeared in the cause; and if he does not insist on the reclaiming motion, any other party may do so in the same way as if the motion had been enrolled at his instance.

(4) An unopposed motion by a party to refuse a reclaiming motion shall be treated as if all parties consented to it.

(5) Where an interlocutor contains an award of custody, access or aliment, the marking of a reclaiming motion shall not excuse obedience to or implement of the award of custody, access or aliment, as the case may be, unless by order of the court.

### **Effect of extracted interlocutor**

**38.9.** Review by the Inner House of an interlocutor shall not be prevented by reason only that extract has been issued before the expiry of the reclaiming days.

### **Appeals treated as reclaiming motions**

**38.10.** In respect of the following appeals, the rules in this Chapter shall apply to those appeals as they apply to reclaiming:-

- (a) an appeal from a decision of the Lord Ordinary under section 6 of and Article 37 or 41 of the convention in Schedule 1 or 3C to, the Civil Jurisdiction and Judgments Act 1982(a) (appeals in relation to decisions on enforcement); and
- (b) an appeal from a decision of the Lord Ordinary under section 103(3) of the Debtors (Scotland) Act 1987 (appeals on questions of law).

### **Reclaiming against decree by default**

**38.11.**-(1) Where decree by default has been granted against a party in respect of his failure to lodge a step of process or other document, a motion for review by that party of the interlocutor granting such decree shall be refused unless the document is lodged on or before the date on which the motion is enrolled.

(2) A decree by default may, if reclaimed against, be recalled on such conditions, if any, as to expenses or otherwise as the court thinks fit.

---

(a) 1982 c.27; section 6 was amended by the Civil Jurisdictions and Judgments act 1991 (c.12), Schedule 2, paragraph 3, Schedule 1 to the Act of 1982 was substituted by S.I.1990/2591 and Schedule 3C to the 1982 Act was inserted by the Act of 1991, section 1(3).

### **Reclaiming against interlocutor adjusting issues**

**38.12.** A party who reclaims against an interlocutor adjusting issues for jury trial shall, on enrolling the motion for review-

- (a) lodge in process the issue or counter-issue proposed by him showing the amendment to the issues, as adjusted, sought to be made; and
- (b) send a copy of the issue or counter-issue, as the case may be, to every other party.

### **Early disposal of reclaiming motion**

**38.13.**-(1) A party who seeks early disposal of a reclaiming motion (in the case of the claimer, whether or not by virtue of rule 38.7A) shall-

- (a) where he is the claimer, include in his motion under rule 38.6(1) (method of reclaiming) either the words "and for early disposal on the Summar Roll" or the words "and for early disposal in the Single Bills"; or
- (b) where he is the respondent-
  - (i) within the period allowed for opposing the motion, endorse on the motion of the claimer made under rule 38.6(1), or send by post or facsimile transmission a notice of opposition in Form 23.4 including the words "The respondent (name) seeks early disposal."; or
  - (ii) add, to his opposition under rule 38.14(1) (objections to competency of reclaiming motion), the words "and for early disposal".

(2) The entry in the rolls in respect of the motion for early disposal shall be starred; and the parties shall, at the hearing of that motion, provide the Inner House with an assessment of the likely duration of the hearing to determine the reclaiming motion.

(3) At the hearing of the motion for early disposal, the Inner House may -

- (a) appoint the cause to the Summar Roll for hearing; or
- (b) direct that the cause be heard in the Single Bills,

and may make such order as to the lodging of grounds of appeal as it thinks fit.

(4) At any hearing of the reclaiming motion in the Single Bills, the Inner House may determine the motion or make such other order as it thinks fit.

### **Objections to competency of reclaiming motion**

**38.14.**-(1) After a reclaiming motion has been marked by a claimer, any other party may oppose the motion on the ground that the reclaiming motion is incompetent.

(2) Where a reclaiming motion has been opposed under paragraph (1), the cause shall be put out for hearing in the Single Bills before a Division of the Inner House.

(3) At the hearing in the Single Bills arranged under paragraph (2), the Inner House may-

- (a) dispose of the objection to competency and, where it repels the objection, order grounds of appeal to be lodged;
- (b) appoint the cause to the Summar Roll for a hearing on the objection;
- (c) reserve the objection until grounds of appeal have been lodged and order such grounds to be lodged;
- (d) reserve the objection for hearing with the merits and order grounds of appeal to be lodged.

(4) Where the Deputy Principal Clerk considers that a reclaiming motion may be incompetent, whether or not any other party has opposed the reclaiming motion under paragraph (1), he may, before the cause is brought before the Inner House, refer it to a single judge in accordance with paragraph (5).

(5) Any referral by the Deputy Principal Clerk under paragraph (4) shall be made to a judge nominated for that purpose by the Lord President.

(6) Where a referral is made under paragraph (4), the judge may-

- (a) order any party to make representations to him in respect of the competency of the reclaiming motion;
- (b) refuse the reclaiming motion on the ground that it is incompetent;
- (c) direct that the reclaiming motion is to proceed as if the referral had not been made;
- (d) make such order as to expenses or otherwise as he thinks fit.

(7) Any decision of a judge in respect of a reclaiming motion referred to him under paragraph (4) shall be final and not subject to review.

#### **Procedure where no objection to competency**

**38.15.**-(1) Subject to paragraph (2), where a reclaiming motion is not opposed on the ground of competency, the Inner House shall, without hearing parties, order grounds of appeal to be lodged.

(2) This rule shall not apply where an application is made under rule 38.13(1) (early disposal of reclaiming motion).

#### **Grounds of appeal in reclaiming motions**

**38.16.**-(1) An order for grounds of appeal shall require-

- (a) the claimer, and
- (b) any respondent seeking to bring an interlocutor under review or to challenge the grounds on which the Lord Ordinary has pronounced the interlocutor under review, to lodge grounds of appeal in process within 28 days after the date of the interlocutor making the order.

(2) Grounds of appeal shall consist of brief specific numbered propositions stating the grounds on which it is proposed to submit that the reclaiming motion should be allowed or as the case may be.

(3) On lodging grounds of appeal, the party lodging them shall-

- (a) lodge three copies of them in process; and
- (b) send a copy of them to every other party.

(4) A party who has lodged grounds of appeal may at any time apply for leave to amend his grounds of appeal on cause shown.

(5) Where a claimer fails to lodge grounds of appeal in accordance with paragraph (2) within the period prescribed under paragraph (1), the Inner House may, at its own instance or on the motion of a respondent, refuse the reclaiming motion with or without hearing parties as the court thinks fit.

#### **Orders for hearing**

**38.17.**-(1) Subject to rule 38.13 (early disposal of reclaiming motion), on lodging grounds of appeal-

- (a) the reclaimer who has lodged grounds of appeal, or
- (b) where the reclaimer no longer insists in his reclaiming motion, a respondent who has lodged grounds of appeal, shall apply by motion to the Inner House for an order for hearing.

(2) On a motion under paragraph (1), the Inner House may-

- (a) appoint the cause to the Summar Roll for hearing; or
- (b) direct that the cause be heard in the Single Bills.

(3) In a cause in which an objection to competency has been reserved under rule 38.14(3)(c), the motion under paragraph (1) of this rule shall require the attendance of counsel or other person having a right of audience, and, at the hearing of that motion in the Single Bills, the Inner House may-

- (a) dispose of the objection, and, where it repels the objection, either dispose of the merits in the Single Bills or appoint the cause to the Summar Roll for hearing;
- (b) appoint the cause to the Summar Roll for hearing on the objection; or
- (c) reserve the objection for hearing with the merits and appoint the cause to the Summar Roll for hearing.

### **Reclaiming prints**

**38.18.** A reclaiming print shall be in the form of a record and shall contain-

- (a) the whole pleadings and interlocutors in the cause;
- (b) where the reclaiming motion is directed at the refusal of the Lord Ordinary to allow the pleadings to be amended in terms of a minute of amendment and answers, the text of such minute and answers; and
- (c) where available, the opinion of the Lord Ordinary.

### **Lodging of appendices in reclaiming motions**

**38.19.**-(1) Where, in a reclaiming motion-

- (a) the opinion of the Lord Ordinary has not been included in the reclaiming print, or
- (b) it is sought to submit notes of evidence or documents for consideration by the court, the reclaimer shall lodge an appendix incorporating such documents within three months after the cause has been appointed to the Summar Roll.

(2) Where the reclaimer considers that an appendix is not necessary, the reclaimer shall, by the date specified in paragraph (1)-

- (a) give written intimation of that fact to the Deputy Principal Clerk; and
- (b) send a copy of that intimation to the respondent.

(3) Where a respondent in a reclaiming motion seeks to submit notes of evidence or documents for consideration by the court which the reclaimer has given written intimation to the respondent he does not intend to include in his appendix, the respondent shall incorporate such notes or documents in an appendix which he shall lodge within one month after the date on which intimation under paragraph (2) or this paragraph, as the case may be, was given.

(4) Where a reclaimer fails to lodge an appendix in accordance with paragraph (1), a respondent may apply by motion to the Inner House to have the reclaiming motion refused.

(5) In a case where early disposal is sought by virtue of rule 38.7A, the Inner House may, on the application by motion of the reclaimer, determine that paragraphs (1) to (4) shall not apply or shall apply subject to such modifications as it considers appropriate.

### **Notes of evidence not extended when agreed**

**38.20** Where, in a reclaiming motion, the parties are agreed that on any particular issue the interlocutor reclaimed against is not to be submitted to review, it shall not be necessary to reproduce the notes of evidence or documents relating to that issue.

### **Amendment of pleadings in reclaiming motions**

**38.21.**(1) Where, after a reclaiming motion has been marked, any party applies by motion to have the pleadings amended in terms of a minute of amendment and answers, he shall apply for a direction as to further procedure.

(2) Where it appears to the Inner House that the proposed amendment makes a material change to the pleadings, it may recall the interlocutor of the Lord Ordinary reclaimed against and remit the cause back to the Lord Ordinary for a further hearing.