

CHAPTER 38

RECLAIMING

Introduction

38.1.—(1) This Chapter applies subject to any other provision in these Rules or any enactment.

- (2) 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 within the reclaiming days in accordance with the provisions of this Chapter.

(3) In this Chapter, “reclaiming days” means the days within which an interlocutor may be reclaimed against.

Reclaiming days

38.2.—(1) 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.

(2) Where an interlocutor which reserves or does not dispose of the question of expenses is the subject of a reclaiming motion under paragraph (1)(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 the 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 mentioned in paragraph (5) may be reclaimed against, without leave, within 14 days after the date on which the interlocutor was pronounced.

- (5) Those interlocutors are—
- (a) an interlocutor disposing of part of the merits of a cause;
 - (b) an interlocutor 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) an interlocutor limiting the mode of proof;
 - (d) an interlocutor adjusting issues for jury trial;
 - (e) an interlocutor granting, refusing, recalling, or refusing to recall, interim interdict or interim liberation;
 - (f) an interlocutor in relation to an exclusion order under section 4 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981^(b);
 - (g) an interlocutor granting or recalling a sist of execution or procedure;

^(a) 1982 c.53; section 12 was modified by the Consumer Protection Act 1987 (c.43), sections 6(1)(d), 41(2) and 47(1) and (2)

^(b) 1981 c.59; section 4 was amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c.73), sections 13(5) and 60(6).

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

(6) An interlocutor (other than a decree in absence or an interlocutor mentioned in paragraph (2), (3) or (5) 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

38.3.—(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 (appeals on questions of law arising from making, variation or recall of time to pay directions)(a)—

- (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, other than an interlocutor—

- (a) deciding whether to give permission (including the giving of permission either subject to conditions or only on particular grounds) for group proceedings to be brought under Chapter 26A (group procedure);
- (b) deciding whether to grant permission for the application to proceed under section 27B(1) of the Act of 1988(b) or an interlocutor determining the application, pronounced under Chapter 58 (applications for judicial review)(c),

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

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

(6) An interlocutor pronounced on the Commercial Roll, other than an interlocutor which makes such disposal as is mentioned in rule 38.2(1), may be reclaimed against only with the leave of the commercial judge within 14 days after the date on which the interlocutor was pronounced.

Applications for leave to reclaim

38.4.—(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) 1987 c.18.

(b) Section 27B was inserted by the Courts Reform (Scotland) Act 2014 (asp 18), section 89 and amended by S.I. 2015/700.

(c) Chapter 58 was substituted by S.S.I. 2015/228 and amended by S.S.I. 2017/200.

(d) Rule 42.4 was amended by S.I. 1996/1756.

(e) Rule 47.10 was substituted by S.I. 1994/2310.

- (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 38.2(6) (reclaiming days and leave) or rule 38.3 (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, a procedural judge or the vacation judge.

Method of reclaiming

38.5.—(1) A party who seeks to reclaim against an interlocutor shall mark a reclaiming motion by enrolling a motion for review in Form 38.5 before the expiry of the reclaiming days.

(2) On enrolling a motion for review under paragraph (1), the claimer shall lodge a reclaiming print in the form of a record which 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.

(3) 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.

Effect of reclaiming

38.6.—(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 38.2(2), 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 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 residence, contact or aliment, the marking of a reclaiming motion shall not excuse obedience to or implement of the award of residence, contact or aliment, as the case may be, unless by order of the court.

Effect of extracted interlocutor

38.7. 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

38.8. 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 (appeals in relation to decisions on enforcement)(a); and
- (b) an appeal from a decision of the Lord Ordinary under section 6A of the Civil Jurisdiction and Judgments Act 1982 and Article 44 and Annex IV to the Lugano Convention, as defined in rule 62.26(2) (application and interpretation of Part V of Chapter 62(b) of these Rules); and
- (c) an appeal from a decision of the Lord Ordinary under section 103(3) of the Debtors (Scotland) Act 1987 (appeals on questions of law)(c).
- (d) an appeal from a decision of the Lord Ordinary concerning permission to proceed in petitions for judicial review under section 27D of the Act of 1988 (appeal following oral hearings).

Reclaiming against decree by default

38.9.—(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.

Reclaiming out of time

38.10.—(1) In a case of mistake or inadvertence, a procedural judge may, on an application made in accordance with paragraph (2), 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 judge thinks fit.

(2) An application under paragraph (1) shall be made by motion included in the motion for review made under rule 38.5(1).

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- (a) 1982 c.27. Section 6 was amended by the Civil Jurisdiction and Judgments Act 1991 (c.12), Schedule 2, paragraph 3(b). Schedule 1 was substituted by S.I. 1990/2591 and Schedule 3C was inserted by section 1(3) of the Act of 1991.
 - (b) Section 6A of the Civil Jurisdiction and Judgments Act 1982 was inserted by regulation 7(3) of the Civil Jurisdiction and Judgments Regulations 2009 (S.I. 2009/3131). The definition of “the Lugano Convention” was inserted into rule 62.26(2) by S.S.I. 2009/450.
 - (c) 1987 c.18.

Urgent disposal of reclaiming motion

38.11.—(1) Where the claimer seeks urgent disposal of a reclaiming motion, he shall include in his motion under rule 38.5(1) either the words “and for urgent disposal on the Summar Roll” or the words “and for urgent disposal in the Single Bills”.

(2) Where a respondent seeks urgent disposal of a reclaiming motion, he shall, within the period allowed for opposing the motion, endorse on the motion of the claimer under rule 38.5(1), or send by post or facsimile transmission a notice of opposition in Form 23.4 including the words “The respondent (*name*) seeks urgent disposal on the Summar Roll” or the words “The respondent (*name*) seeks urgent disposal in the Single Bills”, as the case may be.

(3) The entry in the rolls in respect of the motion for urgent disposal shall be starred; and the motion shall call before a procedural judge.

(4) At the hearing of the motion, the parties shall provide the procedural judge with an assessment of the likely duration of the hearing to determine the reclaiming motion.

(5) The procedural judge may—

- (a) grant the motion for urgent disposal and either appoint the reclaiming motion to the Summar Roll for a hearing or direct that the reclaiming motion be heard in the Single Bills; or
- (b) refuse the motion for urgent disposal.

(6) Where the procedural judge grants the motion for urgent disposal, he may make such order as to the future timetabling of, and procedure in, the reclaiming motion as he thinks fit.

(7) Rules 38.12 to 38.16 shall apply to a reclaiming motion in respect of which the procedural judge has granted a motion for urgent disposal only to the extent that he so directs.

Required application of certain reclaiming motions for urgent disposal

38.11A. Where a party reclaims against an interlocutor in relation to an order under section 11(1) of the Children (Scotland) Act 1995, the claimer shall seek urgent disposal of the reclaiming motion under rule 38.11(1).

Objections to the competency of reclaiming

38.12.—(1) Any party other than the claimer may object to the competency of a reclaiming motion by—

- (a) lodging in process; and
- (b) serving on the claimer,

a note of objection in Form 38.12.

(2) Where the Deputy Principal Clerk considers that a reclaiming motion may be incompetent he may (whether or not any party has lodged and served a note of objection under paragraph (1)) refer the question of competency to a procedural judge.

(3) Where the Deputy Principal Clerk refers a question of competency, he shall intimate to the parties the grounds on which he considers that question of competency arises.

(4) A note of objection may be lodged, and the Deputy Principal Clerk may refer a question of competency, only in the period of 14 days after the date on which the reclaiming motion was marked.

(5) Where a note of objection is lodged, or the Deputy Principal Clerk has referred a question of competency, the Keeper of the Rolls shall—

- (a) allocate a diet for a hearing before a procedural judge; and
- (b) intimate the date and time of that diet to the parties.

(6) Each party shall, within the period of 14 days after the date on which a note of objection is lodged or a question of competency is referred by the Deputy Principal Clerk—

- (a) lodge in process; and
- (b) serve on the other party,

a note of argument giving fair notice of the submissions which the party intends to make as to competency.

(7) At the hearing allocated under paragraph (5), the procedural judge may—

- (a) refuse the reclaiming motion as incompetent;
- (b) direct that the reclaiming motion is to proceed as if the note of objection had not been lodged or the question not been referred, whether under reservation of the question of competency or having found the reclaiming motion to be competent; or
- (c) refer the question of competency to a bench of three or more judges; and he may make such order as to expenses or otherwise as he thinks fit.

(8) Where a procedural judge refers a question of competency under paragraph (7)(c), the cause shall be put out for a hearing in the Single Bills before a Division of the Inner House comprising three or more judges.

(9) At the hearing in the Single Bills arranged under paragraph (8), the Inner House may—

- (a) dispose of the objection to competency;
- (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.

Timetable in reclaiming motion

38.13.—(1) The Keeper of the Rolls shall—

- (a) issue a timetable in Form 38.13, calculated by reference to such periods as are specified in this Chapter and such other periods as may be specified from time to time by the Lord President, stating the date by which the parties shall comply with the procedural steps listed in paragraph (2) and the date and time of the hearing allocated in terms of subparagraph (b) of this paragraph; and
- (b) allocate a diet for a procedural hearing in relation to the reclaiming motion, to follow on completion of the procedural steps listed in paragraph (2).

(2) The procedural steps are—

- (a) the lodging of grounds of appeal and answers;
- (b) the lodging of any appendices to the reclaiming print or, as the case may be, the giving of intimation that the claimer does not intend to lodge any appendices;
- (c) the lodging of notes of argument; and
- (d) the lodging of estimates of the length of any hearing on the Summar Roll or in the Single Bills which is required to dispose of the reclaiming motion.

(3) The Keeper of the Rolls shall take the steps mentioned in paragraph (1)—

- (a) where no note of objection has been lodged and no question of competency has been referred by the Deputy Principal Clerk within the period mentioned in rule 38.12(4), within 7 days of the expiry of that period;

- (b) where a procedural judge has made a direction under rule 38.12(7)(b), within 7 days after the date that direction was made; or
- (c) where a question of competency has been referred to a bench of three or more judges and—
 - (i) an interlocutor has been pronounced sustaining the competency of the reclaiming motion under rule 38.12(9)(a) or following a Summar Roll hearing under rule 38.12(9)(b), or
 - (ii) an interlocutor has been pronounced under rule 38.12(9)(c) or (d), within 7 days after the date of that interlocutor.

Sist or variation of timetable in reclaiming motion

38.14.—(1) A reclaiming motion may be sisted or the timetable may be varied on the application by motion of any party.

(2) An application under paragraph (1) shall be—

- (a) placed before a procedural judge; and
- (b) granted only on special cause shown.

(3) The procedural judge before whom an application under paragraph (1) is placed may—

- (a) determine the application;
- (b) refer the application to a bench of three or more judges; or
- (c) make such other order as he thinks fit to secure the expeditious disposal of the reclaiming motion.

(4) Where the timetable is varied, the Keeper of the Rolls may —

- (a) discharge the procedural hearing fixed under rule 38.13(1)(b);
- (b) fix a date for a procedural hearing; and
- (c) issue a revised timetable in Form 38.13.

(5) Upon recall of a sist, the Keeper of the Rolls may —

- (a) fix a date for a procedural hearing; and
- (b) issue a revised timetable in Form 38.13.

Failure to comply with timetable in reclaiming motion

38.15.—(1) Where a party fails to comply with the timetable, the Keeper may, whether on the motion of a party or otherwise, put the reclaiming motion out for a hearing before a procedural judge.

(2) At a hearing under paragraph (1), the procedural judge may—

- (a) in any case where the claimer or a respondent fails to comply with the timetable, make such order as he thinks fit to secure the expeditious disposal of the reclaiming motion;
- (b) in particular, where the claimer fails to comply with the timetable, refuse the reclaiming motion; or
- (c) in particular, where a sole respondent fails or all respondents fail to comply with the timetable, grant the reclaiming motion.

Procedural hearing in reclaiming motion

38.16.—(1) At the procedural hearing fixed under rules 38.13(1)(b) or 38.14(4)(b) or (5)(a), the procedural judge shall ascertain, so far as reasonably practicable, the state of preparation of the parties.

(2) The procedural judge may—

- (a) appoint the reclaiming motion to the Summar Roll for a hearing and allocate a date and time for that hearing;
- (b) appoint the reclaiming motion to the Single Bills for a hearing and allocate a date and time for that hearing; or
- (c) make such other order as he thinks fit to secure the expeditious disposal of the reclaiming motion.

(3) Where this paragraph applies the procedural judge is to make an order under paragraph (2)(c) appointing the reclaiming motion to be determined in chambers without appearance unless satisfied that cause exists for making some other order.

(4) Paragraph (3) applies where—

- (a) the interlocutor reclaimed against is an interlocutor disposing of an application for a protective expenses order under Chapter 58A of these Rules; and
- (b) the grounds of appeal do not seek to submit to the review of the Inner House any other interlocutor, other than a subsequent interlocutor dealing with expenses.

Amendment of pleadings in reclaiming motion

38.17.—(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 that the amendment makes a material change to the pleadings, the Inner House may recall the interlocutor of the Lord Ordinary reclaimed against and remit the cause back to the Lord Ordinary for a further hearing.

Grounds of appeal in reclaiming motion

38.18.—(1) 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 granted.

(2) 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.

(3) A party who has lodged grounds of appeal or answers to the grounds of appeal may apply by motion to amend the grounds or answers, on cause shown.

(4) An application under paragraph (3) shall include any necessary application under rule 38.14(1) (sist or variation of timetable).

Lodging of appendices in reclaiming motion

38.19.—(1) Where, in a reclaiming motion, the claimer considers that it is not necessary to lodge an appendix to the reclaiming print, the claimer shall, by the relevant date specified in the timetable—

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

(2) Where the claimer provides intimation under paragraph (1), a respondent may apply to a procedural judge, by motion, for an order requiring the claimer to lodge an appendix.

(3) An application under paragraph (2) shall include specification of the documents that the respondent seeks to have included in the appendix.

(4) Where an application is made under paragraph (2), a procedural judge may make an order requiring the reclaimer to lodge any appendix that the procedural judge considers necessary, within such time as the procedural judge may specify.

(5) An order under paragraph (4) may only be granted by a procedural judge after having heard parties.

(6) Paragraph (7) applies where—

- (a) a respondent seeks to submit for consideration by the court notes of evidence or documents in respect of which the reclaimer has given written intimation to the respondent that the reclaimer does not intend to include in his appendix; and
- (b) a procedural judge has not made an order under paragraph (2) requiring the reclaimer to lodge an appendix which includes such notes of evidence or documents.

(7) The respondent shall incorporate such notes or documents in an appendix which he shall lodge within such period as is specified by the procedural judge in disposing of the application under paragraph (4).

(8) Where, in any reclaiming motion other than one in which intimation is given under paragraph (1)—

- (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 such period as shall be specified in the timetable.

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.

Single Bills

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