

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

[2026] SC ABE 92

ABE-B868-25

JUDGMENT OF SHERIFF IAN WALLACE

in the Summary Application of

WENDY HEPBURN

Applicant

against

(FIRST) DEESIDE CREWING SERVICES LIMITED,
a company incorporated under the Companies Acts and having its registered office at
4th Floor, Regent Centre, Regent Road, Aberdeen, AB11 5NS, and

(SECOND) VROON OFFSHORE SERVICES LIMITED,
a company incorporated under the Companies Acts and having its registered office at
4th Floor, Regent Centre, Regent Road, Aberdeen, AB11 5NS

Respondents

Applicant: Macpherson, advocate; Digby Brown LLP
Respondents: McLean KC; Brodies LLP

ABERDEEN, 3 July 2026

Introduction

[1] On 19 January 2024, the applicant's husband was working at sea on board the vessel *VOS Voyager*. In the early hours of the morning he fell in his cabin and suffered life changing injuries which rendered him quadriplegic. He died nearly 6 months later, on 13 July 2024. The applicant has lodged an application under section 1 of the Administration of Justice (Scotland) Act 1972 ("the 1972 Act"). She seeks to recover material relating to proceedings she states she intends to raise for loss she has suffered as a result of her husband's accident.

Relevant law

[2] An application for recovery of documents under section 1 of the 1972 Act can be raised both before and after proceedings have commenced. Orders under section 1 are often associated with “dawn raids” but can be obtained where there is none of the urgency which would justify such a course (*per* Lord President Rodger in *Iomega Corporation v Myrica (UK) Ltd* 1998 SC 636 at p 638). In order to grant an application before proceedings have commenced, the court requires to be satisfied that proceedings are likely to be brought and that it is appropriate that the order should be granted (*per* Lord Cullen, *Dominion Technology Ltd v Gardner Cryogenics Ltd (No 1)* 1993 SLT 828 at 832B).

[3] The applicant must set out the substance and basis of her case. However, the usual tests of relevancy and specification do not apply. An application requires to set out: “adequate averments as to the substance of and basis for the case” (*Dominion Technology supra*, *per* Lord Cullen, at p 832C); “a prima facie, intelligible and stateable case” (*Pearson v Educational Institute of Scotland* 1997 SC 245, *per* Lord Drummond Young, at p 250B; *Harwood v Jackson* 2003 SLT 1026, *per* Temporary Judge JG Reid, QC, p 1029-H); and “not... a prima facie case which could confidently be expected to pass muster against the standards which would be applied at procedure roll, but merely an ‘intelligible’ such case” (*Mex Group Worldwide Ltd v Ford* 2024 SLT 901, *per* Lord Sandison, at para [47]).

The 1999 Rules

[4] Rule 3.1.2 of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) 1999 applies to applications made before proceedings have commenced. Rule 3.1.2(2) provides:

“The summary application shall contain–

- a) the listed items;
- b) the address of the premises within which the applicant believes the listed items are to be found; and
- c) the facts which give rise to the applicant's belief that, were the order not to be granted, the listed items, or any of them, would cease to be available for the purposes of section 1 of the Act.”

[5] Rule 3.1.3 of the 1999 Rules requires that: “The applicant shall lodge with the summary application... (a) an affidavit supporting the averments in the summary application”

Opposition to the current application

[6] This application is opposed by the respondents for a number of reasons. These include that the applicant has not competently followed the correct procedures; that her case is not sufficiently clearly stated to allow the court to be satisfied that it is likely she will raise proceedings; and that it is not otherwise appropriate for the court to grant the application. The respondents submit that the application amounts to a fishing diligence, which involves a heavy-handed procedure which will cause significant disruption to the respondents’ businesses. Senior counsel for the respondents makes further criticisms relating to the approach of the applicant’s legal representatives which he submits the court should take into account.

Compliance with the 1999 Rules

[7] The respondents submitted that the application should be dismissed as the applicant had not followed the correct procedure as set out in the 1999 Rules. In particular, although the applicant lodged an affidavit, that affidavit did not support all of the key averments

made in the summary application, “including those about the need for speedy recovery lest documents be destroyed”.

[8] The applicant in this case does not claim that there is a there is a need for speedy recovery due to a concern that documents will be lost or destroyed. As stated above, an application can be made in the absence of such urgency (*Iomega Corporation, supra*).

[9] However, Rule 3.1.2(2)(c) of the 1999 Rules, as drafted, is premised on the basis that an applicant will have a belief that if the order is not sought information will cease to be available. That rule would on the face of it appear to require an averment or urgency, and Rule 3.1.3(a) would require an affidavit supporting that averment, even in circumstances where the applicant does not make that claim. That would pose any applicant not claiming urgency with a problem.

[10] The Inner House in *Manning v Manning* [2018] CSIH 67 (at paragraph 22), however, provided a solution to that problem. It could be overcome, suggested the court, by reading Rule 3.1.2(2) as follows:

“The summary application shall contain *as appropriate or as the circumstances require* [my emphasis] –

- a) the listed items;
- b) the address of the premises within which the applicant believes the listed items are to be found; and
- c) the facts which give rise to the applicant's belief that, were the order not to be granted, the listed items, or any of them, would cease to be available for the purposes of section 1 of the Act.”

[11] Each requirement of the rules would not therefore necessarily apply in every case.

Sheriff Principal CAL Scott QC applied this interpretation in *Alec Cairney v Glasgow* 2014 3843474 (2014). In that case a “dawn raid” was not sought and there was no concern in relation to the continued availability of the information sought. Therefore, Rule 3.1.2(2)(c) had no function and compliance with its terms was rendered unnecessary.

[12] In this case, the application did aver somewhat vaguely that there was a risk that the documents sought will be lost with the passage of time (which may have been an attempt to ensure formal compliance with Rule 3.1.2(2)(c)). There was no reference to any such belief that documents would be lost in the applicant's affidavit. However, I am satisfied that the circumstances of this case do not require any averment under Rule 3.1.2(2)(c). Therefore, the absence of anything in the applicant's affidavit to support any such averment (in accordance with Rule 3.1.3(a)) cannot render the application incompetent.

Are proceedings likely and is it appropriate to grant an order?

[13] The applicant has stated that she intends to bring proceedings. However, in considering whether an order should be granted, the court requires to consider whether the applicant has set out an intelligible and stateable case.

[14] The summary application states that on 19 January 2024 the deceased was acting in the course of his employment on board the *VOS Voyager*. The application then states:

"Prior to the deceased's accident he suspected that the ship was incorrectly ballasted. The vessel was not moving or behaving as it should. It was too light. He reported his concerns to the Skipper.... No further action was taken. On or around 19 January 2024 the vessel came into adverse weather conditions. In the early hours of the morning the deceased was awoken by items in his cabin falling. He became aware that the vessel was pointing in the wrong direction. When he arose he was thrown through the cabin and struck the frame of his bed with his back. He was unable to move."

[15] The application further states that the deceased suffered a spinal cord injury and was rendered quadriplegic. On 13 July 2024 he passed away. As a result of the deceased's death the applicant suffered loss, injury and damage. I was further informed that the claim had been intimated to the respondents in February 2025. That claim stated that the ballast was "too low" and/or "incorrect".

[16] Senior counsel for the respondents submitted that the applicant's case was unclear. The applicant had raised a number of potential issues which may or may not relate to the ballast. The causal links in the applicant's case were not made explicit. There was no causal link averred between Mr Hepburn's accident and his death (and there was no medical evidence to support this). It was not clear what duty either of the respondents had breached. It was not clear what was the legal basis of the applicant's claim, whether at common law or under regulations which the applicant had referred to. If the applicant's claim was related to the ballast, it was not clear what was wrong with the ballast, what should have been done differently, and how that affected the ship and caused the accident.

[17] The applicant's case could certainly have been stated more clearly. The parataxical construction of the application leaves the reader to infer the causal links. Nevertheless, the substance of the applicant's case is clear: the ballast was too low, which made the ship unstable, which caused the deceased to fall, as a result of which he fell and suffered life-limiting injuries. He died a few months later. I am satisfied that the case is intelligible and stateable.

[18] The respondents further submitted that, if the applicant had an evidential basis for her claim, the appropriate course would be for her to bring that claim and thereafter seek recovery of documents. The applicant submitted that the better course was to seek to recover further documentation at this stage so that the applicant could provide further detail and substance to her claim before raising proceedings.

[19] Section 1 provides for an application to be made to supplement an evidential case before proceedings are raised. As stated by Lord President Rodger in *Iomega Corporation*, section 1 was designed to make it easier for parties to recover documents before proceedings were begun. In *Manning*, the Inner House explained that the background to the introduction

of section 1 included a concern that the courts should have more extensive powers to order early disclosure of evidence (including documents) relevant to personal injuries, both before and after the raising of an action.

[20] In this context, it is worth considering the principles which underpin the personal injury pre-action protocol (OCR Ch 3A). That protocol does not apply to this case as the claimant estimates the claim will be over £25,000. Parties did not voluntarily agree to continue with the protocol (as they could have under Rule 4). However, initial communications had been exchanged in what were referred to as “pre-action protocol documents”. Counsel for the applicant submitted that, even though the protocol was not applied in this case, the principles referred to in the protocol were relevant to consider. I agree with that submission.

[21] The aims of the protocol are set out in paragraph 3. The protocol seeks to encourage good practice, including in relation to the “early and full disclosure of information about the dispute”. The protocol, however, does not create that good practice. Rather, it encourages parties to implement what is already considered to be good practice. I am satisfied that encouraging early disclosure appropriate to the circumstances of the case is a factor for the court to take into account when considering whether it is appropriate to grant an order under section 1, whether or not the personal injury pre-action protocol applies.

[22] In this case there are good reasons for the applicant to seek further information before raising proceedings. The information that the applicant can provide in relation to the ballast is necessarily limited. Her intended claim is based on observations she says were made by her deceased husband, who had professional experience working at sea. The applicant claims no expertise in the relevant matters. She has no access to information to check the observations she says her husband made about the ballast. She can reasonably

anticipate that information she requires to add substance to any claim will be held by the respondents. That information may either support her intended claim or undermine it. In either case, early disclosure is in the best interests of all parties.

The Marine Accident Investigation Board

[23] Senior counsel for the respondents further based his opposition to the application on the fact the Marine Accident Investigation Board (“the MAIB”) had discontinued its investigation into the incident. No formal report was prepared, though a letter had been produced, which stated that there were no identifiable safety issues to report. This, it was submitted, showed that there was expert advice available which suggested that the applicant did not have a basis for a case. Senior counsel relied on the case of *Connolly v Edinburgh Northern Hospitals Board* 1974 SLT (Notes) 53 for his submission that it may be difficult to obtain recovery in order to have another expert take a look at papers to try to identify a ground of action. When the MAIB’s involvement was considered, it could not be said it was likely that proceedings would be brought.

[24] I do not consider that there is anything in the case of *Connolly* which would justify refusing this application. The facts of that case and this case are different. In *Connolly* (a medical negligence case) an expert of the petitioner’s own choosing had already considered his medical records and provided a report which did not support his claim. The application that was refused was for recovery of his records in order to get another opinion from another medical professional based in the United States. The court highlighted a number of reasons why the value of such an exercise was likely to be limited.

[25] The applicant in this case has not had the opportunity to have an expert examine relevant documentation. The MAIB’s conclusions are briefly stated, and focus largely on the

treatment of the applicant's husband after his fall. It is not known to what extent the MAIB considered the concerns about the ballast reportedly expressed by the applicant's husband. On the information available, it is difficult to draw any firm conclusion about the relevance of the MAIB discontinuing its investigation.

Other issues with the application

[26] Senior counsel for the respondents gave a number of other examples showing the unsatisfactory manner in which the applicant's legal representatives had approached both requesting information from the respondents and proceeding with this application. When they initially requested information, they provided no further specification of their claim when requested to do so by the respondents. They appeared to change the factual and legal basis of their claim. They had not provided the affidavit which apparently had been taken from Mr Hepburn before he died. The initial application had been lodged incompetently. The applicant's legal representatives were not prepared at the initial hearing on 22 January 2026 to debate the application. They had not responded to the detailed objections set out in the respondents' answers to the application. They had only very recently confirmed that they were abandoning two of the calls in the application. They only confirmed at the hearing on the debate that the sole issue their case focussed on was the incorrect ballast. There was a number of typographical errors contained in the applicant's documentation.

[27] The applicant's solicitors can be rightly criticised. A more open, careful and focussed approach in which their case was stated with greater clarity may have encouraged early disclosure and made an application under section 1 unnecessary. However, none of the failings provided a basis for refusing the application.

[28] Senior counsel for the respondents further submitted that the applicant had called the wrong parties. The first respondent was not the applicant's employer and the second respondent was not the owner of the vessel, as had been set out in the application. They were rather agents respectively for the employer and owner. The applicant's counsel submitted that even if the respondents were not the correct parties against which to ultimately raise proceedings, they were still the appropriate parties from which to seek the documents as havers. I accept that submission.

The documents sought

[29] Senior counsel for the respondents submitted that the calls were too wide and unclear. The applicant's counsel narrowed the focus of the documents sought at the start of his submissions. Two of the applicant's wider calls were no longer insisted upon. The wording of some of the remaining calls was unclear and obscured the meaning of what was sought. Some of the calls sought information relating to an extended time period. I have therefore restricted and focussed the scope of the calls. I am satisfied that the application can be granted in respect of the following documents held by or on behalf of the respondents which may be relevant to the applicant's claim and should be straight forward for the respondents to identify and produce:

- Call I: Any job description and contract of employment relating to the employment of the deceased, in place on 19 January 2024.
- Call III: All accident reports, or similar documentation, relating to the circumstances of the deceased's accident on board the *VOS Voyager* on 19 January 2024.

- Call V: Documents current at the time of the deceased's accident showing or tending to show the safe level of ballast water for the *VOS Voyager* on a journey of the type as was underway on 19 January 2024.
- Call VI: Documents current at the time of the deceased's accident relating to the Ballast Water Book and Stability Report on board the *VOS Voyager* during the period 18 January 2024 to 19 January 2024.
- Call VII: Documents current at the time of the deceased's accident relating to GPS tracking data for the *VOS Voyager* during the period 18 January 2024 to 19 January 2024 showing the journey it was undertaking and the direction it was facing.
- Call VIII: Documents current at the time of the deceased's accident relating to weather information available to those in charge of the *VOS Voyager* during the period of 18 January 2024 to 19 January 2024.
- Call IX: Failing principals, drafts, copies or duplicates (including where electronically or digitally stored) of the above of any of them.

[30] These calls identify information relating to the circumstances of the incident, the ballast, the known weather conditions, and the vessel's location. The documents relate to a restricted time period. In practice, the information can be produced with limited disruption to the business of the respondents.

Expenses

[31] Both the claimant and the respondents moved for sanction for counsel. In the case of the respondents this was for senior counsel. I am satisfied that, in all the circumstances, it is reasonable to sanction the employment of counsel in this case. I sanction the employment of

senior counsel for the respondents. I accept that this application raised issues of wider concern to both parties. The court benefitted from the submissions of counsel.

[32] The outcome is one of mixed success. In considering expenses, I also take account of the conduct of the parties. The legal representatives for the applicant (though not counsel who conducted the debate) can be criticised for the substandard manner in which they have approached these proceedings and this application. My impression was that this contributed to a reactive intransigence on the part of the legal representatives for the respondents. The outcome of the approach of both sets of legal representatives was that what might properly have been dealt with through open discussion has required to be resolved through court proceedings. I therefore make no award of expenses to either party.

[33] Finally, senior counsel for the respondents expressed the concern that allowing this application would encourage the legal representatives of the applicant to make many similar such applications. This decision should give no such encouragement. This application has been decided on the particular circumstances of this case. The applicant's legal representatives should take greater care in their approach to submitting any applications in future.