SHERIFF APPEAL COURT

[2017] SAC (Civ) 27
ABE-B212-13

Appeal Sheriff P J Braid
Appeal Sheriff A MacFadyen
Appeal Sheriff A Cubie

OPINION OF THE COURT

delivered by SHERIFF PETER J BRAID

in the cause

NRAM, otherwise known as Northern Rock (Asset Management) Plc, and previously known as Northern Rock Plc

Pursuer and Respondent

against

PETER HANVEY CORDINER

First Defender

and

VERA CORDINER

Second Defender and Appellant

Pursuer and Respondent: Kinnear;
Defender and Appellant: Houston;

1 September 2017

Introduction

[1] In this action the pursuers and respondents, who are heritable creditors under a standard security granted by the appellant and her husband (hereinafter collectively referred to as "the defenders"), are seeking to exercise their rights under the security, following default by the defenders in respect of their failure to comply with the

requirements of a calling up notice served on them some years ago. Following a lengthy and somewhat unusual procedure, described in more detail below, decree was granted against the defenders on 17 December 2015 at a peremptory diet of which they had been given due notice. A further hearing then took place on 17 February 2016, apparently instigated by the sheriff, who had noticed that there was a minor error in the interlocutor of 17 December 2015 (although that error merely replicated an error in the crave). At that hearing the original decree was recalled, the crave amended and decree granted of new. No notice of that hearing was given to the defenders. While the procedure after 17 December 2015 strikes us as unusual, the appellant's solicitor stressed that he was not challenging the competency of the proceedings on 17 February 2016 and we mention this only to explain how there came to be an interlocutor of that date. Subsequently, the appellant lodged a minute in terms of section 24D of the Conveyancing and Feudal Reform (Scotland) Act 1970 (the "1970 Act"), craving recall of the decree of 17 February 2016.

[2] That minute was refused by the sheriff as incompetent. We set out the terms of the interlocutor in full, since we will revert to their significance below:

> "The Sheriff, having considered Mr Cordiner's application to act as Lay Representative for the Defender Vera Cordiner, Refuses said application on basis (*sic)* that Mr Cordiner is not an approved Lay representative in terms of section 24E(3) of the Conveyancing and Feudal Reform (Scotland) Act 1970; Refuses Mr Cordiner's motion to continue today's hearing; thereafter having considered submissions on behalf of the Pursuer, refuses the Minute for Recall of Decree lodged by the said Vera Cordiner as incompetent".

It is that interlocutor which is the subject of the present appeal.

[3] The only issue raised by the appellant in her grounds of appeal is whether the sheriff was correct to reach the view that the minute was incompetent, having regard to the terms of section 24D of the 1970 Act as properly construed. The short point raised by that ground of appeal is whether the recall procedure available under the 1970 Act is available to a

defender who has previously participated in a court action but was not present at the hearing at which decree was granted. However, on considering the papers lodged with the appeal, it occurred to us (as indeed it had to the procedural appeal sheriff at an earlier stage) that there might be an issue over the competency of the appeal and we invited parties to address us on that issue also, which they duly did.

Competency of the Appeal – Submissions

[4] The competency or otherwise of the appeal is regulated by section 110 of the Courts Reform (Scotland) Act 2014, which is in the following terms:

> "110(1) An appeal may be taken to the Sheriff Appeal Court, without the need for permission, against –
> (a) a decision of a sheriff constituting final judgment in civil proceedings, or
> (b) any decision of a sheriff in civil proceedings –
> (i) granting, refusing or recalling an interdict, whether interim or final,
> (ii) granting interim decree for payment of money, other than a decree for expenses,
> (iii) making an order ad factum praestandum,
> (iv) sisting an action,
> (v) allowing, refusing or limiting the mode of proof, or
> (vi) refusing a reponing note.
> (2) An appeal may be taken to the Sheriff Appeal Court against any other decision of a sheriff in civil proceedings if the sheriff, on the sheriff's own initiative or on the application of any party to the proceedings, grants permission for the appeal.
> …
> (4) This section does not affect any other right of appeal to the Sheriff Appeal Court under any other enactment.
> …
> (6) This section is subject to any provision of this or any other enactment that restricts or excludes the right of appeal from a sheriff to the Sheriff Appeal Court."

[5] The sheriff was not asked to, and did not, grant, permission for the appeal. It was not submitted to us that the interlocutor appealed against constituted a final judgment, nor that any other enactment contained any relevant provision. Rather, it was both parties'

contention that the appeal fell under section 110(1)(b)(vi), namely that it was an appeal against a decision refusing a reponing note. The solicitor for the appellant submitted that a broad approach should be taken to the meaning of reponing note, to which a minute for recall was analogous. "Reponing note" should be construed as including a minute for recall. To hold otherwise would be to place resident homeowners in a less favourable position than non-resident homeowners. The latter could repone any decree in absence, since any proceedings against them would proceed by way of ordinary action. Proceedings against a resident homeowner, by contrast, must proceed by summary application, in which the reponing procedure was not available, but the equivalent was a minute for recall. If there was no right of appeal against the refusal of a minute for recall, that could amount to unjustifiable discrimination against resident homeowners, in violation of their ECHR rights since it could be a difference in the treatment of two analogous groups. Counsel for the respondents was content to leave the issue of competency for the court, but suggested that a minute for recall was probably sufficiently analogous to a reponing note that the appeal could be held to be competent. If there was no automatic right to appeal against the refusal of a minute for recall which ought to have been allowed, that would be a surprising result.

[6] We are conscious that the similarities between reponing and recalling a decree lie at the heart of the merits of this appeal, as does the legislative background against which section 24D came to be enacted. We will therefore revert to the issue of competency below, when we come to give consideration of the merits of the appeal.

Section 24D of the Conveyancing and Feudal Reform (Scotland) Act 1970

[7] Section 24D of the 1970 Act is in the following terms:

"24D(1) A person mentioned in subsection (2) below may apply to the court for recall of a decree granted on an application under section 24(1B) of this Act.
(2) Those persons are –
(a) the creditor;
(b) the debtor, but only if the debtor did not appear and was not represented in the proceedings on the application under section 24(1B);
(c) an entitled resident, but only if the entitled resident did not make an application under section 24B(1) in the proceedings.
(3) An application under subsection (1) may be made at any time before the decree has been fully implemented.
(4) An application by any person under subsection (1) above is not competent if an application under that subsection has already been made by that person in relation to the application under section 24(1B)…".

[8] The issue which arises for determination in this appeal is whether the appellant is a person who did not appear and was not represented in the proceedings.

The History of the Proceedings

[9] At this stage it is appropriate to have regard to what actually happened in the course of the proceedings. We set out a table of the important dates in the action, what happened on those dates and the appellant's involvement therein:

Date of court hearing	**Nature of hearing**	**Appellant's involvement**
6 June 2013	First hearing	Defences lodged by parties personally Represented by solicitor
4 July 2013	Peremptory diet, intimation having been ordered 26 June 2013	Defender personally present and by solicitor
18 July 2013	Continued first hearing	Represented by solicitor
15 August 2013	Continued first hearing for payment of £5150 to account and to negotiate payment of the	Represented by solicitor

Date of court hearing	**Nature of hearing**	**Appellant's involvement**
	outstanding balance	
11 October 2013	Continued first hearing	Fax received form defender
14 January 2014	Evidential hearing	Represented by solicitor; decree granted of consent; effect suspended pending payment of an agreed sum
24 July 2015	Hearing on pursuers' minute for recall; decree recalled; pursuers' minute of amendment allowed to be received and answered	Absent
4 September 2015	Hearing on minute of amendment and answers	Answers (number 11 of process) lodged in advance to pursuers' minute of amendment; continued for adjustment
25 September 2015	Hearing on minute of amendment and answers	Represented by solicitor
23 October 2015	Hearing on minute of amendment and answers	Represented by solicitor
17 December 2015	Peremptory diet for which intimation was made; decree of new granted	Absent
17 February 2016	Recall of decree; decree granted of new	Absent

[10] Of particular note is the fact that following the appearance in the proceedings, and at various court hearings, of both defenders, and the fixing of an evidential hearing in January

2014, the defenders then consented to decree passing against them at that hearing on 14 January 2014. Unusually, the pursuers subsequently recalled that decree and, even thereafter, the defenders participated in the proceedings by lodging answers to a minute of amendment and by being represented at various hearings until eventually their agents withdrew and decree was granted against them at a peremptory diet of which they had been given notice.

The Legislative Framework

[11] Before embarking upon an analysis of section 24D, and a discussion of how it falls properly to be construed, it is necessary to have regard to the legislative framework which governs the enforcement of standard securities, and to the historical background, in order to put the provision into context.

[12] Section 9 of the 1970 Act makes provision for a creditor to obtain a heritable security over land in the form of a standard security. Section 11 of the Act enables a creditor to obtain a real right in security where the standard security is duly recorded. Subject to any variation agreed between the parties, every standard security is regulated by the standard conditions contained in schedule 3 of the 1970 Act. Standard condition 9 provides that a debtor shall be held to be in default in certain specified circumstances, and standard condition 10 provides for the rights of a creditor on the default of a debtor. The right to eject an occupier is conferred by section 5 of the Heritable Securities (Scotland) Act 1894.

[13] Under the 1970 Act as originally enacted, a creditor had an unqualified right to enforce a standard security by serving a calling up notice. If not complied with, he was then entitled to enter into possession, eject the debtor and sell the subjects. That unqualified right was modified by the Mortgage Rights (Scotland) Act 2001, which entitled a debtor to apply

to the court to suspend the heritable creditor's rights. However, the need for more radical reform was recognised and the Scottish Government set up a repossessions group whose remit was, among other things: "to consider urgently whether the legal protection for homeowners in Scotland at risk of repossession provided through UK legislation and in Scotland through such vehicles at the Mortgage Rights (Scotland) Act 2001 and the Conveyancing and Feudal Reform (Scotland) Act 1970 is adequate and, if necessary, make specific recommendations on ways in which either reserved or devolved legislation should be strengthened": (*Repossessions Group, Final Report, Scottish Government, June 2009*). Among other measures, that group recommended that repossession actions should always call in court (which did not happen when such actions were raised, as they generally were under the 1970 Act, as ordinary actions): para 5.6; and that there should be a simplified recall procedure (paras 5.15 and 5.16). In particular, the report stated at para 5.15:

> "Current protections require the defaulter to apply for a section 2 Mortgage Rights (Scotland) Act order in response to an action immediately after this is raised. Unfortunately, many defaulters do not address matters at this stage and only start to deal with them after the court decree is granted when a repossession date is already set."

The report went on to say at para 5.16:

> "Making the front end of the repossession process simpler and more accessible is a key part of this report. This could be complemented by a simpler post decree option for borrowers who do not defend the case when it is first raised. Advice agencies point out that they are often contacted by borrowers who have not responded to the repossession action and have been presented with a letter detailing the date on which they are due to be repossessed. *A simplified reponing note procedure (similar to the minute for recall procedure in the summary cause rules) could help advice providers and in-court advisors to stop impending repossessions and link people back into the court process and its protections"* (emphasis added).

[14] At paragraph 5.17, the report went on to observe that ordinary cause reponing notes normally required a solicitor to carry out the drafting, the authorisation of the sheriff and a lodging fee of £75 and in that context recommended an amended procedure which included

the abolition of the lodging fee and that the note have a simpler format similar to the form in summary cause procedure. It may be worth observing that although the repossessions group recommended that repossession actions should always call in court, they appear to have envisaged that such actions would continue to be governed by the ordinary cause rules.

[15] Pausing there, the mischief (or one of them) that the Home Owner and Debtor Protection (Scotland) Act 2010 was introduced to address was the non-engagement by homeowners in proceedings for repossession, coupled with the potentially cumbersome mechanism for reponing decrees granted in absence in ordinary actions. It is against that background that the 2010 Act was enacted. Aside from substantive measures designed to ensure that repossession became a remedy of last resort, that Act also made procedural changes, including the insertion into the 1970 Act of section 24(1D) which provides that an application for warrant to exercise any of the remedies which the creditor is entitled to exercise on a default is to be made by summary application. It will be appreciated that since repossession actions were now to proceed by means of summary application and since reponing was not available under that procedure, an alternative method of recalling any decree granted in absence would be required. So it was that the new section 24D, which was inserted into the 1970 Act by the 2010 Act, came into being, and we now return to it.

Submissions for the Appellant

[16] The submission for the appellant, stated shortly, was that the recall procedure was available to a defender who was not present at any hearing at which decree was granted, subject to one or two possible exceptions such as an evidential hearing. The significant words in section 24D(2)(b) were "but only if the debtor did not appear and was not

represented in the proceedings on the application under section 24(1B)". The appellant's solicitor submitted that if the intended meaning of the subsection was that a minute for recall of decree could not be granted where a party had appeared or had had the benefit of representation at any stage in respect of the application, the provision would not have required to refer to "the proceedings". Had that been Parliament's intention, it would have been sufficient to provide that a minute for recall of decree could not be granted where a party had appeared or had been represented "in the application". The conjunctive linking of the words "appearance" and "representation" made more sense if a wider interpretation were applied, so that a party was entitled to seek recall of a decree where there was no appearance and no representation at the hearing at which decree was granted, no matter how many appearances there had been previously. It was further submitted that the effect of a recall was that the action returned to square one, as it were. In the present case, that meant that it was irrelevant to look at what happened before the first decree was recalled by the pursuers. The solicitor for the appellant submitted that this proposed construction of section 24D was supported by an unreported decision of Sheriff Principal Abercrombie, *Leeds Building Society* v *H*. Not only is that case unreported, no written judgment was issued. However, we were told that Sheriff Principal Abercrombie held that it was competent to recall a decree granted at a hearing at which the defender was absent, even though the defender had appeared at the first calling. Beyond that, parties were unclear as to the precise facts, although they did agree that they were unusual. Further, it was common ground that the sheriff had continued the case *ex proprio motu* when it first called and, on any view, there had been less engagement in the process by the defender in that case than there had been in the present. However, in the absence of a written decision, we do not know the precise facts of that case nor how they differed from those in the present case

(beyond knowing that they were unusual); we do not know what was argued; and we do not know the ratio of the decision. We are therefore unable to attach any weight to it, and simply regard it as a decision reached on its own particular facts.

[17] The solicitor for the appellant further argued that if we were against him as to the primary meaning of section 24D we should nonetheless read it down in such a way as to render it ECHR compliant. Articles 6, 8 and 14 of the ECHR were all engaged, as was article 1 protocol 1. Particular reliance was placed upon article 14 which prohibits discrimination on a variety of grounds including property and status. Differences of treatment in analogous situations required to be justified. Homeowners were at a procedural disadvantage in seeking to recall a decree, by comparison with the rights available to a tenant. The rights of the latter to recall a decree were governed by the summary cause rules, and in particular by rule 24.1, which permitted recall of a decree granted under paragraphs (5), (6) or (7) of rule 8.2, which encompassed a decree granted at any hearing at which the defender did not appear and was not represented, including a continued hearing. While that would not permit recall following failure to appear at a proof, it did permit recall where there had been multiple hearings at which the defender did appear followed by one at which he did not. Homeowners should be in an equivalent position. A purposive interpretation should therefore be adopted. The following cases were referred to in support of this submission: *Zehentner* v *Austria (2011) 52 EHRR 22; Van der Mussele* v *Belgium (1984) 6 EHRR 163; AL (Serbia)* v *Secretary of State for the Home Department [2008] UKHL 42; James* v *United Kingdom (1986) 8 EHRR 123*.

Submissions for the Pursuers and Respondents

[18] Counsel for the pursuers submitted that the court must deduce the intention of Parliament from the words used in the Act; and the natural meaning of the words should be departed from only if they were ambiguous or if the provision was contradicted by or incompatible with any other provision in the Act: *Westminster Bank Ltd* v *Zang* [1966] 1 All ER 114 at 1.20, HL. Applying that approach to section 24D, its meaning was perfectly clear. "Proceedings" could only mean the proceedings on the application. The defender could seek recall but only if he did not appear and was not represented in those proceedings. In the present case the defender quite clearly had appeared because defences had been lodged and the process had been entered. Both defenders were represented and a decree was granted of consent. There had then been further procedure involving the defenders. There was no ambiguity in the wording of section 24D. It did not apply to the appellant.

[19] However, even if a purposive approach were required, the purpose was quite clearly to allow a defender who had not had the opportunity to do so before, to make representations to the court. That much could be gleaned from the explanatory notes to the Act which stated that: "the debtor or an entitled resident may make an application for the recall of a decree only where they did not appear in the earlier proceedings". The explanatory note to the Bill was in similar terms. As regards the ECHR argument, landowners and tenants were different things and therefore they were inevitably treated differently. There was no discrimination. Even if there was any difference, it was not one which could not be justified. Heritable creditors were in a different position from landowners in that their right to enforce a security and recover the debt owed to them had to be taken into consideration. It was a legitimate aim to afford reasonable protection to their rights. It was in the public interest that a creditor was entitled to enforce his security.

Finally, counsel submitted under reference to *Gow* v *Henry* (1899) 2F 48 that litiscontestation commenced when defences were lodged (page 52) which led to the subsequent decree being one granted *in foro* which was a bar to a minute for recall just as it would have been to a reponing note in an ordinary action. The appellant had still had a right of appeal, and so her rights were adequately protected.

Discussion

[20] We begin by returning to the issue of the competency of the appeal. We acknowledge that there are significant differences in the procedure which applies to reponing notes on the one hand, and minutes for recall on the other. Reponing notes are peculiar to ordinary actions, and minutes for recall to repossession actions, which must proceed as summary applications. A reponing note must set out why the action was not defended and state the nature of the proposed defence. A minute for recall need not do so. A sheriff has a discretion as to whether or not to grant a reponing note, whereas there is no discretion in relation to a minute for recall: if competently made, it must be granted. Conversely, if incompetent by virtue of section 24D(4) it must be refused (although arguably an incompetent minute should not even be accepted by the sheriff clerk). A reponing note can be lodged only by a defender, whereas a minute for recall is available also to a pursuer. However, it must be acknowledged that there are also certain similarities between the two forms of procedure, at least where it is the defender who has lodged the minute for recall. Not only does each provide a means of recalling a decree in absence, but refusal of a reponing note on the one hand, and a minute of recall on the other, both have the effect that a decree in absence effectively becomes final and unchallengeable.

[21] It is plain from the material to which we have referred above that the minute for recall procedure was introduced into summary applications in repossession actions in order that a simpler method of reponing was available to defenders in such actions against whom decree in absence had been granted. While it is pertinent to note that the right afforded to those defenders was an unfettered right to recall the decree – as opposed to the discretionary nature of the decision in reponing – there is nothing in that material to indicate that Parliament intended to remove or restrict the right of appeal against a refusal to allow the defender back into the action. Our tentative view is that the term "reponing note" can be construed to extend beyond simply the means of challenging a decree in absence pronounced against a defender who has failed to lodge a notice of intention to defend in an ordinary action. Such a view is supported by the opinion of Lord Emslie sitting as a procedural judge of the Inner House in *McDermid* v *D & E Mackay (Contractors) Ltd* 2013 SLT 32. However, we are conscious that we did not have the benefit of full submissions from the parties, nor reference to any authority, on the issue of competency. For present purposes, we are content to proceed as invited by both parties, namely to read "reponing note" in section 110 of the 2014 Act as including a minute for recall of a decree by a defender in a repossession action, and thereafter to consider the merits of the appeal. However, in view of the view reached on the merits, it is unnecessary to reach any concluded view on the question of competency.

[22] However, the appellant cannot have it both ways. If an appeal is competent only because a minute for recall is to be regarded as a species of reponing note, it follows that regard must be had to the nature of reponing in considering the nature of a minute for recall and the circumstances in which it is intended to be used as the appropriate means of reviewing a decree. It is therefore worth restating some general principles about the

circumstances in which reponing is available in ordinary actions, and what other remedies are available to a defender to challenge a decree.

[23] Reponing is the means by which a defender may review a decree in absence against him. Such a decree is to be contrasted with a decree *in foro*, against which reponing is not competent. Authority for these propositions, if any is needed, is to be found at *Macphail*, Sheriff Court Practice (3rd Edition) paragraphs 7.24 and 7.26. If a defender wishes to bring a decree *in foro* under review, he must appeal (or, depending on the circumstances, bring an action of reduction, although that is rare). That does not lead to any injustice because the decree, by definition, will have been granted in a process in which the defender has been participating, and has taken the opportunity to make representations. He will therefore be taken to be aware of any diet at which decree has been granted. That will apply no less to a hearing at which decree by default has been granted than to a hearing in the form of a proof or debate; and will apply equally to a hearing at which the defender was not present, as to one which he did attend. With respect to the solicitor for the appellant, he has, we think, fallen into the trap of equiparating a decree in absence with a decree granted in the absence of the defender; but the two are different. The sheriff, for his part, at paragraph 6(b) of his Note, embarks upon a discussion as to whether the decree granted on 17 December 2015 was a decree in absence or a decree by default but we do not consider that it is helpful in the present context to inquire whether the decree was a decree by default or not. That applies all the more so when one bears in mind that in a repossession action it is never appropriate to grant a decree simply because of a failure to appear: the sheriff must always be satisfied that it is reasonable to do so before granting decree. The true distinction lies between a decree in absence and a decree *in foro*.

[24] It seems to us that in considering whether a decree is a decree in absence or not, the true test is whether there has been litiscontestation (see *Macphail*, para 14.06). The following passage from *Gow* v *Henry* (1899) 2F 48 at 52 is instructive:

> "In any action in this Court or the Sheriff Court litiscontestation (which has important effects) commences when defences are lodged, and subsists until the action is judicially disposed of so as to be put out of Court."

Two observations fall to be made about that dictum. First, *Macphail* suggests at paragraph 7.24, footnote 94, that litiscontestation, at least for the purposes of reponing, occurs not when defences are lodged but when a notice of intention to defend is lodged. However, it cannot occur later than the date of lodging of defences. Second, in a summary application, where the procedure is different, litiscontestation may occur at a different time, notably, at the date of the hearing, should the defender appear (or be represented) and make representations. However, on any view, having regard to the procedure in the present case, litiscontestation must have occurred long before decree was granted against the appellant on 17 December 2015, given that she had both lodged pleadings and been represented in court on numerous occasions, including at the evidential hearing at which decree was granted on 14 January 2014.

[25] Returning, then, to the meaning of section 24D(2)(b) of the 1970 Act, and bearing the above distinction in mind, we find no ambiguity at all in its terms. It is clear to us that the phrase "but only if the debtor did not appear and was not represented in the proceedings on the application under section 24(1B)" is intended to refer to the debtor who has not appeared at all, such as to bring about litiscontestation, rather than to a debtor who has appeared but was not present at the hearing at which decree happened to be granted, regardless of what procedure had taken place in the meantime. Had the legislature intended to afford a right of recall (as distinct from a right of appeal) to a debtor who did not

appear at any hearing, even in a defended action, not only would that have run contrary to the whole notion of reponing (to which recall is intended to be an alternative but simpler procedure) but it is contrary to the plain wording of the provision. Not even the appellant contended that failure to appear at any hearing whatsoever would result in a right to present a minute for recall. He appeared to accept, for example, that failure to attend an evidential hearing would not lead to such a right. How is the line to be drawn between hearings where the failure to attend gives rise to a right to recall and other such hearings where it does not? The construction proposed by the appellant would lead to great uncertainty and confusion. It seems to us that had the legislature intended that the provision should have the meaning contended for by the appellant, the provision would have referred to "the hearing at which decree was granted", which would have put the matter beyond doubt. We also do not agree with the appellant that any inference falls to be drawn from use of the phrase "proceedings in the application" as opposed to "application". On an ordinary reading of the provision, it clearly refers to the defender who has not appeared in the proceedings at all.

[26] We agree with counsel for the pursuer that one need not go any further than that in construing the provision, because its terms are clear and unambiguous, but that if a purposive approach is taken, the same result is arrived at, having regard to our observations on the background to the legislation, at paragraphs 13 to 16 above and to the material referred to therein.

[27] That is not necessarily an end to the matter, as we were invited to read section 24D down, in the manner intended for by the appellant, so as to render it ECHR compliant. We decline to do so, for various reasons. First we are not persuaded that there is any material difference in the treatment of tenants under summary cause procedure, and homeowners

under the 1970 Act. Even the solicitor for the appellant accepted that there came a stage in summary cause procedure where a tenant would lose the right to recall granted against him at which he did not appear; and we are not persuaded that the test is not the same, viz, has there been litiscontestation in a true sense. The argument was predicated on there being multiple continuations to monitor payments of rent, or mortgage payments, as the case may be, but that is far from the situation in the present case. Second, even if there is a difference in treatment, such a difference is justified for the reasons set out by counsel for the pursuers. Third, even if reading down is required, in our view that should be done, not by twisting the clear meaning of "in the proceedings on the application" but rather by taking a broad approach to the meaning of "appear or be represented". As we have made clear, the real issue having regard to the purpose of the legislation is whether or not the defender engaged in the proceedings. Having regard to the extent of the appellant's participation in the process in the present case, there can be no doubt whatsoever that both defenders including the appellant engaged wholly with the action (to the extent of consenting to decree) and on any reading of section 24D the appellant can only be a person who did appear and who was represented in the proceedings. Indeed, reverting briefly to the unreported decision of Sheriff Principal Abercombie, this may be the true point of distinction between that case and the present one.

Decision

[28] For all of these reasons, we find that the sheriff was correct in holding that the appellant was not a person who "did not appear and was not represented in the proceedings on the application" within the meaning of section 24D(2)(b) and that the appeal falls to be refused. It was accepted that expenses should follow success, and we shall award these to

the pursuers. The short point raised by the case is novel and, we accept, of some importance to heritable creditors who might be faced with debtors willing to use delaying tactics to prevent or delay enforcement of a security, as appears to be the case here. We shall therefore sanction the case as suitable for the employment of junior counsel.

Postscript

[29] One final point underlines the futility of the appellant's position from the time the minute for recall was presented. We return to the terms of the interlocutor appealed against which make clear that the appellant was neither present nor represented at the hearing at which the minute for recall was considered. It follows that even had the minute been competent and even had it been granted, the sheriff would thereafter have been bound to conduct the hearing in the absence of the appellant. It seems likely that decree would again have been granted, which does call into question the appellant's motives in lodging that minute and in pursuing this appeal.