OUTER HOUSE, COURT OF SESSION

[2017] CSOH 146

CA27/17

OPINION OF LORD DOHERTY

In the cause

TARMAC TRADING LIMITED

Pursuer

against

MRS MARJORY GRAHAM DARE SIMPSON or HAMILTON, as Executrix of the late Robert Scott Hamilton

Defender

Pursuer: Massaro; Shepherd and Wedderburn LLP
Defender: Burnet; Davidson Chalmers LLP

5 December 2017

Introduction

[1] The pursuer ("Tarmac") in this commercial action (CA27/17) was the tenant under the lease of a quarry. The late Robert Scott Hamilton was the landlord. Tarmac's right under the lease to occupy the subjects as a quarry came to an end on 9 March 2012. Mr Hamilton died on 30 August 2016. The defender ("Mrs Hamilton") is his executrix.

[2] On 8 March 2017 Mrs Hamilton purported to have a Summons in an ordinary action served upon Tarmac at its registered office in Birmingham. However, the schedule of citation was not signed by the process server. In that action (A96/17) the original Summons

sought declarator that Tarmac was in breach of its obligations under the lease; and payment of certain sums said to be due under the lease, *viz* (i) compensation in lieu of Tarmac carrying out restoration work; (ii) unpaid annual fixed rent until restoration work had been carried out or compensation paid; (iii) the fees and expenses of a mining engineer appointed by Mrs Hamilton.

[3] In the commercial action Tarmac seeks declarator that it was not validly cited on 8 March 2017, production and reduction of the certificate of service relating to that purported citation (7/1 of process), and interdict against Mrs Hamilton founding upon the purported citation. On 27 March 2017 at an *ex parte* hearing before calling I granted interim interdict prohibiting Mrs Hamilton from taking any steps to lodge the Summons in the ordinary action for calling.

[4] Mrs Hamilton enrolled a motion in the ordinary action seeking to be relieved from the consequences of her failure to comply with Rules 13.7 and 16.1(1)(b) of the Rules of Court (Act of Sederunt (Rules of the Court of Session 1994) 1994, Article 2 and Schedule 2 ("the Rules")). By interlocutor of 18 August 2017 Lord Bannatyne continued that motion; allowed a Minute of Amendment for Mrs Hamilton (No 9 of process) to be received and granted warrant for service of the Summons, the Minute of Amendment and the interlocutor of that date upon Tarmac; and authorised Tarmac to make representations at the hearing of the continued motion without entering the process. It was envisaged that the last mentioned aspect of the interlocutor would preclude any possible argument that by making representations Tarmac would lose its right to challenge the defect in service (see Rule of Court 16.11; *Colley* v *Celtic Pacific Ship Management (Overseas) Ltd* 2001 SLT 320, per Lord Macfadyen at paragraph 1; *Greenwoods Ltd* v *Ans Homes Ltd* 2007 SLT 149, per Lord Brodie at paragraph 2). The Minute of Amendment added a conclusion for specific

implement of Tarmac's obligation to restore the subjects, failing which for payment of damages.

[5] The commercial action was appointed to a Debate on the commercial roll. The motion in the ordinary action and the Debate were heard together.

[6] On 24 August 2017 process servers served the Summons, the Minute of Amendment and the interlocutor of 18 August 2017 on Tarmac at its registered office. They appear to have done so first at 15.30, and to have repeated service at 18.15. On the first occasion the Form 13.7 was almost fully completed and was signed and dated by the process server and a witness, but the date space at the top of the form was left blank. On the second occasion the Form 13.7 was fully completed and was signed and dated by the process server and the witness. At the Debate copies of both of those Form 13.7 citations, copies of the envelopes in which they were said to have been contained, and the relative certificates of service (7/4 of process) were lodged on behalf of Mrs Hamilton. She also lodged a signed witness statement from a process server, Mr Hope, which bore to confirm that the Summons and citation served on 8 March 2017 had been contained within a sealed envelope with a notice written on it, and that the envelope had been signed and dated by him and witnessed by Ms Philomena Hope. The statement narrated that the terms of the notice were:

> "This envelope contains a Citation to, or intimation from, the Court of Session. If delivery of the letter cannot be made it must be returned immediately to the Deputy Principal Clerk of Session, Court of Session, 2 Parliament Square, Edinburgh, EH1 1RQ."

While Counsel for Tarmac did not oppose the lodging of these productions, he stressed that their contents were not agreed.

Statutory Provisions

[7] The Citation Act 1592 (c 59) is a pre-Union Act of the Scottish Parliament. It contains a preamble and a single section:

> "That the Copies of lettres or chargis be subscryvit be the executor thairof
>
> 1. It is statute and ordanit that in all tyme cuming all copys of summoundis and lettres quhilkis salbe deliuerit to ony pairtie be subscryuit be the officiar executour thairof"

[8] The Rules provide:

> "**Forms**
> **1.4.—** Where there is a reference to the use of a form in these Rules, that form in the appendix to these Rules, or a form substantially to the same effect, shall be used with such variation as circumstances may require.
>
> …
>
> **Relief for failure to comply with rules**
> **2.1.—** (1) The court may relieve a party from the consequences of a failure to comply with a provision in these Rules shown to be due to mistake, oversight or such other excusable cause on such conditions, if any, as the court thinks fit.
> (2) Where the court relieves a party from the consequences of a failure to comply with a provision in these Rules under paragraph (1), the court may pronounce such interlocutor as it thinks fit to enable the cause to proceed as if the failure to comply with the provision had not occurred.
>
> …
>
> **Service and intimation of summonses**
> **13.7.—** (1) Where a summons is to be executed, a copy of the summons which has passed the signet shall be–
> (a) served on the defender with a citation in Form 13.7 attached to it; …
>
> …
>
> **Methods and manner of service**
> **16.1.—** (1) Subject to any other provision in these Rules or any other enactment, service of a document required under these Rules on a person shall be executed–
> (a) in the case of an individual–
>
> …

(b) in the case of any other person–
(i) by leaving the document and any citation or notice, as the case may be, in the hands of an individual at, or depositing it in, the registered office, other official address or a place of business, of that other person, in such a way that it is likely to come to the attention of that other person;

…

(3) Subject to paragraph (4), where service has been executed, the party on whose behalf service has been executed shall attach to the document served and lodge in process–
(a) a certificate of service as required by these Rules;

…

Service by messenger-at-arms

16.3.— (1) Service by a method mentioned in rule 16.1(1)… (b)(i), shall be executed by a messenger-at-arms who shall–
(a) explain the purpose of service to any person on whom he executes service;
(b) complete a citation or notice, as the case may be, and a certificate of service in Form 16.3; and
(c) send the certificate of service to the pursuer.
(2) Such service shall be witnessed by one witness who shall sign the certificate of service (which shall state his name, occupation and address).
(3) Where service is executed by a method mentioned in rule 16.1(i)… (b)(i), the document and the citation or notice of intimation, as the case may be, shall be placed in an envelope (bearing the notice specified in rule 16.4(2)) and sealed by the messenger-at-arms.

…

(6) In the application of this rule to service in England and Wales, reference to a messenger-at-arms shall be construed as a reference to a person entitled to serve Senior Courts writs; …

…

Service by post

16.4.— (1) This rule applies to service of a document by post …
(2) Service by post shall be executed by–
(a) a messenger-at-arms, or
(b) an agent,
posting a copy of the document to be served with any citation or notice, as the case may be, by registered post or the first class recorded delivery service addressed to the person on whom service is to be executed and having on the face of the envelope a notice in the following terms: 'This envelope contains a citation to, or intimation from, the Court of Session. If delivery of the letter

cannot be made it must be returned immediately to the Deputy Principal Clerk of Session, Court of Session, 2 Parliament Square, Edinburgh EH1 1RQ.'.

…

(4) The person executing service of a document shall complete–
(a) a citation or notice, as the case may be; and
(b) a certificate of service in Form 16.4.

…

(7) Subject to rule 16.11 (no objection to regularity of service or intimation), the execution of service by post shall be valid unless the person on whom service was sought to have been made proves that the envelope and its contents were not tendered or left at his address.

…

No objection to regularity of service or intimation

16.11.— (1) A person who enters the process of a cause shall not be entitled to state any objection to the regularity of the execution of service or intimation of a document on him; and his appearance shall be deemed to remedy any defect in such service or intimation.

…

APPENDIX

…

FORM 13.7

Rule 13.7(1) **Form of citation of defender**

CITATION

Date: (*date of posting or other method of service*)

To: (*name and address of defender*)

IN HER MAJESTY'S NAME AND AUTHORITY, I (*name of agent*), solicitor [*or* person having a right to conduct the litigation], for (*name of pursuer*) [*or*(*name of messenger-at-arms*), messenger-at-arms], serve the attached summons on you.

> The summons contains a claim made by (*name of pursuer*) against you in the Court of Session, Edinburgh.
>
> If you intend to deny the claim you must: (1) enter appearance … (2) subsequently lodge defences … The summons will not call in court earlier than [21] days after the date of service on you of the summons. The date of service is the date stated at the top of this citation …
>
> **If you do not enter appearance and lodge defences the court may make an order against you.**
>
> **…**
>
> (*Signed*)
>
> Messenger-at-arms
> [or Solicitor [or Agent] for pursuer]
> (*Address*)"

The Form 13.7

[9] The Form 13.7 left with Tarmac on 8 March 2017 is 6/4/1 of process. The form was only partially completed. No date was inserted at the top. Tarmac's name and address had been inserted in the space after "To:". In the next line the form had been completed to indicate that the person serving the attached summons was a process server, but the process server's name was not inserted. The foot of the form was completed as follows:

> "
>
> Witness Process Server
> 3 Wellington Park, Belfast, BT9 6DJ
>
> We are instructed in this action by **Davidson Chalmers LLP, 12 Hope Street, Edinburgh, EH2 4DB**, telephone number 0131 625 9191, to whom all payments and correspondence should be directed, quoting reference MILN/1/1/GF/SMW/LL."

The citation was not signed by a process server or a witness.

The Pleadings in the Commercial Action

[10] In Articles 5 and 6 of Condescendence Tarmac avers:

> "5. … The process server did not complete the citation. The process server did not sign the citation. A copy of the citation served on the Pursuer is produced, adopted for its terms and held to be incorporated herein for the sake of brevity. The citation is accordingly invalid in terms of both the Rules and the 1592 Act. The Summons has not therefore been served on the Pursuer…
>
> 6. The process server completed a certificate of service in the Form 16.3 on 8 March 2017 purportedly pursuant to Rule 16.3(1)(b). The information in the purported certificate is wrong, as it confirms that service of the Summons has been executed on the Pursuer… the Pursuer accordingly seeks production and reduction of the said Rule 16.3(1) certificate."

In answer 5 of the the defences Mrs Hamilton admits that she purported to have the Summons served by process servers on Tarmac at its registered office in Birmingham on 8 March 2017. She further avers:

> "5. …Believed to be true on the basis of the citation produced by the pursuer that the process server did not complete the citation Form 13.7 and did not sign the citation Form 13.7. Quoad ultra denied except insofar as coinciding herewith. Explained and averred that the requirement to serve a citation with a Summons is a requirement of the Rules. In terms of Rule 2.1 of the Rules the Court has a discretion to relieve a party from the consequences of failure to comply with a provision of the Rules … In the circumstances, the Defender seeks the Court exercise that discretion and relieve the Defender of the consequences of any failure on the part of the process servers in England to serve a valid citation … A copy of the … Summons and the citation were left in the hands of an employee of the pursuers … at its registered office … on 8 March 2017. They were left by … process servers. The leaving of the documents … was witnessed … The documents were left in an envelope with the requisite notice on the face of the envelope explaining that it contained a citation for the Court of Session. Believed and averred that the process server … and the witness … signed the said envelope … The pursuers were aware that the Defender intended to raise proceedings. Agents acting of (sic) the pursuers were asked to accept service on behalf of the pursuers. The defender's agents emailed a copy of the … Summons to the pursuer's agents at 10.03am on 9 March 2017. The pursuer has not been prejudiced by any inadvertent failure to comply with the Rules …"

Answer 6 is in the following terms:

> "6. Admitted that the process server completed a certificate of service in From (sic) 16.3 on 8 March 2017 purportedly pursuant to Rule 16.3(1)(b). The certificate

> of service, Rule 16.3 and Form 16.3 are referred to for their whole terms. Quoad ultra denied. Reference is made to the preceding Answer."

Tarmac adjusted Condescendence 5 in response to Mrs Hamilton's averments:

> "With reference to the Defender's averments in answer, admitted that a copy of the Summons was left in the hands of an employee of the Pursuer, …, at its registered office in Birmingham on 8 March 2017. Admitted that the parties have been in dispute for some time. Admitted that the Defender's agents emailed the Pursuer's agents a copy of the Summons on 9 March 2017, under explanation that the copy emailed … was incomplete. Not known and not admitted who the process servers were that attended at the Pursuer's office on that date, what envelope (if any) the Summons and blank citation were left in, or whether that envelope (if any) was signed. *Quoad ultra* denied. …In the event that the copy Summons and blank citation were left in an envelope by the process servers, that envelope has not been retained by the Pursuer. The requirement to leave the copy Summons and a citation in an envelope (with a completed notice on that envelope in terms of Rule 16.4(2)) was a requirement of Rule 16.3(3). *Esto* the process servers complied with Rule 16.3(3) (which is not known and not admitted), service was still invalid because of the failures to comply with the 1592 Act and Rules 13.7(1) and 16.3(1) (as read with Rule 16.3(6)). The Court has no power under Rule 2.1 to relieve the Defender's failure to comply with the 1592 Act in action A96/17."

Submissions for Tarmac

[11] Mr Massaro submitted that there were at least two issues which could be determined at Debate. First, whether an unsigned Form 13.7 citation was a nullity by reason of non-compliance with the 1592 Act. Second, if so, whether such non-compliance was of a type capable of being relieved by resort to the general dispensing power in Rule 2.1.

[12] It was clear that the Form 13.7 citation had not been completed, and it had not been signed by the process server. The consequences were that the purported citation of Tarmac on 8 March 2017 failed to comply with the Rules (Rules 13.7(1) and 16.3(1)(b)), and, more fundamentally, it failed to comply with the statute because it was not signed.

[13] It was established that the words "copys of summoundis" were to be interpreted as a reference to the schedule of citation: *Erskine,* IV, I, 4; the Opinions of the First Division in *Izatt* v *Robertson* (1840) 2 D 476; the Opinion of Lord Fullerton in *Bruce* v *Hill*, appended to

the report in *Izatt* at p 478; *Maclaren, Court of Session Practice,* p 321-322; *Maxwell, Court of Session Practice,*p 177; *Blackfriars (Scotland) Ltd* v *Shetland Salmon Co's Trustee* 2001 SLT 315, per Lord Penrose at p 316H-K. The Act had not been superseded by the Rules of Court: *Blackfriars,* per Lord Penrose at p 317B-E.

[14] Citation was a formal and significant event which had important legal consequences: *Stair,* iv,38,2; *Maclaren, Court of Session Practice,* p 317; *McLaren* v *McLaren* 1956 SLT 324, per Lord Guthrie at p 324-325. The consequence of the citation being unsigned was that it was a nullity: *Blackfriars,* per Lord Penrose at p 317E-318B; *cf Shiells* v *Reid* (1829) 7 S 535, per Lord Mackenzie at p 541. Whether or not the unsigned citation had been contained in an envelope, and whether or not that envelope had been signed by the process server, the fact remained that the citation had not been signed, let alone subscribed.

[15] It was plain that the dispensing power could only be used to excuse a "failure to comply with a provision in these Rules". It could not excuse a failure to comply with a statutory requirement: *Blackfriars, supra,* per Lord Penrose at p 318C-D; *Colley* v *Celtic Pacific Ship Management (Overseas) Ltd, supra,* per Lord Macfadyen at paragraphs 12 and 17 (in particular at p 323K); *Brogan* v *O'Rourke Ltd* 2005 SLT 29, per the Opinion of the Court at paragraph 28; *Cultural and Educational Development Association of Scotland* v *Glasgow City Council* 2008 SC 439, per the Opinion of the Court at paragraph 14. Lord Penrose in *Blackfriars* and Lord Macfadyen in *Colley* were at one that the power was not available to relieve a pursuer from the consequences of an unsigned citation. Accordingly, it was unnecessary for the court to express a view as to whether other aspects of *Colley* were correct or not. If need be, the court should decline to follow *Colley* if, and in so far as, any of the reasoning in that case was inconsistent with *Blackfriars.* In any case, the power could not be exercised to relieve a party from the consequences of a fundamental nullity: *cf Boslem* v

Paterson 1982 SLT 216, per Lord Ross at p 217; *Cultural and Educational Development Association of Scotland* v *Glasgow City Council*, *supra,* per the Opinion of the Court at paragraph 16. Where the officer executing a citation did not sign it there was a fundamental nullity. Likewise, the complete absence of any citation was a fundamental nullity.

[16] If, contrary to Mr Massaro's submissions, the court concluded that the dispensing power was available to excuse the absence of signature on the citation, the court might require to determine certain of the disputed facts before deciding whether or not to exercise the power (eg whether an envelope containing the citation was signed by the process server; the terms of any instructions given by Mrs Hamilton's agents to the process server).

[17] Mr Massaro suggested that I should issue an Opinion ruling on those two issues of law and put the case out by order for discussion as to (i) appropriate interlocutors in each case; and (ii) further procedure.

Submissions for Mrs Hamilton

[18] Mr Burnet accepted that Rule 2.1 could only relieve a failure to comply with a provision in the Rules. It could not relieve a party from a failure to comply with a statute, and it could not cure a fundamental nullity. However, he submitted that Mrs Hamilton was not asking the court to do either of those things.

[19] The 1592 Act ought to be narrowly construed. Properly construed, all it provided was that any schedule of citation which was served had to be signed by the officer executing service. The requirement to serve a citation was a requirement of the Rules, not a requirement of the 1592 Act: *Colley*, *supra*, per Lord Macfadyen at paragraph 16. Accordingly, failure to serve a citation was a matter which could be excused under Rule 2.1. If the unsigned citation was a nullity (*Blackfriars),* there had been a failure to serve a citation

and that failure could be excused. If lack of citation because of the absence of any attempt at citation could be excused (as in *Colley*), lack of citation because of the failure to sign a citation ought also to be capable of excusal. That was the logical extension of the reasoning in *Colley*. Mr Burnet submitted that *Blackfriars* had been wrongly decided and that it ought not to be followed. He also suggested, tentatively, that it could be distinguished because here the envelope containing the Summons and Form 13.7 had been signed by the process server. The submission was sketched rather than developed, but its gist, as I understood it, was that the Form 13.7 citation and the envelope ought to be treated as if they were a single document. The signed envelope and the Form 13.7 within it did not correspond precisely with the Form 13.7 in the Appendix to the Rules, but together they comprised "a form substantially to the same effect" as it. In that regard reference was made to Rule 1.4.

[20] Mr Burnet submitted that if Rule 2.1 was available the court should exercise its discretion to excuse the lack of proper citation. Tarmac had been made fully aware of the terms of the Summons on 8 March 2017. It had received a service copy Summons then (and a further copy had been emailed to its solicitors the following day). The envelope containing the service copy Summons and the Form 13.7 had been signed by the process server. If the failure was not excused Mrs Hamilton's claim to enforce the principal obligations founded upon in the Summons may have prescribed. It was far from clear that she would have an alternative remedy against one or other of those who instructed or carried out the purported service. Reference was made to *Greenwoods Ltd* v *Ans Homes Ltd, supra*.

Reply for Tarmac

[21] Mr Massaro was taken by surprise by Mr Burnet's suggestion that the Form 13.7 and the envelope in which it was said to have been contained might be treated as being a single

document comprising the citation. He submitted that it was plain that they were not a single document. This was not a case where a form different to, but substantially to the same effect as, Form 13.7 in the Appendix had been used. On the contrary, the form used had been the form in the Appendix, but it had not been subscribed.

Decision and Reasons

[22] There is no doubt that the 1592 Act remains in force. Mr Burnet did not suggest otherwise. It has not been expressly repealed. Nor has it been impliedly repealed by any later enactment or by falling into desuetude (*cf. Stair Memorial Encyclopaedia of the Laws of Scotland,* volume 12, paragraphs 1198 and 1201). *Izatt, Blackfriars* and *Colley* all recognise the Act's continuing effect (as does the Statute Law Revision (Scotland) Act 1964 (section 2 and Schedule 2)). In *Blackfriars* Lord Penrose observed (at pp 316L-317E):

> "The second issue between the parties is whether the Act has been superseded by the code now contained in the rules of court…. The use of the form of citation, form 13.7, is provided for by rule 13.7 (1). The rule does not refer to signature. The form itself makes provision for signature. But there is no equivalent of rule 4.2 (1), which provides for the signature of the summons and of other documents. The form of citation is not among the documents dealt with in that rule. The form of summons, form 13.2A, has provision for signature, and it is plain that the rules are drafted on the basis that provision in the form is not a substitute for express provision in the rules of such requirements as are intended to be imposed by them. Counsel for the defender accepted that there was no express requirement for signature of the form of citation in the rules. In my opinion the structure and terms of the rules are wholly consistent with the view that the 1592 Act, construed in the light of *Izatt*, remains the source of the requirement for signature of the citation of the defender in an ordinary action. Reading the sources together the Act does, and the rules do not, make provision for signature of citations. In this respect the statute cannot be regarded as superseded by the rules of court."

I respectfully agree with that analysis.

[23] In my opinion it is also well established that the expression "copys of summoundis" in the Act falls to be interpreted as a reference to the schedule of citation: *Izatt; Bruce* v *Hill;*

Erskine, IV, I, 4; *Maclaren, Court of Session Practice*, p 321-322; *Maxwell, Court of Session Practice*, p 177; *Blackfriars*, per Lord Penrose at p 316F-K.

[24] While the Act does not make express provision as to the consequences of non-compliance, in my view it is implicit that an unsigned citation is a nullity. As Lord Penrose noted in *Blackfriars* (at p317I-K):

> "It is clear that citation does have a practical role in informing a defender of the raising of the action, and in communicating to him the timetable within which he must act in instructing a defence. It is equally true that the signature of the solicitor or messenger at arms may be the least communicative part of the citation, and will frequently be illegible. However, regular citation is an essential step in the initiation of a litigation: *McLaren v McLaren*. The solicitor or other officer in executing the citation represents his mandate to act for the pursuer and his authority as a qualified law agent to execute the warrant of the court, using Her Majesty's name. One would incline naturally to the view that the signature was an essential of such a formal step in the judicial process rather than a mere check on the fact that there had been a citation. In *Izatt* the court held that the Lord Ordinary had erred in applying the Act to the service copy summons rather than the citation. But there was no criticism of his view that failure to comply with the Act would imply a nullity. The only purpose of the 1592 Act is to require signature."

Once again, I respectfully agree.

[25] In my opinion nothing in *Colley* conflicts with any of this. On the contrary, Lord Macfadyen recognised (paragraph 17) that the source of the requirement that a citation be signed remained the 1592 Act.

[26] I turn then to Mr Burnet's submission that the unsigned Form 13.7 and the signed envelope ought to be treated as if they were a single document. There is no mention of this proposition in the defences or in the note of argument for Mrs Hamilton. In any case, in my view the proposition is ill-founded. The Form 13.7 was the schedule of citation. The envelope, and anything written on it, was separate from that document and did not form part of it. In my opinion that is plain. It is also plain that the Rules clearly distinguish between the Form 13.7 and any envelope within which it is contained. Rule 1.4 has no

bearing on the matter in my view. This is not a case where there has been purported service of a schedule of citation using a form which differed from Form 13.7 in the Appendix. Rather, a citation in that form was used but was not signed (or fully completed).

[27] I come next to the submission that the dispensing power is available to excuse the unsigned citation. In my opinion it is clear that it is not. The source of the requirement for subscription of the schedule of citation is not a provision in the Rules. It is the 1592 Act. That aspect of the requirements of citation continues to be governed by the Act rather than the Rules. Since the failure to sign the citation is not a failure to comply with a provision in the Rules it cannot be excused under Rule 2.1. Thus, although the dispensing power would be available to excuse mere failures by Mrs Hamilton to comply with the provisions of Rules 13.7(1) and Rule 16.3(1)(b), it is not available to excuse non-compliance with the 1592 Act. As Lord Penrose stated in *Blackfriars* (at p 318C-D):

> "The interaction of the Act and the rules of court does not assist the defenders, in my view. The general dispensing power in rule 2.1 is available only to relieve a party from the consequences of failure to comply with provisions of the rules themselves. It cannot extend to a requirement of statute. The peremptory requirements of statute cannot be dispensed with: *Scottish Eastern Investment Trust Ltd, Petrs* [1966 SLT 285]. Further, there is no incompatibility between a subsisting statutory requirement which is inflexible in application and rules which are subject to an overriding dispensing power but which leave the statutory requirement untouched. A deliberate distinction between the two provisions merely serves to underline the absolute nature of the statute."

Mr Burnet says that if the purported citation is a nullity it, and the non-compliance with the statute, may be ignored, with the result that the dispensing power is available to excuse an absence of citation. I disagree. Citation is a nullity because of the non-compliance with the statute. That non-compliance cannot be vanished away. The position remains that there was purported service with an unsubscribed schedule of citation: *Blackfriars*, *supra*, p 318C-D; *Colley*, *supra*, paragraph 17.

[28] It follows that the first of the issues referred to in paragraph 11 above falls to be answered in the affirmative, and the second falls to be answered in the negative. In accordance with Mr Massaro's request I shall put both cases out by order to discuss (i) the terms of appropriate interlocutors to give effect to my decision; (ii) any necessary further procedure.

[29] I also agree with Mr Massaro that, had I been persuaded that the dispensing power was available to excuse the lack of subscription of the schedule of citation, further elucidation of the relevant facts would have been appropriate before determining whether the power should be exercised.

[30] Finally, it is unnecessary to my decision to express a view as to whether, on its facts, *Colley* was correctly decided. I prefer to reserve my opinion on that matter.