



**SHERIFF APPEAL COURT**

**[2020] SAC (Civ) 13  
ABE-F48-18**

Sheriff Principal Pyle  
Sheriff Principal Turnbull  
Appeal Sheriff McCulloch

**OPINION OF THE COURT**

delivered by SHERIFF PRINCIPAL D C W PYLE

in appeal by

**GEORGE FLETT DUTHIE**

Pursuer and Appellant

against

**TERESA FINDLAY**

Defender and Respondent

**Pursuer and Appellant: Malcolm, advocate; Brodies LLP  
Defender and Respondent: Hayhow, advocate; Grant Smith Law Practice**

24 August 2020

**Introduction**

[1] This is an appeal against the decision of the summary sheriff after proof in respect of an application under Section 28 of the Family Law (Scotland) Act 2006. The grounds of appeal do not criticise the sheriff's findings in fact on the parties' respective economic advantages and disadvantages. Instead, they focus upon the sheriff's decision, in the exercise of her discretion, not to make an award in favour of the appellant.

**Sheriff's findings in fact**

[2] The sheriff made 56 findings in fact. That was to be expected given the detailed analysis in the evidence before her of the parties' financial affairs and circumstances during the whole period of their cohabitation which lasted for over 15 years. The evidence included such matters as the financial arrangements for the sale and purchase of motor vehicles and which party benefited or otherwise from those arrangements. It might be said in passing that such scrutiny lapsed into the problem identified by Lady Hale in *Gow v Grant* [2012] UKSC 29(para [54]) of running accounts of who has paid for what and who has enjoyed what benefits in kind during cohabitation. Nevertheless, despite the complexity, the sheriff was able to identify in detail the advantages and disadvantages. And in fairness to the parties, whilst it is all very well to say, as Lady Hale did in *Gow*, "who can say whether the non-financial contributions, or the sacrifices, made by one party were offset by the board and lodging paid for by the other?"; it is quite another to say that the board and lodging payment need not be accurately identified by the court. In many cases, this being an example, considerable evidence will perforce be led about such matters in relation to the whole period of the cohabitation.

[3] The sheriff found in fact and law that the respondent had derived economic advantage from the contributions made by the appellant in relation to her one half share in a property at 41 Morningfield Mews, Aberdeen, her ownership of an Audi motor vehicle and the appellant's provision of financial support. That economic advantage was only partially offset by any disadvantage she had suffered in the interests of the appellant. The sheriff also found in fact and law that the respondent had suffered economic disadvantage in the interests of the appellant through a loss of earnings, but that this was offset by the economic advantage she had derived from the contributions of the appellant, as described above.

### Grounds of appeal

[4] The appellant's first ground of appeal was that the sheriff misdirected herself in law in that the statutory test does not require consideration of factors to rebut a presumption that at the end of the cohabitation each party will retain his or her own property. In our opinion, this submission has no merit. Implicit in the submission was a criticism of a passage in Lord Hope's judgment in *Gow v Grant* (para [33]) in which he makes reference to the rebuttable presumption. Instead, counsel submitted that the correct test was fairness. But that is to ignore the context in which Lord Hope made reference to a presumption. The purpose was to contrast the provisions for cohabiting couples with the provisions on divorce where there is a rebuttable presumption that property will be shared fairly if it is shared equally. That comment was not seeking to dilute or add an additional test to the basic principle of fairness enunciated by Lord Hope at para [31]. Indeed, when one considers the sheriff's judgment, it is perfectly clear that throughout she was applying that principle. She did not misdirect herself in law.

[5] The second ground of appeal was that the sheriff erred by taking into account of where the parties were at the beginning of the cohabitation and where they were at the end without giving due consideration to the extent of contributions made during it. As counsel recognised, that approach derives from a passage in Lady Hale's judgment in *Gow v Grant* (para [54]). In essence, the criticism was that having calculated the economic advantages and disadvantages of both parties, in exercising her discretion on the issue of fairness the sheriff should not revisit that calculation. If that were the sheriff's position there might well have been a basis for criticism, but looking at the sheriff's judgment as a whole we do not consider that she has proceeded in the way counsel described. Instead, the sheriff records

(para [145]) that an assessment of the parties' respective positions at the beginning and end of cohabitation may provide confirmation as to whether there is an economic imbalance "requiring correction". In other words, the sheriff looked in detail at the circumstances of the economic imbalance, the parties' respective financial positions looking into the future and the financial effects of any award being made or not made. In our opinion, these were all matters which the sheriff was entitled to take into account. The concept of fairness entitles the court to take into account the present and future financial circumstances of the parties. In particular, the ability to satisfy an award and the consequences of it are relevant factors for the court to take into account. That was the approach taken in *Smith-Milne v Langler* 2013 Fam LR 58.

[6] The third ground of appeal was a general critique of the sheriff's reasoning in the exercise of her discretion and a conclusion that her decision was manifestly inequitable. We do not find it necessary to set out in detail the numerous findings in fact made by the sheriff. For present purposes it is sufficient to record the following:

1. From the beginning of their cohabitation the parties resided in a house solely owned by the appellant.
2. About 4 years later they purchased another house in Morningfield Mews in joint names for £287,000, all of which was funded by the appellant. By the time the parties' relationship ended the property had increased in value by £38,000. The sheriff expressly found that in proceeding as he did the appellant "wished to demonstrate his commitment to the relationship, and to provide [the respondent] with the security she sought" (Finding in fact 5). The property was renovated at a cost of £70,000, almost entirely funded by the appellant. Again, the appellant funded the purchase of furniture and furnishings in the sum of £40,000.

3. On divorce in September 2007, the respondent received from her ex-husband £151,350 for her share of the matrimonial home. She also retained certain capital assets in the form of a pension, shareholdings and an investment.
4. In 2009 the parties purchased in joint names a flat as an investment, each contributing half the purchase price of £285,000. Its current value is £320,000. Renovations cost £15,000 and were paid from the parties' joint bank account which was funded by the appellant.
5. At the start of the relationship the respondent was in full time employment, but subsequently agreed with the appellant that as he could support them both she should work part time and later not work at all when the appellant agreed that he would support her. In contrast, the appellant was at the start earning a much higher salary than the respondent and supported the parties to a large extent during their relationship in what the sheriff described as a relatively luxurious lifestyle. The appellant is still in full time pensionable employment.

[7] The determining factors for the conclusion the sheriff reached can be summarised as (1) the appellant's present and likely future financial circumstances and, in particular, that his income permits him to build up his savings reasonably quickly (para [146]); (2) the respondent's income position is worse than at the start of the cohabitation, but she is in capital terms better off (para [147]); (3) both parties in effect wanted to unpick joint decisions made during the cohabitation, for which a limit should be set (para [150]); (4) the context of the cohabitation in which the appellant financially supported the respondent should be given considerable weight, including such factors as the decision to pool resources of both financial and non-financial kinds, the solid domestic base which the respondent

provided so that the appellant could earn his income, including taking care of him when he was ill (para [150]); and (5) the comparative position of the parties in terms of income and liquid funds and in particular that the transfer to the appellant of the respondent's one-half share in the Morningfield Mews property would cause her a degree of impoverishment which at her stage in life would be unfair, given that she would be unlikely to fund another house purchase by means of a mortgage (para [152]).

[8] Counsel for the appellant criticised the sheriff's reasoning on a number of grounds. She submitted, first, that the context of the cohabitation was no more than a description of the nature of a cohabiting relationship; secondly, that the decision to purchase the Morningfield Mews property was to provide the respondent with a sense of security in the relationship, which is precisely the type of decision which the Act is designed to address where it results in one party being economically disadvantaged as a result; thirdly, that in the event that an award was made in favour of the appellant the respondent would be no worse off in capital terms than she was at the beginning of the relationship; fourthly, that there is no finding in fact that the appellant would not be able to obtain a mortgage; and, finally, that the sheriff was wrong to conclude that the appellant will recover the capital invested in the properties when they are sold. Counsel moved the court to order that the appellant be found entitled to the entire net free proceeds of the sale of the Morningfield Mews property.

[9] In our opinion, this ground of appeal has no merit. As has been said many times, it is only exceptionally that an appellate court should interfere in a discretionary decision of the court below, particularly where evidence has been led and that court has had the advantage of seeing and hearing the witnesses. In particular, the sheriff was well entitled to have regard to the nature of the relationship and the respondent's role in a non-economic

sense. The reason for the decision to purchase the Morningfield Mews property (to provide the respondent with a sense of security in the relationship) was not just for her benefit but was also for the benefit of the appellant. That is a good example of the very point which Lady Hale made in *Gow v Grant*. While it is true that there was no finding in fact that the appellant could not obtain a mortgage, the sheriff was in reality just making a general point that given the appellant's age (64 years) and her financial circumstances it was reasonable to surmise that she might have difficulty in purchasing another property, as against the potential insecurity of entering a lease. That is just a general point which the sheriff was entitled to make when considering the evidence as a whole. The emphasis on "fairness" necessarily means that the sheriff is entitled to take a broad axe approach. The sheriff in this case has carefully assessed all the evidence and has reached a conclusion which was within the band of reasonable decisions which were open to her (*Gow v Grant*, Lord Hope, para [42]).

[10] The appeal will be refused. Expenses will follow success. We shall sanction the appeal as suitable for the employment of junior counsel.