



SHERIFF APPEAL COURT

**[2025] SAC (Civ) 27
ELG-SM2-20**

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D C W PYLE

in appeal in the cause

JULIE ANNE STRACHAN SMITH

Appellant

against

GORDON DUNCAN

Respondent

**Appellant: S Mountain, Solicitor Brodies LLP
Respondent: H Macandrew, Solicitor, Grant Smith Law Practice**

29 August 2022

[1] This continued appeal follows on the production of a note from the sheriff.

[2] In her written submissions and before this court the appellant's solicitor submitted that the remit to the sheriff had been incompetent. That was surprising given that she had not expressed any concern about it at the previous hearing. In any event, in my opinion the remit was competent where, as here, the interests of justice required it (Macphail, *Sheriff Court Practice* (4th edit) para 18-140).

[3] However, the underlying complaint by the appellant's solicitor was that the sheriff had changed her mind and for that reason the contents of her note, in so far as inconsistent

with her original report, should be ignored. The appellant's agent particularly relied upon the following sentence in the sheriff's report:

"I do not consider that there was a 'contract' of any sort between the parties in the purchase of Martha."

If that is so, by definition the respondent had failed to trump the plain terms of the written contract between the appellant and one of the sellers. At the evidential hearing, there had been no mention of any contract of agency between the appellant and the respondent and the evidence of intention and the actings of the parties after the contract were irrelevant.

[4] I accept, as the appellant's solicitor submitted, that in the context of ordinary procedure a sheriff may not issue an interlocutor explaining a supposed ambiguity in a prior interlocutor (MacPhail, para 17.21) and I see no reason for that principle not to apply to simple procedure cases. I also accept that to some extent the sheriff did make findings in fact in her original report. But it was not an ambiguity which I wished to be resolved by the remit; my point was that the report was wholly inadequate. My previous decision was the first time that this court has expressed a view on what is required of the sheriff in simple procedure cases for setting out the factual and legal basis for the decision in terms of Rule 16.3(2) of the Simple Procedure Rules. Nevertheless, the sheriff ought to have known that the report in substance had to contain the basic requirements of any judgment, namely a statement of what facts she held as proved, a discussion of the evidence to explain on what basis she did so, at least in respect of disputed facts, a statement of the relevant law and an explanation of how and why she applied that law to the facts to reach her decision. As I said during the course of the hearing, the law does not change just because a claim is of small value; nor should the sheriff fail to analyse the law and apply it correctly to the facts as found.

[5] The note by the sheriff is not of high quality. Nevertheless, this court and the parties have to deal with it as best they can. But I do accept the point that if there is indeed a material difference between a fact found by the sheriff in her initial report and the subsequent note, then this court has no choice but to accept the original finding. I also accept that having now received a fuller and purportedly proper explanation from the sheriff of her reasons it would be incompetent to remit for further clarification. The situation is of course a very unusual one, but this court has to do the best it can to achieve justice for the parties. Moreover, it is not uncommon that legal representatives of parties do not properly analyse the law before the sheriff. I do not know if that happened here, although on questioning the respondent's solicitor she seemed unaware of the possibility that the law of agency might be relevant to determine the relationship between the parties. But no matter – it is the sheriff's role to consider what the relevant law is, albeit that it is also a rule that the sheriff herself should not go on a fishing expedition.

[6] In her note the sheriff finds in fact 6 that the parties "agreed to purchase a dog together" and in fact 7 that the dog "was purchased by both parties". She goes on to find in fact and law that the dog "was purchased jointly by parties following a prior agreement". I accept that these findings do not sit easily with the statement in the original report (*supra*). But they are not inconsistent with the final decision of the sheriff that the appellant had failed to prove that she was the sole owner of the dog. Indeed, without these findings it is difficult to see how the sheriff could have made the decision she did.

[7] The full paragraph in the report bears repeating:

"3. A contract of ownership was signed by the appellant and one of the sellers of the dog (Martha). I did not consider that this of itself was sufficient to establish ownership in the whole circumstances. The respondent had been present but had not signed the contract on the basis that he was unaware of what the contract was for and that the appellant had been in charge of the 'paperwork side of things' in their

relationship. The second seller had not signed the contract either (although his name appeared on the document) although he had also been present when the parties had attended to purchase the dog (Martha). The document to my mind, a contract of sale to the extent only that a puppy was provided and payment was made. [sic] By her own evidence, the dog breeder stated that she hadn't considered speaking to the respondent about the contract and, as far as she was concerned, the dog (Martha) was going into the household consisting of the parties and, at that time, another dog (Stella) and not to any particular individual. Law of contract only applies in a peripheral way insofar as the relevance of the contract to purchase Martha is concerned. I do not consider that there was a 'contract' of any sort between the parties in the purchase of Martha."

There are a number of difficulties with this passage. First, the document is not a "contract of ownership", whatever that might mean. It is, properly, a written contract from which certain rights and duties flow. The sheriff may have meant to say that the document is not a contract to the extent that it confers on the appellant sole title to own the dog. Standing its terms, that cannot be right: *ex facie* the document title to the dog passed from the owner (or owners – for the purposes of the dispute I agree with the appellant's solicitor that that does not matter) to the appellant. That conclusion derives from a fair reading of the words. In particular, there is nothing in the document which would point to the respondent becoming a joint owner of the dog. Secondly, it is absurd to suggest that the law of contract "only applies in a peripheral way insofar as the relevance of the contract to purchase Martha is concerned". I accept that ownership of corporeal moveables is a separate concept of law from the law of contract, but they can and often do overlap. The reality is that standing that there was no point in this case of, for example, title to the dog arising from possession the law of contract was central to the resolution of the dispute. There is a written contract and, if it was the sheriff's intention, she made an error in law to treat it as irrelevant. The evidence before her was clear: the contract for the purchase of the dog was between the appellant and the seller (or one of them). The proper question then was how as a matter of contract might the respondent be entitled to joint ownership of the dog. Thirdly, it is

difficult to understand what the sheriff meant by the sentence, "I do not consider that there was a 'contract' of any sort between the parties in the purchase of Martha." It is unclear why she considered it necessary to put the word "contract" between apostrophes. I accept, as the appellant's solicitor submitted, that "parties" was a reference to the parties to the action, rather than to the seller(s) and buyer or buyers – that is how the word is used in the rest of the paragraph. I also accept her point that "of any sort" appears conclusive and beyond doubt.

[8] But what is also clear is that the sentence is not a finding in fact; it is a finding in fact and law. The issue then becomes whether on the facts as found the sheriff erred in law in reaching that finding. There is in my opinion no inconsistency between the supposed findings in fact in the original report and the findings in fact in the note. The sheriff plainly believed the respondent; she did not believe the appellant. By way of example, she was unimpressed by the appellant's efforts to explain away the deposit of £600 in her bank account, not least because the reference in it was to "Martha". That led to the sheriff concluding (para [46]) that the parties had reached an agreement to purchase a dog together. By definition, that is a contract. The issue then is whether the contract was implemented. For example, no matter its terms the appellant might have simply purchased the dog herself and never transferred a half share to the respondent. This is what the sheriff has failed properly to address as a matter of law; in other words, she has not applied her mind to whether or not the contract as entered into with the seller was in implement of the contract between the parties. It is important to emphasise that what is being determined here is not whether and on what terms a contract was entered into (with all the rules about the admissibility of evidence of intention, surrounding circumstances and post contract actings) but whether the contract between the parties was implemented. That is a question of fact to

be decided on the evidence. That, in my opinion, is what the sheriff decided but without expressing it correctly and in accordance with the relevant law. There was no dispute that both parties were present when the purchase took place. In her original report the sheriff appeared to accept the respondent's evidence that "the appellant had been in charge of the "paperwork side of things" in their relationship". The sheriff also accepted the respondent's evidence that he paid a one half share of the purchase price, by a deposit into the appellant's bank account. In my opinion, on the evidence the sheriff was entitled to conclude that the contract between the parties had indeed been implemented and as a matter of law the appellant had in effect been acting both on her own account and as the agent of the respondent when she signed the purchase contract.

[9] The appeal falls to be refused. I omitted to invite parties to address me on the question of expenses. They would normally follow success. But I will reserve them and invite parties, failing agreement, to address me on the matter by way of written submissions on a timetable to be later set. They should contact my secretary about that.