SHERIFF APPEAL COURT

[2025] SAC (Civ) 9

Sheriff Principal A Y Anwar KC
Sheriff Principal D C W Pyle
Sheriff Principal C Dowdalls KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL AISHA Y ANWAR KC

in the appeal in the cause

AT

Pursuer and Respondent

against

NK (AP)

Defender and Appellant

Pursuer and Respondent: Coltman, solicitor; Johnson Legal Solicitors
Defender and Appellant: Leighton, advocate; Thompson Family Law

28 March 2025

Introduction

[1] This appeal concerns an action of divorce in which both parties seek financial provisions and orders in relation to residence and contact with the children of the marriage. On the respondent's motion, the sheriff awarded her interim aliment. On the respondent's motion, the sheriff also ordered the sale of the matrimonial home, title to which is in the joint names of the parties. The sheriff made no order about the distribution of the anticipated net free proceeds of sale.

[2] The appellant appeals both of these decisions. Leave to appeal from the sheriff was not sought. The respondent raised a preliminary point on the competency of an appeal against the award of interim aliment on the basis that leave was required. A hearing on competency was assigned. Parties were invited to also address the issue of whether leave was required to appeal the order for sale of the property.

[3] During the course of the hearing, this court allowed parties to address the merits of the grounds of appeal in the interest of economy.

Background

[4] The parties were married in Glasgow on 18 January 2020. There are two children of the marriage. Both parties aver that the marriage has broken down irretrievably, although the reasons for that are disputed.

[5] On 31 January 2024 the respondent lodged a motion seeking an incidental order for the sale of the matrimonial home; that motion was opposed. The following month the motion was refused *in hoc statu* as being premature. The respondent made a motion for interim aliment at the bar on 18 March 2024; the sheriff's interlocutor of that date records that both parties were to prepare to address the court on the question of interim aliment on 3 April 2024.

[6] At the hearing on 3 April 2024, the appellant failed to lodge evidence of his financial position with the court. It had been sent to the respondent's solicitor only 6 minutes before the hearing called. The hearing was continued to 17 April 2024 to allow the respondent to consider the evidence produced. The sheriff also continued the respondent's renewed motion for the incidental order for sale of the matrimonial home. The respondent asked for vouching to substantiate the information sent to her by the appellant on 3 April 2024;

however, none was provided. As a consequence, the hearing on 17 April 2024 was continued to 13 May 2024 with both parties ordered to lodge their vouching.

[7] The respondent complied and lodged her vouching by 8 May 2024; however, the appellant's agent appeared on 13 May and advised the sheriff he was unaware of the need to lodge vouching, despite it having been stated explicitly in the interlocutor of 17 April. Both motions were continued again to an opposed motion hearing on 29 May 2024.

The sheriff's note

[8] Despite being ordered to do so on a number of occasions, the appellant did not lodge any vouching of his financial position until the morning of 29 May 2024. He lodged one wage slip (for May 2024) and three bank statements covering the period 17 February to 17 May 2024. There was no breakdown provided of his income and expenditure. No explanation was offered as to why the vouching was late; nor was there any suggestion that the appellant required further time to provide further vouching.

[9] The sheriff reviewed the vouching provided by the respondent and considered that she had a shortfall of around £1,200 per month. The sheriff was satisfied that the respondent's needs and resources necessitated support through an award of interim aliment. Thereafter, she considered the appellant's vouching. The sole payslip lodged disclosed a gross salary of just over £4,000; after tax, the appellant earned just over £2,300 for May 2024.

[10] The sheriff drew attention to two credit entries in the appellant's bank statements, for which she could not identify the source of funding or income; no explanation was provided. The respondent believed that they came from other bank accounts operated by the appellant; however, he had provided no detail of additional accounts. The sheriff

considered that the failure to supply that information suggested a lack of candour on the part of the appellant. He had had ample opportunity to provide the necessary vouching and to produce a statement of income and expenditure, but had failed to do so.

[11] Having considered the information, the sheriff awarded interim aliment in the sum of £1,500 per calendar month, payable in advance.

[12] The sheriff acknowledged that, in principle, the respondent was entitled to seek an order for sale of heritable property in which she is a one-half *pro indiviso* proprietor at any stage of the proceedings; the issue was whether the sheriff should exercise her discretion to grant that order at the hearing. The appellant's opposition proceeded on the basis that he hoped to obtain an order for residence of the children and to care for them in the matrimonial home. Standing their age and the terms of the child welfare report, the sheriff did not consider that to be a realistic prospect in the short to medium term. The motion was granted.

Submissions for the appellant

Competency of appeal against interim aliment

[13] It was submitted that *Milne* v *Milne* 1964 SLT (Sh Ct) 28 was wrongly decided. *Milne* failed to recognise that an interim award of aliment can be extracted and enforced. While an award of interim aliment can be temporary in its effect, it is not necessarily subject to review. *Cassidy* v *Cassidy* 1986 SLT (Sh Ct) 17 was also wrong; aliment is money that is put into the pocket of another party and if that money is not paid a decree can be extracted and it can be enforced. The same error, it was submitted, is evident in *Hulme* v *Hulme* 1990 SLT (Sh Ct) 25 and *Richardson* v *Richardson* 1991 SLT (Sh Ct) 7.

[14] The language used in section 110(1)(b) of the Courts Reform (Scotland) Act 2014 was clear; there is no basis for a purposive interpretation. The court was invited to overturn *Milne*, *Cassidy*, *Hulme* and *Richardson*.

Merits of appeal against interim aliment

[15] The sheriff stated that the award of interim aliment would, "of course, supersede the award from the CMS [Child Maintenance Service]"; that was incorrect. A maintenance calculation supersedes an extract in relation to aliment: Ordinary Cause Rule 33.91. The Child Maintenance Service has exclusive jurisdiction over child maintenance save in exceptional circumstances: sections 8 - 9 of the Child Support Act 1991. Part 5 of the respondent's schedule of income, which was lodged in process, contained resources relating to child maintenance. The figures had been double counted and not discounted by the sheriff.

[16] The respondent's productions failed to disclose the payment of child maintenance in the summary of income. The appellant's productions showed a deduction of £691.06 for child maintenance. That was not represented in the respondent's schedule of income and expenditure as at April 2024.

[17] The true monthly income of the respondent is in excess of £3,600 per month in circumstances where her outlays are, at best, estimated. The respondent's net income is £2,309.58, some £1,300 per month more than the appellant's. His bank account discloses council tax of £245, a mortgage payment of £1,063.11, car finance of £295.62 and car insurance of £104.44.

[18] The appellant lacked sufficient means to pay both the mortgage over the matrimonial home and interim aliment. That being so, the award of interim aliment at £1,500 per calendar month was unreasonable and the sheriff should have made no award.

Competency of appeal against order to sell matrimonial home

[19] The challenge against the sheriff's order was an appeal against an order *ad factum praestandum*. No leave was required from the sheriff for such an appeal: section 110(1)(b)(iii) of the 2014 Act.

[20] Counsel acknowledged that *McMaster* v *McMaster* [2021] SAC (Civ) 31 had determined that an order for sale of the matrimonial home was an order ancillary to a crave of decree for divorce. As such, Sheriff Principal Turnbull (as he then was) held that such an order was not an order *ad factum praestandum* and that an appeal against such an order was not competent without leave. What determines if something is an order *ad factum praestandum* is the order that is pronounced – not the source of the obligation. In the present case the interlocutor of 29 May 2024 included the following wording: "… ordains the defender along with the pursuer to execute and deliver to any purchaser a valid disposition…"

[21] Counsel invited this court to overturn *McMaster*; an order for sale is an order *ad factum praestandum* – it is an order to do something. *McMaster* was wrong in holding that this was not such an order. Under reference to *MacColl* v *MacColl* 1992 SCLR 187, it was contended that the policy underlying section 110 of the 2014 Act (and section 27 of the Sheriff Courts (Scotland) Act 1907, its predecessor) was that interlocutory appeals without leave are to be permitted only when they relate to some matter which could not easily be put right: *MacColl* at p 188. If the matrimonial home were to be sold, that was not something

which could be reversed. Leave was not required and the appeal against the sale was competent.

Merits of appeal against order to sell matrimonial home

[22] For any order requiring sale of the matrimonial home, it had to be justified with reference to the principles set down in section 9 of the 1985 Act. The sheriff had lacked sufficient evidence to conclude that the sale of the matrimonial home was justified and had failed to apply the statutory test.

Submissions for the respondent

Competency of appeal against interim aliment

[23] Macphail, *Sheriff Court Practice*, (4th edn) at paragraph 18.34 states: "An appeal against an award of interim aliment is not competent without permission." Case law supported that position. *Milne* (*supra*); *Cassidy* (*supra*); *Hulme* (*supra*); *Richardson* (*supra*); and *Wilson* v *Wilson* 2001 SLT (Sh Ct) 55 all set out a clear differentiation between classes of interim decree. They state that interim aliment is in a separate class of interim decree to an "interim decree for payment of money". All of the cases cited held that it was incompetent to appeal an order for interim aliment without first obtaining leave to appeal.

[24] While the appellant argued that the cases cited pre-date the Courts Reform (Scotland) Act 2014, on behalf of the respondent it was submitted that section 110 of the 2014 Act is predominantly in the same terms as its predecessors, section 27 and 28 of the Sheriff Courts (Scotland) Act 1907. The cases cited, therefore, remain authoritative.

[25] Further, Ordinary Cause Rule 31.10(1) entitles a sheriff to make interim orders in respect of aliment or residence of the children, notwithstanding that an appeal has been

marked: Macphail, *Sheriff Court Practice*, (4th edn) at paragraph 18.122; and *Cunningham* v *Cunningham* 1965 SC 78 at p 80. To allow the sheriff to retain such power but for them to be appealed without requiring leave to appeal from the sheriff was counterintuitive.

[26] With respect to *MacColl* (*supra*) and *Jones* v *Jones* 1993 SCLR 151, it was accepted that, prior to the passing of the 2014 Act, it was possible for a party to challenge an award of interim aliment without leave from the sheriff, if the appeal also challenged another aspect of the interlocutor awarding interim aliment. Subsequent to the passing of the 2014 Act, however, it was submitted that that was no longer possible. The exceptions in section 110(1)(b) apply with reference to the "decision" of the sheriff; not the "interlocutor" as had been the case with section 27 of the 1907 Act: *Finlayson* v *Munro* 2020 SLT (Sh Ct) 287. As a consequence, the appeal against the award of interim aliment was not competent without leave.

Merits of appeal against interim aliment

[27] The appellant had consistently sought to delay the progress of the action. He delayed lodging his vouching to substantiate his income and, when he did, he lodged one bank statement. That bank statement showed debits to other bank accounts belonging to the appellant. He has averred that he has two bank accounts. The respondent advised the sheriff at the hearing on 29 May 2024 that she did not think the full vouching ordered by the court had, in fact, been lodged. She also submitted that the appellant had not paid child maintenance, to the extent that the Child Maintenance Service had been forced to seize sums from him.

[28] The sheriff made a determination from the facts that had been put before her. Since the commencement of the action, the entirety of the financial vouching put before the court

by the appellant encompassed the title sheet for the matrimonial home and the vouching lodged. The sheriff used her discretionary power to assess the information before the court and to make a determination. As part of that, she took into consideration the appellant's prolonged pattern of conduct in the action.

[29] The respondent did, however, accept that the sheriff had made a calculation error. In the event the appeal against interim aliment were held to be competent, it was accepted that the sheriff's interlocutor be amended to a reduced figure of £947.89 for interim aliment to account for the sums to be paid by the appellant for child maintenance.

Competency of appeal against order to sell matrimonial home

[30] The solicitor for the respondent agreed with counsel for the appellant – this aspect of the appeal was competent without leave. As a result, it was agreed that *McMaster* was wrong and ought to be overturned. The matrimonial home is often the most valuable asset in an action for divorce. Its sale will impact upon the final decision on any financial provision to be awarded in an action for divorce. If the policy intent behind section 110 is to allow appeals without leave against matters which could not be reversed, then section 110(1)(b)(iii) was applicable.

Merits of appeal against order to sell matrimonial home

[31] Although the sheriff had not explicitly set out the manner in which she had applied section 9 of the 1985 Act in assessing whether the matrimonial home should be sold, it was evident within her reasoning that it was at the forefront of her considerations. Specific reference to section 9 was made by the sheriff at paras [30], [33] and [54] of her note. It was

submitted that, when viewing the sheriff's note as a whole, the sheriff had correctly applied section 9.

Legislation

[32] The legislative provisions relevant to this appeal are:

> **"Sheriff Courts (Scotland) Act 1907**
> **27. Appeal to sheriff**
> Subject to the provisions of this Act an appeal to the sheriff principal shall be competent against all final judgments of the sheriff and also against interlocutors—
> (a) Granting or refusing interdict, interim or final;
> (b) Granting interim decree for payment of money other than a decree for expenses, or making an order ad factum praestandum;
> (c) Sisting an action;
> (d) Allowing or refusing or limiting the mode of proof;
> (e) Refusing a reponing note; or
> (f) Against which the sheriff either ex proprio motu or on the motion of any party grants leave to appeal . . .
>
> **28. Appeal to Court of Session**
> (1) Subject to the provisions of this Act, it shall be competent to appeal to the Court of Session against a judgment either of a sheriff principal or sheriff if the interlocutor appealed against is a final judgment or is an interlocutor—
> (a) Granting interim decree for payment of money other than a decree for expenses; or
> (b) Sisting an action; or
> (c) Refusing a reponing note; or
> (d) Against which the sheriff principal or sheriff either ex proprio motu or on the motion of any party, grants leave to appeal . . .
>
> **Courts Reform (Scotland) Act 2014**
> **110. Appeal from a sheriff to the Sheriff Appeal Court**
> (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.

Act of Sederunt (Rules of the Court of Session 1994) 1994/1443
Schedule 2
38.2 Reclaiming days

(1) An interlocutor disposing, either by itself or taken along with a previous interlocutor, of—
  (a) the whole subject matter of the cause; or
  (b) the whole merits of the cause whether or not the question of expenses is reserved or not disposed of,
  may be reclaimed against, without leave, within 21 days after the date on which the interlocutor was pronounced.

(2) Where an interlocutor which reserves or does not dispose of the question of expenses is the subject of a reclaiming motion under paragraph (1)(b), any party to the cause who seeks an order for expenses before the disposal of the reclaiming motion shall apply by motion to the Lord Ordinary for such an order within 14 days of the date of enrolment of that reclaiming motion.

(3) An interlocutor disposing of the merits of the action and making an award of provisional damages under section 12(2)(a) of the Administration of Justice Act 1982 may be reclaimed against, without leave, within 21 days after the date on which the interlocutor was pronounced.

(4) An interlocutor mentioned in paragraph (5) may be reclaimed against, without leave, within 14 days after the date on which the interlocutor was pronounced.

(5) Those interlocutors are—
  (a) an interlocutor disposing of part of the merits of a cause;
  (b) an interlocutor allowing or refusing proof, proof before answer or jury trial (but, in the case of refusal, without disposing of the whole merits of the cause);
  (c) an interlocutor limiting the mode of proof;
  (d) an interlocutor adjusting issues for jury trial;
  (e) an interlocutor granting, refusing, recalling, or refusing to recall, interim interdict or interim liberation;
  (f) an interlocutor in relation to an exclusion order under section 4 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981;
  (g) an interlocutor granting or recalling a sist of execution or procedure;
  (h) an interlocutor loosing, restricting or recalling an arrestment or recalling in whole or in part an inhibition used on the dependence of an action or refusing to loose, restrict or recall such an arrestment or inhibition;
  (i) an interlocutor granting authority to move an arrested vessel or cargo;
  (j) an interlocutor deciding (other than in a summary trial) that a reference to the European Court should be made.

(6) An interlocutor (other than a decree in absence or an interlocutor mentioned in paragraph (2), (3) or (5) of this rule) may be reclaimed against, with leave, within 14 days after the date on which the interlocutor was pronounced."

Decision

Competency of appeal against interim aliment

[33] In *Irving v Irving* 1998 SCLR 373 (at p 375), Sheriff Principal Bowen QC made the following pithy observation:

> "As Sheriff Principal Maguire pointed out in *Richardson*, there can be few points in the law which have received so much shrieval scrutiny as has interpretation of the phrase "interim decree for payment of money". To my mind it borders on the absurd that what ought to be a straightforward matter of practice should have occupied substantial quantities of judicial time and, it would appear, taxed the legal ingenuity of so many distinguished holders of the office of Sheriff Principal."

[34] Unfortunately, 27 years later, the absurdity continues and the legal skill of three sheriffs principal is to be taxed on the same point. Between 1964 and the present date, there have been no less than 15 judgments issued by sheriffs principal on the interpretation of the phrase "interim decree for payment of money". In 11 of those 15 cases, leave was required; in 4 it was not. Of the 11 judgments which concluded that leave is required, 2 concluded that leave is not required if another part of the interlocutor which awarded interim aliment was also challenged on appeal. Regrettably, neither party provided this court with a full citation of all the relevant authorities. For the purposes of this opinion, it is appropriate to consider all of the reported judgments of the sheriffs principal.

[35] The question was first considered in *Milne (supra*) by Sheriff Principal Walker QC, who concluded that leave to appeal from a sheriff was required if a party wished to challenge an interim award of aliment. The basis for the *ratio decidendi* in *Milne* was, in effect, MacLaren, *Court of Session Practice*, (1916) at pp 1090 - 1091, specifically the following passage:

> "*Interim* decrees may be divided into two classes – *First*, where the decree is for the purpose of making an *interim* provision until the merits of the case are fully decided.

> Under this head are decrees for *interim* aliment and expenses in a consistorial cause, *interim* interdict, and *interim* appointment. *Second*, an *interim* decree may be pronounced on the merits of the cause."

[36] Sheriff Principal Walker QC considered that the "first" type of interim decree mentioned by MacLaren could not be appealed without leave. That was because such interim decrees did not dispose of the action; they were pronounced without prejudice to the ultimate decision on the merits of the action and would cease to be effective as soon as a final decision was made: *Milne* at p 29. In interpreting section 27(b) of the Sheriff Courts (Scotland) Act 1907, the sheriff principal accepted that, although there were two possible meanings of the phrase "interim decree for payment of money" the more obvious meaning was an interim decree which disposed of part of the merits of the case: *Milne* at p 29. The sheriff principal noted that in the Court of Session the only interim decree that could be reclaimed without leave was one which disposed of part of the merits of the cause. He therefore refused the appeal as incompetent.

[37] The issue did not rear its head again for 19 years until 1983. Then, in *Spencer* v *Spencer* 1983 SLT (Sh Ct) 87, Sheriff Principal Gimson QC elected not to follow *Milne*. He considered that the terms of section 27(b) were plain and absolute and had to be read in their ordinary sense. Moreover, he considered that a decree for interim aliment amounted to a disposal of part of the merits of the action: *Spencer* at p 87. As such, he considered leave was not required.

[38] In *Good* v *Good*, unreported, Hamilton Sheriff Court, 24 June 1983, Sheriff Principal Gillies QC dismissed an appeal against interim aliment as incompetent; however, his interlocutor does not explain the reasoning for his judgment.

[39] In *Duff* v *Duff*, unreported, Dunfermline Sheriff Court, 16 November 1983, Sheriff Principal Taylor QC followed *Spencer*. Again, no reasoning was provided; however, he did later provide this in *Dickson* v *Dickson* 1990 SLT (Sh Ct) 80 (discussed below).

[40] Subsequently, in *Lamberton* v *Lamberton* 1984 SLT (Sh Ct) 22, Sheriff Principal Caplan QC gave his judgment explaining in detail why he disagreed with the reasoning in *Milne* and why he followed *Spencer.* He acknowledged that there can be a danger in being over-ready to ascribe a "plain meaning" to expressions which are terms of art: *Lamberton* at p 23. With respect to the passage in MacLaren, *Court of Session Practice* (*supra*), he considered that *Milne* read too much into it; MacLaren was doing no more than setting out two situations which may necessitate a payment of money before the conclusion of an action: *Lamberton* at p 24. The sheriff principal, under reference to *Baird* v *Glendinning* (1874) 2 R 25, held that an award of interim aliment was covered by section 27(b) and that, accordingly, an appeal against such an award did not require leave. He acknowledged that his decision led to the inevitable consequence that leave to appeal interim aliment was not required in the sheriff court, yet was in the Court of Session; however, he considered that this was explained by the different historical development of appeal procedures in the two courts: *Lamberton* at p 24.

[41] In *Cassidy* (*supra*) Sheriff Principal Dick QC followed *Milne*. He described the approach in *Spencer* as "simplistic": *Cassidy* at p 18. As for *Lamberton*, he concluded that it was wrong in considering that MacLaren was merely being descriptive. He also considered that *Baird* did not apply to an interlocutor granting an *ad interim* decree *pendente lite*: *Cassidy* at p 19. An award of interim aliment was not simply a case of putting money into the pocket of one of the parties, who may spend it before determination of the action; it was money awarded, at the discretion of the court, to support a party pending the decision of the case

on the merits: *Cassidy* at p 19. The sheriff principal relied upon the following passage in the opinion of the Lord President (Clyde) in *Adair* v *Adair* 1924 SC 798 at p 801 to substantiate that position:

> "…It is a mistake, I think, to say that the obligation to provide interim aliment in a consistorial case is an obligation created by the decree. On the contrary, the decree would have neither validity nor justification, if it were not that a legal obligation underlay it. What is true is that the decree for interim aliment is an act of regulative administration (in circumstances where the parties' true rights are in suspense) of an underlying and permanent legal obligation…"

[42] In other words, it is the very nature of the obligation to provide aliment that precludes an appeal without leave: *Cassidy* at p 19.

[43] In *Trolland* v *Trolland* 1987 SLT (Sh Ct) 42, Sheriff Principal O'Brien QC followed *Milne* and *Good*. Starting from basic principles, he considered that the broad purpose behind section 27 of the 1907 Act was that decisions on procedural matters, with no direct bearing on the outcome of the action, required leave, while those having more far-reaching effect would not require permission: *Trolland* at p 43. He determined that leave was required to challenge an award of interim aliment.

[44] Sheriff Principal Ireland QC provided more historical background to the legislative history of section 27 in *Rixson* v *Rixson* 1990 SLT (Sh Ct) 5. Prior to 1853 there was an unlimited right of appeal from the sheriff-substitute to the sheriff. Between 1853 and 1907, the ability to appeal became constrained. Section 19 of the Sheriff Courts (Scotland) Act 1853 provided that:

> "Until an Interlocutor shall have been pronounced disposing in whole or in part of the Merits of the Cause, it shall not be competent to appeal to the Sheriff against any Interlocutor of the Sheriff Substitute, not being an Interlocutor disposing of a dilatory Defence, or an Interlocutor sisting Process, or an Interlocutor allowing a Proof".

[45] That provision was repealed by the Sheriff Courts Act 1876. Instead, the following language was used in section 27 of the 1876 Act:

> "The following, and not other, appeals to the sheriff against judgments or interlocutors of the sheriff substitute shall be competent that is to say, an appeal against a final judgment or an appeal against an interlocutor, -
>
> (1) Granting or refusing interdict, interim or final; or
> (2) Granting interim decree for money, or making an order *ad factum praestandum* or sisting an action; or
> (3) Allowing, or refusing, or limiting the mode of proof; or,
> (4) Against which the sheriff substitute, either ex proprio motu or on the motion of a party, grants leave to appeal."

[46] On the basis of this historical analysis of the legislative provision, the sheriff principal concluded that leave to appeal interim aliment was required; he therefore followed *Milne, Cassidy* and *Trolland*, as did Sheriff Principal Hay 2 months later in *Hulme* (*supra*).

[47] Thereafter, in *Dickson* v *Dickson* 1990 SLT (Sh Ct) 80, Sheriff Principal Taylor QC reaffirmed the position he had taken 7 years earlier in *Duff* v *Duff*; he continued to be of the view that leave from the sheriff was not required to appeal an award of interim aliment, notwithstanding that by that stage, five sheriffdoms in Scotland held the opposite view. *Dickson* was not an appeal on the granting of interim aliment, but rather its refusal. The sheriff principal, however, took the opportunity to explain why he did not agree with *Milne, Cassidy*, *Trolland* and *Rixson*. He considered that the distinction they attempted to make (ie the distinction set out in MacLaren, *Court of Session Practice*) was "illusory": *Dickson* at p 81. Moreover, he considered that an award of interim aliment did amount to a disposal of the merits of the action: *Dickson* at p 81. That same point had been previously made by Sheriff Principal Gimson QC in *Spencer*.

[48] *Dickson* was reported in March 1990; however, following Sheriff Principal Taylor's retirement, his successor, Sheriff Principal Maguire QC, departed from his view in

October 1990. In *Richardson* (*supra*) Sheriff Principal Maguire QC held *Milne* was correct and its reasoning had been sufficiently explained in *Hulme*. As a result, all six sheriffdoms in Scotland were placed on the same footing for the first time: leave to appeal from a sheriff was required against an award of interim aliment. That position has remained to the present date.

[49] *Richardson* was not, however, the end of the discussion. In *MacColl* an appeal was made to the sheriff principal challenging: (i) an award of interim interdict against molestation; and (ii) an award of interim aliment. By the time of the appeal hearing, the appeal proceeded solely against the award of interim aliment. A challenge was tabled as to the competency of the appeal. Sheriff Principal Ireland QC stated the following at pp 187 – 188:

> "… when section 27 of the 1907 Act allows an appeal against certain classes of interlocutor, what is subject to appeal in each case is the interlocutor itself, i.e., the judgment beginning with the place and date of issue and ending with the signature of the judge; and in order to determine whether the interlocutor can be appealed, it is necessary to examine its content to see whether it is properly described by the language of one of the paragraphs (a) to (f) of section 27."

[50] As one aspect of the interlocutor challenged in *MacColl* was the award of interim interdict, the appeal against the whole interlocutor without leave was competent by virtue of section 27(a). Put differently, if a party raised an appeal against an interlocutor which contained more than just an award of interim aliment, and that other aspect of the interlocutor was one which did not require leave to appeal under the terms of section 27, then a party could, in effect, pursue an appeal against an award of interim aliment which would otherwise have been incompetent without leave: *MacColl* at p 188. In *Jones* (*supra*), Sheriff Principal Maguire QC considered *MacColl* was correct and followed it: *Jones* at p 151.

[51] There have been two further reported decisions on the competency of leave to appeal an award of interim aliment. In *Irving* (*supra*) Sheriff Principal Bowen QC had doubts as to whether the analysis in *Milne* and its reliance on MacLaren's distinction was correct: *Irving* at p 375. Instead, he considered the better argument for stating leave was required was to be found in *Cassidy* at p 19, namely that one must look to the underlying obligation and that an order for aliment should be viewed as an order to implement an obligation to support, rather than simply as an order to pay money: *Irving* at p 375.

[52] Finally, in *Wilson* (*supra*), Sheriff Principal Lockhart QC considered the terms of section 27 of the 1907 Act. The appellant appealed without leave against the sheriff's interlocutor allowing: (i) an interim order for payment of aliment; and (ii) an interim order under section 2(4)(b) of the Matrimonial Homes (Family Protection)(Scotland) Act 1981. It was submitted by the appellant that although the first part of the interlocutor would normally have required leave to appeal, the second part was appealable without leave and, in turn, the whole interlocutor could be challenged. The sheriff principal noted that the proposition was not challenged: *Wilson* at p 56. That was presumably due to the decisions in *MacColl* and *Jones*; however, the sheriff principal held that the second part of the interlocutor did, in fact, require leave to appeal. The appeal was therefore incompetent. On the issue of whether leave was required to appeal an award of interim aliment, the sheriff principal stated in *obiter dicta* that he had no issue with the analysis as had first been stated in *Milne* on the need for leave: *Wilson* at p 57.

[53] In our opinion, the view of the majority of the sheriffs principal is the correct one. We find Sheriff Principal Walker QC's reasoning in *Milne,* provided over 60 years ago, compelling. The fundamental point, as this court pointed out in *Finlayson* (see below), can be stated thus: the statutory intention behind the overall scheme in the sheriff court for

appeals to a higher court is that litigation is conducted within the appropriate level of the judicial hierarchy and is dealt with expeditiously at whatever level Parliament has decided is appropriate. It can be assumed that the drafter of the 2014 Act was aware of the previous authorities on leave to appeal for awards of interim aliment. The drafter can be assumed to have been aware that by the decision in *Richardson* in 1990 the law was settled in all six sheriffdoms – indeed to the point that by the 3rd edition of Macphail, *Sheriff Court Practice*, in 2006 (para [18.39]), the law was as stated without comment. If Parliament considered that awards of interim aliment should be appealable without leave, there was an opportunity in the 2014 Act to so legislate. Moreover, the modern approach to all litigation, but particularly in family actions, is to identify as quickly and efficiently as possible the true points of contention between the parties and to avoid lengthy and protracted litigation which is not in the overall interest of the parties. To allow appeals without leave from what is ultimately a stopgap to deal with an immediate need of one of the parties (or as the Lord President expressed it in *Adair* "an act of regulative administration") would be to cause unnecessary and very substantial delay to the resolution of the parties' financial arrangements following separation, undermining the modern approach to the expeditious resolution of family proceedings.

[54] The fundamental tension between the two sides of the debate among the sheriffs principal is that the minority, while sympathetic to the arguments of the majority, considered that the words actually used – "interim decree for payment of money" – could not be ignored. There is considerable force in that view. A layman may understandably reach the same conclusion; aliment is money and it has to be paid. The majority has tried to square the circle by, as in *Milne*, seeking to distinguish between types of decree under reference to MacLaren or, as in *Irving*, relying for support on the identification of an

underlying obligation. It is trite to say that statutory construction begins with the words used; poor expression is for Parliament to resolve, not the courts. However, the words used require to be considered in light of their context. The approach to statutory interpretation was recently summarised by the Inner House (*Glasgow City Council* v *MM* 2025 SLT 178 at para [31]):

> "In any exercise of statutory interpretation the general rule is that the language should bear its ordinary meaning in the general context of the statute (*Crozier v Scottish Power* 2024 SC 373, per Lord President (Carloway) at paragraph 27). As Lord Burrows emphasised in the 2022 article (Statutory Interpretation in the Courts Today, the Christopher Staughton Memorial Lecture, 24 March 2022), referred to by the appellant, the modern approach is to regard the object of the exercise as 'contextual and purposive'. The courts are seeking to ascertain the meaning of the words used in a statute in the light of their context and the purpose of the statutory provision (*JR 222* [2024] 1 WLR 4877, per Lord Stephens at paragraph 73). The context will include the group of statutory provisions within which the words to be interpreted are included and the statute as a whole."

Applying these rules, if one requires to rely solely upon the strict meaning of the term – "interim decree for payment of money" – the circle cannot be squared; the payment of interim aliment plainly involves the payment of money. That, however, is too simplistic an approach. Section 110(1)(b)(ii) requires to be examined by considering the context and purpose of rights of appeal; generally, an appeal to the Sheriff Appeal Court may be taken without leave against a decision of a sheriff constituting final judgment. Section 110(1)(b)(ii) provides an exception to that general rule. It is intended to apply to interim decrees which are not subject to variation by the sheriff and which dispose of part of the merits of the case. Interim orders for payment of aliment do not fit into that category.

[55] We understand that an interim order for payment of aliment would similarly not be appealable without leave to the Inner House in proceedings in the Court of Session, as such an order does not dispose of part of the merits of the cause (Act of Sederunt (Rules of the Court of Session 1994) 1994/1443, Schedule 2, Rule 38.2(5)(a)). We are unable to identify any

logical reason as to why Parliament would have intended a litigant in the sheriff court to enjoy a broader right of appeal than that available to a litigant in the Court of Session on matters of interim aliment.

[56] Whether an appeal without leave is competent when the decision challenged is part of an interlocutor which also deals with a matter for which leave is not required, was considered by this court in *Finlayson*. The appellant argued that as the sheriff's interlocutor which had been challenged included within it a refusal of craves for final interdict, no matter that that part of the interlocutor was not challenged in the grounds of appeal, the effect was that the entire interlocutor was appealable without leave standing the terms of section 110(1)(b)(i). This court rejected that argument in *Finlayson* for the following reasons at paragraphs [6] – [8]:

> "The exception which applies to refusal of interdict is of the sheriff's *decision*, not the interlocutor. The latter is merely the vehicle for expressing that decision. In the same way, if an appeal court decides to reject an appeal it 'refuses the appeal' and only then adheres to the interlocutor complained of. Or if it decides to allow the appeal, again it 'sustains the appeal' and only then recalls the interlocutor.
>
> In our opinion, there are sound policy reasons behind s.110. It is important that litigation is conducted within the appropriate level of the judicial hierarchy and is dealt with expeditiously at whatever level Parliament has decided is appropriate. That principle would be undermined if at any point in the process an aggrieved party were entitled to appeal to a higher court an interlocutory decision of the court below. The reason for the exceptions reinforces that principle, in that they are all decisions which are of material importance or would affect the status quo of the parties (Macphail, *Sheriff Court Practice* (3rd edn), para 18.31).
>
> We are also reinforced in our view when we consider the very different terms of the previous rule as contained in s.27 of the Sheriff Courts (Scotland) Act 1907, which provided for exceptions in similar terms to s.110, but against the *interlocutors*, rather than the decisions. Sheriff Principal Ireland in *MacColl v MacColl* 1992 SCLR 187, in holding as competent an appeal against an interlocutor which contained orders both for interim interdict and interim aliment but in respect of which the appeal was against only the decision on interim aliment, said this (at 1992 SCLR at p.188): 'I have a strong suspicion that the result is not what the draftsman meant to say, since the general drift of section 27 is that interlocutory appeals without leave are to be permitted only when they relate to some matter which cannot easily be put right if

> the appeal is postponed until after final judgment.' It would appear that Parliament took these comments to heart when considering the rule to be introduced in the 2014 Act."

[57] We therefore conclude that the appeal against the sheriff's award of interim aliment is incompetent.

Merits of appeal against interim aliment

[58] Having found the appeal to be incompetent, it is not necessary to comment upon the merits. However, as we are mindful that parties indicated that they were likely to seek a variation of the order for interim aliment, in the event that the appeal was incompetent, it may be helpful for us to address the merits.

[59] We note that in her forecast for July 2024 the respondent expected to receive £552.11 in child maintenance payments as part of her income. The appellant records a deduction of £691 from his income. Neither figure is correct; production 5/28 is a letter from the Department for Work and Pensions which shows that the monthly payment for child maintenance due from the respondent is £616.71. That being so, the respondent's forecast for July is placed too low and the appellant's is too high. Further, the appellant argues that the child maintenance payment covers the costs relating to the children in the respondent's schedule. The fundamental reason for the increase in costs for the children from July onwards was the respondent's return to work. That would entail the children being placed in nursery, leading to a doubling of outgoings relating to the children.

[60] In determining the amount of interim aliment the sheriff had regard to the parties' respective needs and resources, insofar as vouched by them, and all the circumstances of the case. That approach was entirely appropriate.

[61] The sheriff considered the respondent's shortfall of £1,198.85 was vouched for. By contrast, the lack of proper vouching from the appellant suggested a lack of candour on his part. There were unexplained credits into his account. If a party is not forthcoming about their income or produces inadequate vouching notwithstanding repeated opportunities to do so, then he or she runs the risk that assumptions might be made against their interests: Sheriff Principal Young QC, *Johnson* v *Johnson*, unreported, 5 November 2003, Stonehaven Sheriff Court. The respondent had ample, repeated opportunities; indeed, we consider he was afforded too many opportunities, to timeously present vouching and such further information as he wished. By not doing so, he exposed himself to the risk of those adverse assumptions.

[62] We are not persuaded that the sheriff erred in concluding that an award of £1,500 per calendar month as craved, was needed by the respondent and could be afforded by the appellant. She did, however, err in respect that she assumed that the award of aliment would supersede the award of child maintenance, such that the amount payable by way of interim aliment would be reduced to "around £900". On that basis, had the appeal against interim aliment been competent we would have allowed the appeal to the extent of varying the amount of interim aliment to £947.89 to reflect what the sheriff actually intended. It remains open to the appellant to lodge a motion before the sheriff to seek a variation of the amount awarded. We understand that the respondent had already indicated to the appellant that she would consent to such a motion. That is the course of action which ought to have been adopted, rather than the pursuit of an incompetent appeal which has led to unnecessary delays in achieving the outcome the appellant desired.

Competency of appeal against order to sell matrimonial home

[63] The appellant contends that leave was not required from the sheriff to appeal the order to sell the matrimonial home, as the order being an order *ad factum praestandum*, could be appealed without leave in terms of section 110(1)(b)(iii) of the 2014 Act. The second question of competency arising in this appeal is whether an incidental order for the sale of property, issued under section 14(2)(a) of the Family Law (Scotland) Act 1985, is an order, or decree, *ad factum praestandum*? In answering that question, the preliminary – and broader question is – what is an order *ad factum praestandum*?

[64] The most common example of a decree *ad factum praestandum* is a decree for specific implement; a remedy sought by an aggrieved party, compelling the performance of a pre-existing obligation by the defender. Specific implement as a remedy in the law of obligations has a long history in Scots law: see A.D. Smith, "Specific Implement", in K. Reid and R. Zimmermann (eds), *A History of Private Law in Scotland* (2000), Vol 2, pp 195 – 219. Its origins can be traced back to the late 13th and early 14th centuries with the use of a brieve, known as a *compulsion*.

[65] Decrees *ad factum praestandum* have been defined in various ways. What each definition has in common is the need for a pre-existing contractual, common law or statutory obligation or duty which is sought to be enforced by way of such a decree. In *Mackenzie* v *Balerno Paper Mill Co.* (1883) 10 R 1147 at p 1156, Lord Shand stated:

> "…decrees or obligations *ad factum praestandum*, what is thereby meant is decrees or obligations other than for the payment of money, being for the performance of some act such as the signing of a conveyance or other deed, an act of a class which, generally speaking, it is in the power of the party to perform, and which it is therefore reasonable that he should be compelled to perform, in fulfilment of his obligation, even by diligence against his person."

[66] Trayner, *Latin Maxims and Phrases*, (4th edn) (1894) at p 27, defines *ad factum praestandum* as follows:

> "**Ad factum praestandum**. – For the performance of a certain act. In popular language almost all obligations may be said to be of this class, but there are obligations of a peculiar character which alone are denoted by the legal signification of this phrase. The obligation of a debtor is clearly one for the performance of a certain act, namely, the payment of his debt; but a decree at the instance of his creditor would not be termed a decree *ad factum praestandum*. An obligation *ad factum praestandum* is one for the performance of an act within the power of the obligant, and thus a decree of the Court, ordering delivery of certain writs, would be so termed…"

[67] MacLaren, *Court of Session Practice* (1916) at pp 56 – 57, describes the order as being one which:

> "…must order the performance of some specified act, as, to deliver a specific thing, to consign money, to execute a deed, or for an apprentice to return to his service, when the Court will decern for specific performance, which may be enforced by imprisonment."

[68] For the execution of a deed, MacLaren cites *Taylor* v *Macdonald* (1854) 16 D 378. The issue in that case, on appeal to the Inner House, was whether the decree was in a form warranting execution, but the background to the appeal case was a defender being ordered by the sheriff-substitute to execute a disposition in favour of his incarcerating creditor on pain of imprisonment.

[69] Burn-Murdoch, *Interdict in the Law of Scotland* (1933), at paragraph 178 states:

> "A decree *ad factum praestandum '*must be a decree ordering performance of some specified act, and so a decree which can be obeyed by some specific act done on the part of the defender.'"

[70] In chapter 6 of his book, examples of decrees that can be classified as decrees *ad factum praestandum*, include: (i) removal from premises; (ii) delivery of a document; (iii) execution of a deed; (iv) demolition of buildings or works; and (v) building or construction of works.

[71] Under the heading of chapter 6 for "Execution of Deeds", he states at paragraph 181:

> "A person may be ordained to execute a certain deed and, on refusal, may be imprisoned for recalcitrance. In recent practice the Court, on disregard of its order, has further authorized the clerk of Court to execute the deed in place of the defender…"

[72] As authority for that proposition he cites *Taylor* v *Macdonald* as well as two other authorities: *Wallace's Curator* v *Wallace* 1924 SC 212 and *Neilson's Judicial Factor* 1927 SC 595. In the former, the Inner House ordered the clerk of court to sign discharges of bonds in the context of an action of multiplepoinding where a joint minute had been entered into by the parties – and to which the court had interponed authority – whereby the defender undertook to sign the discharges in order that a third-party purchaser of heritable property could obtain a clear title. The latter case concerned the refusal of an alleged bankrupt to deliver up materials in respect of his business to an interim judicial factor in terms of section 14 of the Bankruptcy (Scotland) Act 1913, being a provision for the interim preservation of the estate. The former case involved an order to enforce a pre-existing obligation and the latter, an order to perform a statutory requirement.

[73] Professor Walker defined a decree *ad factum praestandum* as follows (Walker, *Civil Remedies*, (1974), p 269):

> "A DECREE *ad factum praestandum* is a judicial order to do or perform some act, other than to pay money, which the defender should have done in implement of *a legal duty incumbent on him, whether by statute, common law or by contractual undertaking,* or an order to undo some act which the defender should not have done but in breach of a legal duty incumbent on him." [second italics added]

[74] As already discussed, although specific implement is an example of a decree *ad factum praestandum*, the remedy proceeds in the context of a pre-existing obligation between the parties which one of them wishes to enforce. In our judgment, an incidental order granted under section 14 of the 1985 Act cannot, by contrast, be said to share that same

characteristic. There is no underlying pre-existing legal, statutory or contractual obligation incumbent upon the appellant to deliver an executed disposition or otherwise co-operate with the sale of the property. The obligation, such that it is, comes into existence at the moment an incidental order is made. Such an obligation does not fit into the definitions set out by Lord Shand, Trayner and Professor Walker which require an existing obligation *ad factum praestandum* for the performance of an act within the power of the obligant, before decree *ad factum praestandum* can be made.

[75] We note that in *Milmor Properties Ltd* v *W and T Investment Co Ltd* 2000 SLT (Sh Ct) 2, Sheriff Principal Risk QC stated at p 4, that:

> "…an action of divorce may contain a crave to have the defender ordained to transfer property to the pursuer. That is unquestionably an order ad factum praestandum, but I have never heard it suggested that it required to be sought in a summary cause separate from the divorce action. Again, the action is categorised as one of divorce and the crave for transfer of property is ancillary. An action of division and sale of heritable property commonly includes a crave to have the defender ordained to grant a disposition of his interest in the property following sale. That too is an order ad factum praestandum, which is invariably sought in an ordinary cause because the cause in question is properly described as an action of division and sale."

[76] Thus, notwithstanding the absence of an obligation prior to the court action being raised to dispone the property, the sheriff principal considered such an order could be termed an order *ad factum praestandum*. His comments were, however, *obiter dicta.*

[77] In *McMaster (supra*), the pursuer sought to appeal without leave the decision of the sheriff in an action of divorce whereby he granted an incidental order for the sale of a house. Sitting alone as the procedural appeal sheriff, Sheriff Principal Turnbull (as he then was) held that the appeal was incompetent without leave. He stated as follows (para [9]):

> "An order *ad factum praestandum* is sought to enforce the performance of an act other than the payment of money (see *White & Carter (Councils) Ltd v McGregor* 1962 SC (HL) 1, per Lord Morton of Henryton at 16). That is not what is sought (by both parties) in the present action. Both parties seek an incidental order in terms of section 14(2)(a) of the Family Law (Scotland) Act 1985, that is an order ancillary to a

> decree of divorce or of dissolution of a civil partnership. It is not an order *ad factum praestandum* as contemplated by section 110(1)(b)(iii)."

[78] Thus, while Sheriff Principal Risk QC and Sheriff Principal Turnbull agree that a crave, such as the one sought in this action, is ancillary to divorce, where they diverge is over whether the crave seeks decree *ad factum praestandum*.

[79] In *Anthony* v *Anthony* 1998 Fam LR 78, during an action for divorce, a defender sought to recover documents stored in the matrimonial home. The sheriff had granted an order ordaining his wife's solicitor to arrange for the said documents to be transferred to the defender. The defender appealed. The pursuer contended that the sheriff's order was not an order *ad factum praestandum* and that, accordingly, leave from the sheriff ought to have been sought. The defender contended that, as the pursuer's solicitor had been ordained to provide a document, that amounted to a requirement to do something and he was appealing an order *ad factum praestandum*. He submitted he did not require leave to appeal.

[80] Sheriff Principal Nicolson QC held that the appeal was incompetent without leave. He did so on two grounds; however, it is his first basis for refusal which is relevant to this appeal. He held at paragraph 78-19:

> "In my opinion the interlocutor does not fall under that subparagraph. I have several reasons for expressing that opinion. In the first place, I agree with counsel for the pursuer that a decree ad factum praestandum can arise only where there is a legal obligation ad factum praestandum…"

[81] In *Anthony*, the pursuer's solicitors held no such prior obligation; the sheriff principal considered that the sheriff's interlocutor did no more than to make certain administrative arrangements.

[82] Not every order to perform an act is necessarily an order *ad factum praestandum.* As Trayner explained:

> "In popular language almost all obligations may be said to be of this class, but there are obligations of a peculiar character which alone are denoted by the legal signification of this phrase".

The peculiar character of the underlying obligation requires to be examined, as acknowledged by Lord Shand, Burn-Murdoch, Professor Walker and by Sheriff Principal Nicolson QC. In our judgment, properly understood, an incidental order granted under section 14(2)(a) of the Family Law (Scotland) Act 1985 for the sale of a property is not a decree *ad factum praestandum*. Such an incidental order is not based on any pre-existing contractual or statutory obligation; rather, an incidental order for the sale of a property is a neutral act and may be described, using the words of Lord Clyde in *Adair*, as an act of regulative administration, in circumstances where the parties' true rights are in suspense.

[83] Sections 14(1) and 14(2)(a) of the 1985 Act empower the court to make an incidental order for the sale of property prior to the grant or refusal of decree of divorce. It is under these provisions that the sheriff made the order. But it was no more than that; it did not include a division between the parties of the net free proceeds; the parties' true rights in respect of the division of matrimonial property remain to be determined by the court having regard to the principles in section 9 of the Act and the resources of the parties (section 8(2)).

[84] As a consequence, incidental orders for the sale of property, such as the one challenged in this appeal, are not orders *ad factum praestandum*. It follows that section 110(1)(b)(iii) is not engaged; the appellant required leave from the sheriff to appeal that aspect of the sheriff's interlocutor. His appeal is incompetent.

[85] We were not referred to, and have not been able to identify, any reported decisions on whether an incidental order for the sale of property in terms of section 14 of the 1985 Act can competently be reclaimed against without leave in relation to proceedings in the Court of Session. We note that such an order does not fit neatly into the terms of Rule 38.2(1) of

the Court of Session Rules. If that is the case, again, we are unable to identify any logical reason as to why Parliament would have intended a litigant in the sheriff court to enjoy broader rights of appeal than those available to a litigant in the Court of Session in relation to orders under section 14 of the 1985 Act.

[86] Finally, we are mindful that an order for the sale of property can have far-reaching consequences for the parties to an action of divorce. It is important thus to emphasise that the object of requiring permission to appeal those decisions which fall within section 110(2) of the 2014 Act is to avoid inconvenience, expense and delay in the progress of litigation by the taking of appeals which are frivolous, devoid of merit or which are not concerned with matters of material importance. The sheriff is required to exercise his or her discretion when granting or refusing permission to appeal based upon his or her assessment of the circumstances of the particular case (see generally Macphail, *Sheriff Court Practice*, 4th edn, paragraph 18.44); in family cases, particularly where the same sheriff has presided over the proceedings, he or she is very well placed to make that assessment.

Merits of appeal against order to sell matrimonial home

[87] As we have concluded that the appeal is incompetent, we do not consider it necessary to address the merits.

Disposal

[88] We shall refuse the appeal as incompetent. We were advised that the appellant was an assisted person. We were also advised that in the event of success, the respondent might seek an award of expenses on a different scale other than the normal party/party one. Accordingly, we will reserve expenses meantime. Parties should indicate to the clerk within

14 days whether they have agreed expenses, failing which an interlocutor will be issued requiring written submissions on the issue.