SHERIFF APPEAL COURT

[2026] SAC (Civ) 48
DUN-A92-26

Sheriff Principal Gillian A Wade KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL GILLIAN A WADE KC

in the appeal in the cause

BMW FINANCIAL SERVICES (GB) LIMITED

Pursuer and Respondent

against

MR MUHAMMED JAWAD KHAN.

Defender and Appellant

Pursuer and Respondent: McClymont; DWF LLP
Defender and Appellant: Party;

15 July 2026

Introduction and procedural history

[1] On 15 November 2023, the appellant entered into a hire purchase agreement regulated by the Consumer Credit Act 1974 with a maturity date of 15 November 2027 (the “agreement”). In terms of that agreement the respondent agreed to hire a Hyundai Kona Electric Hatchback 150kW Pr motor vehicle, registration number CA22 ULL (the "vehicle") from the respondent for a total price of £30,269.26 payable in instalments. It was a term of the agreement that title to the vehicle would only pass to the appellant once (a) the appellant

elected to purchase the vehicle, and (b) all sums due to the respondent in terms of the agreement had been paid. The appellant took possession of the vehicle but fell into arrears in relation to the instalment payments. This amounted to a breach of the agreement. On 3 October 2025, the respondent served a default notice on the appellant in accordance with section 88 of the Consumer Credit Act 1974. On 24 November 2025, the respondent terminated the agreement. A total sum of £20,354.32 remained due to the respondent.

[2] In terms of the agreement the respondent remains the owner of the vehicle and the appellant has no right to retain possession of it following termination of the agreement. None of this is in dispute.

[3] The appellant admitted the debt but, according to the sheriff lodged a time to pay direction application which the sheriff considered to be in due form and time. In fact the electronic case management system shows that the appellant lodged a Form O3 under Ordinary Cause Rules ("OCRs") 3.3(3), 7.3(2) and 18.5(1)(a). Appended to that form are two alternative application forms. The appellant in this case lodged both an application for a time order under the Consumer Credit Act 1974 dated 2 April 2026 and an application for a time to pay direction under the Debtors (Scotland) Act 1987.

[4] The appellant, who is representing himself has obviously been confused at the outset about the difference between these two orders. As will be seen this confusion has continued through into the note of appeal and his submissions.

[5] The respondent objected to the application for a time to pay direction. Their agents wrote to the appellant on 7 April 2026 rejecting his offer but inviting him to make an improved offer, if he could. A formal note of opposition was lodged with the court and consequently a hearing was assigned to take place on 23 April 2026. The interlocutor of

8 April 2026 makes clear that this was a hearing in relation to an application for a time to pay direction.

[6] In advance of the hearing the sheriff considered the appellant's income and expenditure account which had been lodged with the court in association with his application for a time to pay direction. This disclosed that the appellant had a net monthly income of £2000.00. He did not declare the source of this income, but he also stated that he was a law student. He declared no spouse or other dependents. His monthly outgoings were stated at £1468.00.

[7] The respondent objected on the grounds that the time to pay direction sought by the appellant was excessive and unreasonable. The debt was £20,354.32 and the natural end date of the original agreement would have been 15 November 2027. Payments at the rate proposed would have extended the term of the agreement by around three years and two months. If the appellant were to make payment at the rate of £1,071.28 per month, he would be able to settle the agreement within the original term. The financial information provided by the appellant in his application claimed he had a monthly disposable income of £532.00. He was offering instalments of £350.00 per month. On the basis of the information before the sheriff it was unlikely that the appellant would be able to increase his offer substantially. In his application the appellant set out no need to retain and use the vehicle which remains the property of the respondent. These submissions also seem to conflate issues relevant to a time order and a time to pay direction.

[8] At the hearing the respondent maintained its objections. The appellant was in default and breach of contract. He had made no offer to rectify that position until proceedings had been raised against him. The contract had been terminated some six months earlier and his present offer was unreasonable.

[9] The sheriff heard from the appellant personally and had regard to the fact that his proposal would not clear the debt for a further 3 years and 2 months. In his report to this court the sheriff explains that had he been considering a time order (which he was not) then extending the period of the agreement by the instalments offered would have had the effect of transforming a four-year term to one of seven years and two months. Despite being invited to do so the appellant did not advance any pressing reason why he could expect to retain the vehicle when it should be sold to reduce his liability and associated costs. The appellant had declared that he had no dependents. The sheriff observed that, were the vehicle put to some commercial use (e.g. private hire taxi) that would have vitiated the whole basis of a time to pay direction or indeed a time order. He did not expand upon this comment. The sheriff asked the appellant if he could increase his offer and he responded that he could not.

[10] Accordingly in all the circumstances the sheriff refused the application for a time to pay direction and granted decree as craved. It is against his interlocutor of 23 April 2026 that the appellant now appeals.

Grounds of Appeal

[11] The appellant appeals on the basis that the sheriff erred in law by refusing the appellant's application for a time to pay direction without properly applying the statutory test under the Debtors (Scotland) Act 1987. He goes on to add that:

> "The Sheriff erred in law by granting an order for recovery of possession under section 90 of the Consumer Credit Act 1974 without establishing whether the vehicle constituted protected goods and without considering whether it was just to grant a time order under the section 129 of the Act."

The applicable law

[12] There is some confusion as to whether the appellant was seeking: (a) a time to pay direction under section 1(1) of the Debtors (Scotland) Act 1987, or (b) a time order under section 129 of the Consumer Credit Act 1974. The grounds of appeal refer to both.

[13] The sheriff clearly considered that he was only dealing with an application for a time to pay direction when he was dealing with the matter at first instance. That is the nature of the order upon which he fixed a hearing in his interlocutor of 8 April 2022. His interlocutor of 23 April 2026 commences with the wording: "The sheriff, having heard parties' procurators, refuses the time to pay application." While that is not entirely accurate it is plain that he was not dealing with a time order.

[14] However, as indicated, an examination of the electronic documents available to me, and indeed to the sheriff shows that the appellant submitted an application for a time order in terms of the Consumer Credit Act 1974 and an application for a time to pay direction even although they are different in the circumstances of their application and effect.

[15] However the Form O3 which is the Form of notice to be served on a defender in an ordinary action where either a time order or a time to pay direction is sought is the same. Accordingly, as the respondent observes, the Form O3 that was intimated to it appears to seek both. Similarly the Form O3A which is the response form objecting to an application for a time order or a time to pay direction is the same. The Form O3 explains the difference between the two orders and appends two forms of application from which the applicant can select. In this case the applicant completed and lodged both. It is unfortunate that this was not picked up by the clerical staff or indeed the sheriff in his preparation for the hearing. Had this been noticed, either administratively or judicially, clarification could have been sought from the applicant at an earlier stage as to which order he was insisting upon.

[16] It is unclear why the sheriff thought he was dealing with a time to pay direction rather than a time order. The clerical note appended to the application for a time order states that it was emailed to the pursuer. It also notes "No Action Required". It may well be that the sheriff on considering the electronic documents formed the view that this was not being advanced further and proceeded only with the application for the time to pay direction. He commences his note to this court by stating:

> "1. The defender has appealed my interlocutor of 23rd April 2026 that refused his application for a time to pay direction (erroneously referred to as a time to pay order) and I have been requested to write a Note.
>
> 2. I am slightly perplexed by the references in the Note of Appeal to a Time Order decision. It was my understanding that the defender was relying upon his time to pay direction as the two orders are inimical and cannot both be granted. In any event , I proceeded upon the time to pay direction application."

[17] The OCRs provide:

> **"Applications for time to pay directions or time orders in undefended causes**
>
> **7.3.** (1) This rule applies to a cause in which
> (a) a time to pay direction may be applied for under the Debtors (Scotland) Act 1987; or
> (b) a time order may be applied for under the Consumer Credit Act 1974.
>
> (2) A defender in a cause which is otherwise undefended, who wishes to apply for a time to pay direction or time order, and where appropriate, to have an arrestment recalled or restricted, shall complete and lodge with the sheriff clerk the appropriate part of Form O3 before the expiry of the period of notice.
>
> (2A) As soon as possible after the application of the defender is lodged, the sheriff clerk shall send a copy of it to the pursuer by first class ordinary post.
>
> (3) Where the pursuer does not object to the application of the defender made in accordance with paragraph (2), he shall minute for decree in accordance with rule 7.2; and the sheriff may grant decree or other order in terms of the application and minute.

(4) Where the pursuer objects to the application of the defender made in accordance with paragraph (2) he shall on the same date—
(a) complete and lodge with the sheriff clerk Form O3A;
(b) minute for decree in accordance with rule 7.2; and
(c) send a copy of Form O3A to the defender.

(4A) The sheriff clerk shall then fix a hearing on the application of the defender and intimate the hearing to the pursuer and the defender.

(4B) The hearing must be fixed for a date within 28 days of the date on which the Form O3A and the minute for decree are lodged.

(5) The sheriff may determine an application in which a hearing has been fixed under paragraph (4) whether or not any of the parties appear."

[18] Accordingly the OCRs and the relevant forms for completion are the same whether or not the appellant is seeking a time order or a time to pay direction.

[19] In its written submissions the respondent states that as the debt arises from a hire purchase finance agreement regulated by the Consumer Credit Act 1974, the application should properly seek a time order under section 129 of the Consumer Credit Act 1974. However that is inconsistent with the position in its minute for decree dated 7 April 2026 which states:

> "The pursuer, in respect that the defender has lodged an application for a time to pay direction and the pursuer opposes the application, craves the court: 1. To refuse the defender's application for a time to pay; and 2. To grant decree in terms of the initial writ with expenses, and elects to charge the inclusive fee £315.00 fixed by the Act of Sederunt with £171.00 outlays in addition."

[20] Accordingly by the time the sheriff came to consider the matter all parties and the sheriff were aware that the hearing pertained to what was considered to be an application for a time to pay direction. No one took any exception to that.

[21] The difference between the two orders is spelt out in the Form O3. Time to pay directions in terms of the Debtors (Scotland) Act 1987 give the applicant the right to apply to the court for a "time to pay direction" which is an order permitting the applicant to pay any

sum of money they are ordered to pay to the pursuer (which may include interest and court expenses) either by way of instalments or deferred lump sum. When making a time to pay direction the court may recall or restrict an arrestment made on property by the pursuer in connection with the action or debt.

[22] On the other hand the Consumer Credit Act 1974 allows an application to be made to the court for a "time order" during a court action, to ask the court to give the applicant more time to pay a loan agreement. A time order is similar to a time to pay direction but can only be applied for where the court action is about a credit agreement regulated by the Consumer Credit Act. The court has power to grant a time order in respect of a regulated agreement to reschedule payment of the sum owed. This means that a time order can change the amount which has to be paid each month, the term of the loan and in some cases, the interest rate payable. A time order can also stop the creditor taking away any item bought on hire purchase or conditional sale under the regulated agreement, so long as the applicant continues to pay the instalments agreed.

[23] It will be seen that the time order is wider in its scope than the time to pay direction. Unlike the time to pay direction it is not made on granting decree but rather is sought during the dependency of the action. It provides wider powers for the sheriff to innovate on the credit agreement and can prevent repossession of the item, in this case the vehicle. It may well be that in all the circumstances an application for a time order would have been the more appropriate one to consider here but that is not what the sheriff was invited to do and no one took issue with the terms of the order he was considering. However, as will come to be seen, in the circumstances of this case, it would have made no practical difference to the outcome for the appellant.

The applicable tests

[24] The appellant's first ground of appeal is that the sheriff applied the incorrect test for a time to pay direction. In terms of sections 1(1) and 1(1A) of the Debtors (Scotland) Act 1987, the test for granting a time to pay direction is whether not it is "reasonable in all the circumstances to do so" having regard to: (a) the nature of and reasons for the debt; (b) any action taken by the creditor to assist the debtor in paying that debt; (c) the debtor's financial position; (d) the reasonableness of any proposal by the debtor to pay that debt; and (e) the reasonableness of any refusal by the creditor of, or any objection by the creditor to, any proposal by the debtor to pay that debt.

[25] In contrast the test for granting a time order is found in section 129(1) of the Consumer Credit Act 1974 and the test is whether "it appears to the court just to do so".

[26] The sheriff does not expressly refer to either of these tests in his note to this court. He does however explain his reasons for refusal to grant a time to pay direction and the factors which he took into consideration. He did not address the test for a time order as he did not consider that to be the application before him. Nevertheless he has explained in his note why he would not have granted such an order even if he had been requested to do so.

Appellant's submissions

[27] The appellant submits that the sheriff erred in law and in the exercise of his discretion by failing to consider all the relevant circumstances before refusing what he refers to as "relief". In support of the appeal he refers to additional documentation which was not before the sheriff at first instance which is referred to as "evidence."

[28] This additional material cannot be taken into consideration for the purposes of the appeal. It is simply an attempt by the appellant to rerun the proceedings before a different

forum, on different information and in the hope of securing a different outcome. That is not the function of this court. The appellant then refers to additional factual matters such as significant gearbox failure and submits that the appellant relied upon the vehicle as his principal means of earning income through self-employment as a taxi driver. The loss of the vehicle resulted in financial hardship.

[29] The appellant refers to the correct tests to be applied for either a time to pay direction or a time order but remains unclear about which he is seeking. He goes on to refer again to material which was not before the sheriff such as the Arnold Clark booking confirmation for the repairs and correspondence sent to the respondent demonstrating financial hardship due to the unavailability of the vehicle. All of this pertains to his inability to use the vehicle as a taxi. He also refers to his wife's financial circumstances which once again were not before the sheriff.

[30] The appellant complains of procedural unfairness due to the fact he was representing himself and that the hearing was dealt with remotely. He makes an increased offer of £400 at paragraph [40] of his written submission despite having indicated to the sheriff he was not in a position to increase the amount he could pay.

[31] He invites the court to have regard to productions lodged with the appeal including the PCP agreement, the repair documentation, correspondence with the respondent, evidence of hardship such as the Tele Taxi income records and his wife's bank statements. For the avoidance of doubt the PCP agreement was not lodged by the appellant. It has now been lodged by the respondent. In any event none of this documentary evidence was before the sheriff. He invites the court to allow the appeal and grant a time order or remit the matter to the sheriff for full consideration in light of the material he has now purported to lodge.

[32] He also refers to a number of authorities without explaining how they advance his position before this court or providing copies as he was ordained to do.

Respondent's submissions

[33] Despite the fact that the respondent considers this ought to have been an application for a time order it is submitted that the sheriff has not erred in his approach. It is submitted that the appellant does not explain how the sheriff erred and that in any event the refusal to grant the order was just and reasonable because the application lacked candour particularly as it did not disclose the source of the appellant's income and suggested that the vehicle was being used for his livelihood despite that being expressly precluded by the agreement. No reason was advanced why he should expect to retain the vehicle. The payment rate would unreasonably extend the agreement to one of seven years and two months and the appellant has made no payment since 21 November 2025 but has continued to use the vehicle.

Decision

[34] This appeal demonstrates the importance of all parties and the court being clear as to the nature of the application with which they are dealing. Despite the clear instructions on the Form O3 which explain the distinction between a time to pay direction and a time order, the appellant applied for both. The court administrative staff did not pick that up and despite making something of the point now, neither did the respondent. The sheriff has only seen the application for the time to pay direction and the financial information included in that. He did not consider the application for a time order lodged in process. It was clear from the terms of the interlocutor of 8 May 2026 that he fixed the hearing only in terms of the application for the time to pay direction. Had either party alerted him to the fact that

there was another application pending (if in fact this was being insisted upon, which is not clear) perhaps the matter could have been clarified earlier.

[35] Nevertheless by the time the matter came before him he and indeed everyone else was or ought to have been aware that this was a hearing on an application for a time to pay direction and that the relevant test is to be found in sections 1(1) and 1(1A) of the Debtors (Scotland) Act 1987.

[36] The test for granting a time to pay direction is whether not it is "reasonable in all the circumstances to do so" having regard to: (a) the nature of and reasons for the debt; (b) any action taken by the creditor to assist the debtor in paying that debt; (c) the debtor's financial position; (d) the reasonableness of any proposal by the debtor to pay that debt; and (e) the reasonableness of any refusal by the creditor of, or any objection by the creditor to, any proposal by the debtor to pay that debt.

[37] Although the sheriff does not expressly refer to this test, he does quite clearly apply a test of reasonableness in paragraphs [8]-[9] of his note and concludes that the appellant’s proposal was “unreasonable and the extension he sought was, in my opinion, excessive, unreasonable and unrealistic”.

[38] Although he does not expressly work through the statutory criteria laid out in the Act he does explore the nature and reasons for the debt which included an assessment of the appellant’s inability to pay based on the financial information available to him at the time he was making his decision and the fact that he had been in default for some considerable time before the agreement was terminated. He also had regard to the documentary productions evidencing discussion between the appellant and respondent and in particular the letter of 7 April 2026 in which the appellant was given an opportunity to increase his offer. He assessed the reasonableness of the proposal and the reasonableness of the objection

weighing in factors such as the extent of the debt, which amounted to £20,354.32 and the duration over which the payments would require to be made in order to settle the debt. He observed that had he been considering a time order this would extend the term of the agreement for a further 2 years and 3 months.

[39] The sheriff had no information about the appellant's spouse and importantly did not have information about the source of the appellant's income. His application referred to him being a law student nearing the completion of his studies.

[40] Although much of what the respondent submitted at first instance seems to conflate matters more pertinent to an application for a time order than a time to pay direction the sheriff draws a distinction between the two. Although the sheriff goes on to state that no reason was advanced as to why the appellant required to keep the vehicle which in any event belonged to the respondent, he acknowledges that this would be a matter relevant to an application for a time order and that was not what was being considered.

[41] By this stage all that the sheriff is empowered to do on granting decree for the principal sum and any expenses is to direct that payment may be made by instalments in terms of section 1(1)(a) or direct that a lump sum be paid at the end of a specified period in terms of section 1(1)(b).

[42] In contrast when dealing with an application for a time order the court has wider powers including the ability to innovate on the regulated agreement. This would allow the sheriff to vary the instalment payments, the term of the loan, the interest rate and crucially could prevent a creditor taking away the item, in this case the vehicle, if certain conditions are met. The court can do all or any of these things on making a time order if it appears to the court just to do so. These powers are provided for in the Consumer Credit Act 1974, section 129(2) .

[43] Crucially , however, section 129(3) provides:

> "Where in Scotland a time to pay direction or a time to pay order has been made in relation to a debt, it shall not thereafter be competent to make a time order in relation to the same debt".

That prohibits a time order being made subsequent to a time to pay direction. This is logical because a time to pay direction is made on granting decree for the outstanding sum. By the time that has happened the opportunity to vary the contractual terms of the regulated agreement has been lost.

[44] The appellant's submissions do not identify why the sheriff was wrong to refuse the application for a time to pay direction based on the information which was before him at the time. The appellant did not defend the action on its merits. There are no defences in process, and he does not deny the debt is due. The appeal is essentially an attempt to have this court consider the matter of new on fresh evidence. That is not the purpose of an appeal particularly where the decision made by the sheriff requires the exercise of his discretion. In such cases the appeal court will be slow to intervene to disturb the sheriff's decision unless it can be satisfied that the sheriff was plainly wrong: *Britton* v *Central Regional Council* 1986 SLT. 207; *McTear's Executrix* v *Imperial Tobacco Ltd* 1996 SC 514. That cannot be said in this case.

[45] There is little authority bearing on the criteria for granting or refusing a time to pay direction. However some reference was made to *Capital Bank Plc* v *Paterson* 2002 SLT (Sh Ct) 100 per Sheriff Holligan which is of some assistance in explaining the approach to be taken when determining such an application. In particular the sheriff makes clear that there is nothing in section 1(1) of the Act which imposed an onus on the debtor to justify the making of a direction and once an application has been made it is up to the court, considering the information provided by both parties as to how it should exercise its discretion.

[46] The appellant attempted to lodge a large number of documents which were not before the sheriff and invites this court either to consider these of new or remit the matter to the sheriff for him to do so. As has been explained an appeal is not a rerun of the first instance proceedings. It is not a second chance. The appeal is confined to identifying why and if so, how the sheriff got it wrong. Furthermore the terms of the written submissions go some way to confirm what the sheriff may have suspected was the true source of the appellant's income.

[47] Before the sheriff the appellant stated that the vehicle was essential for his livelihood and that its recovery would deprive him from earning an income. As the sheriff, at paragraph [9] of his note, and the respondent point out, not only was this submission lacking in candour but it led to the conclusion that the vehicle was being used for commercial purposes in direct breach of the regulated agreement.

[48] Unfortunately, because the appellant did not lodge his submissions until the last date for doing so, the respondent has not had an opportunity to comment upon them but the information provided regarding the use of the vehicle compounds the appellant's default position. Rather than advancing any basis to support his application for a time to pay direction, it confirms that he has retained the vehicle and derived a financial benefit from it while failing to make payment to the respondent for its use.

[49] As this was the primary basis upon which the appellant's submissions were made, I sought further clarification from both parties on the legality of using the vehicle as a private hire taxi as I had been referred to no authority on the matter and had not had sight of the agreement. This was all in terms of my interlocutor of 3 July 2026.

[50] The respondent provided supplementary written submissions which directly address the new points raised in the appellant's written submissions and the note to my

interlocutor. The respondent also lodged an inventory of productions containing the hire purchase agreement entered into between the parties and signed by the appellant on 10 November 2023. The agreement is in standard form and includes the following provision: Terms and Conditions

> " 4.Your Care of the Vehicle
>
> (j) Until the vehicle is returned to us at the end of this agreement or you become the owner of the Vehicle , you must (j) not use or permit the vehicle to be used for hire……… or other financial reward …."

[51] The respondent submits that the additional information contained in the appellant's original written submission to this court should be disregarded on the basis that it was not before the sheriff. More importantly, however, the appellant's submission in support of his appeal makes clear that he was using the car as a private hire taxi in direct breach of the provisions of the hire purchase agreement.

[52] Although the appellant's submissions were received late, I have taken their content into account. He submits that neither the Consumer Credit Act 1974 nor the hire purchase agreement which he signed contained an express term prohibiting the use of the vehicle as a private hire taxi for hire and reward or for commercial purposes. This clearly overlooks the provisions of paragraph 4(j) which is to precisely the opposite effect.

[53] The appellant maintains that no such restriction was explained to him at the time of entering into the agreement and had it been he would have sought an alternative source of finance. However in the section where his signature appears there is a heading:-

"IMPORTANT: BEFORE YOU SIGN, ENSURE YOU HAVE READ
1) the information on pages 1 and 2
2) Use of Your Information and the Terms and Conditions starting on the following page"

The remainder of his submission focusses on the breadth of the court's decision in granting a time order, which for the reasons already explained was not the order under consideration.

[54] Before the sheriff no reason was advanced as to why the appellant should keep the vehicle. He did not provide any information about dependents and did not mention his wife or her income. The sheriff cannot be faulted for having failed to take these matters into account if they were not brought to his attention. In any event the only relevance of these factors would have been the effect of the appellant's wife's income on his ability to make instalment payments. The sheriff had no power to vary the hire purchase agreement in the context of an application for a time to pay direction. The appellant was specifically asked by the sheriff if he could increase his offer and he responded in the negative. His enhanced offer of £400 made in his written submissions, even if it were to be acceptable, comes far too late.

[55] The appellant has made no payment to the respondent since 21 November 2025 but appears to have used the vehicle to derive an income. He fails to appreciate the illegality of his approach and the extent to which that further undermines his position.

[56] He complains of procedural unfairness because he was unrepresented. That is a matter for him. He could have instructed a solicitor if he wished and in any event he is in a better position than most party litigants having completed most of his legal studies. Hearings such as these are regularly conducted by Webex for the convenience of all concerned. The appellant does not explain how this platform prejudiced him or led to an outcome unfavourable for him. These grounds of appeal have no merit and fall to be refused.

[57] In short, the application which was before the sheriff on 23 April 2026 and the one on which he adjudicated was an application for a time to pay direction which can only be made

on granting decree. He had no power to vary the agreement by extending the term or the instalment payments and no power to allow the appellant to retain the vehicle. The sheriff applied the correct test in terms of the Debtors (Scotland) Act 1987 and decided that in all the circumstances the application should be refused. That was a decision which was reasonable in all the circumstances as they were known to him and a proper exercise of his discretion with which this court should not interfere in the absence of any identifiable error. The appellant can point to none. In any event the submissions now lodged make clear that the appellant was using the vehicle as a taxi and deriving a commercial benefit from it while failing to pay any sums due to the respondent. Not only was he in default in terms of payment he was also contravening the terms of the hire purchase agreement which preclude a consumer from using the vehicle for such a purpose. Had this been known to the sheriff it would have been further grounds on which to refuse the application rather than a basis for granting it.

[58] For these reasons I shall refuse the appeal and adhere to the sheriff's interlocutor of 23 April 2026. The expenses fall to be determined by the usual rule that they should follow success. Accordingly I shall make an award of expenses of the appeal procedure in favour of the respondent.