SHERIFF APPEAL COURT

[2026] SAC (Civ) 36
KKD-A189-24

Sheriff Principal G A Wade KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL GILLIAN WADE KC

in the application for permission to appeal to the
Court of Session (Courts Reform (Scotland) Act 2014, section 113)

by

SAUL MWAMBA

Applicant

in the appeal in the cause

SAUL MWAMBA

Pursuer and Appellant

against

MR MUHAMMAD ANEES AND MRS NAJMA ANEES

Defenders and Respondents

Pursuer and Appellant: Party
Defenders and Respondents: Party

28 April 2026

[1] The applicant seeks leave to appeal the opinion of this court, dated 13 March 2026, to the Court of Session in terms of section 113(2) of the Courts Reform (Scotland) Act 2014 ("the 2014 Act"). His application focusses on para [35] of the opinion in which it is explained that his

claim has prescribed in terms of sections 6 and 11 of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act").

[2] His proposed grounds of appeal, as set out in his Form 12.2, are that this court (a) ignored his written submissions of 30 January 2026 which address the issue of prescription (b) made no reference to those submissions (c) ignored Part 12.3 of the lease agreement (which makes provision for the landlord to account to the tenant for the net free proceeds of sale of the tenant's property which has been abandoned on expiry of the lease under Part 12.1 thereof) (d) ignored an invoice which was lodged and which the appellant submits was relevant to determination of the prescriptive period (e) in failing to have regard to that invoice wrongly concluded that the date of 18 August 2016 was the appropriate start date for determination of the prescriptive period (f) referred to incorrect dates because of the operation of Part 12.3 of the lease as was submitted in the submissions of 30 January 2026 (g) refused the appellant's motion to allow him to lodge evidence to support his position which was an interference with judicial process.

[3] It is argued that this raises an important point of principle or practice because a lease agreement had been entered into between the parties the terms of which were clear and that the court ignored those terms and conditions in coming to its decision particularly in relation to the calculation of the prescriptive period.

Procedural background and context of the appeal

[4] The appeal to the Sheriff Appeal Court was marked following the sheriff's decision to grant decree of absolvitor in favour of the respondents after debate on the respondents' preliminary pleas, which included a plea that the claim had prescribed.

[5] As explained in paras [9] to [15] of the opinion of this court although the appellant's original note of appeal sought to bring under review the sheriff's interlocutor of 7 April 2025, which turned solely on his decision that the claim was time barred, it became clear at an earlier procedural hearing before me, that the appellant was primarily concerned with a previous interlocutor of 1 April 2025 in terms of which a different sheriff had refused his motion for decree by default.

[6] That sheriff had rejected his submission that there were no competent defences lodged on behalf of the defenders because of alleged discrepancies in the identity of the defenders and the capacity in which they were being sued. The appellant had attempted to appeal that decision immediately but as it did not constitute a final interlocutor and he did not seek leave to appeal, he was not permitted to do so. The debate had already been assigned for a week hence on the respondents' preliminary pleas and it was only after that decision was made that the previous interlocutor could be opened up to review.

[7] The grounds of appeal which were initially lodged by the appellant set out a detailed challenge to the sheriff's conclusion on time bar and advanced broadly the same arguments which are foreshadowed in the appellant's Form 12.2. In particular it is asserted that the basis upon which the sheriff decided the date from which the prescriptive period should run was incorrect and that he was bound by the terms of the lease which had existed between the parties, which made provision for accounting for property belonging to the tenant which had been abandoned on the expiry of the period of the lease.

[8] Before the appeal hearing could take place, the appellant sought and was granted a sist to allow him to adjust the grounds of appeal. The adjusted grounds were lodged on 24 July 2025 and were in substantially different terms from the original grounds. Most significantly they no longer challenged the sheriff's decision on time bar and focussed on arguments about

the defender's identity which are summarised in para [12] of the opinion of this court. Given the effect of the adjustments I sought written submissions from parties on whether the adjusted grounds should be allowed. The respondents did not oppose them on the basis that they did not materially alter their position in relation to the fact that the claim was time barred.

[9] The difficulty for the appellant was that the adjusted grounds of appeal no longer challenged the interlocutor of 7 April 2025 at all. On one view that meant that there was no mechanism by which he could even challenge the decision of 1 April 2025. However as it had been made clear to me at the procedural hearing that this decision was the focus of his criticism and as the appellant is a party litigant, I afforded him a degree of latitude in an effort to explain to him the reasons why his appeal was without merit.

[10] As was made clear in *Khaliq* v *Gutowski* [2018] CSIH 66 paras [34]-[36] such latitude cannot be exercised to the prejudice of the other party (who is now also a party litigant). The respondents relied upon the adjusted grounds of appeal as they were entitled to do. It is plain from the written submissions lodged on their behalf in advance of the appeal to this court that they proceeded on the basis that the decision on prescription was no longer challenged (paragraphs 1, 4 and 10). I agreed with that submission. However as the appellant is a party litigant, and having had sight of his written submissions of 30 January 2026 I sought to explain that even if there had been any grounds of appeal properly before this court relating to the prescription issue or the terms of the lease they fell to be refused on their merits.

[11] The point remains that before the Sheriff Appeal Court there were no extant grounds of appeal addressing the sheriff's decision on prescription. That is why the appellant's written submissions on these points (as contained in his note of 30 January 2026) were not rehearsed in any detail. Although they were considered they were not pertinent to the grounds of appeal ultimately before the court. There is no requirement for the court to make reference in its

opinion to matters which are not relevant to its decision. However as explained at para [15] I did consider that it would be helpful to explain further to the appellant why his claim and his appeal were bound to fail.

[12] What the appellant seeks to do now is to advance arguments which were not legitimately before this court on appeal and to invite the court to consider "evidence" in support of his position. In essence the appellant is seeking a second appeal albeit on different grounds from that which were before this court.

The applicable test

[13] Permission may only be granted if (a) the appeal would raise an important point of principle or practice, or (b) there is some other compelling reason for the Court of Session to hear the appeal. The test has been considered authoritatively in *Politakis* v *Spencely* [2017] CSIH 74; 2018 SC 184 at paras [20] and [21]. The purpose of the test is to restrict the scope for a second appeal. An appeal raises an important point of principle or practice when it refers to one which has not yet been established and does not include a question of whether the principle or practice has been correctly applied. The existence of some other compelling reason presupposes the first part of the test has not been met and no important point of principle or practice has been realised. In this case the appellant does not submit that there is another compelling reason. Accordingly his application proceeds only on the basis that there is an important point of principle or practice in issue.

[14] Even where one of the statutory tests is met, the court is not bound to grant permission to appeal (*Explore Learning Ltd* v *Social Care and Social Work Improvement Scotland* [2019] CSIH 53). It must consider the prospects of success of the appeal and the suitability of the particular case as a vehicle for that.

Application of the test to the circumstances of this appeal

[15] The appeal related to a dispute about fixtures and fittings which were within shop premises known as "Shop N Save", Main Street, Methil in Fife. The respondents leased the shop premises to the appellant. On 30 July 2016 the appellant was sequestrated and his estate vested in his trustee in sequestration. It is not disputed that on 18 August 2016 an agent acting for the trustee in sequestration attended at the shop premises and met with the first respondent. An agreement was entered into on that date whereby the lease was terminated, and the respondents took over the trustee's interest in everything within the premises including the stock and the fixtures and fittings. The appellant was not present at that meeting. However he disputes what was agreed. Although he accepts that the appellant's interest in the shop premises passed from the appellant's trustee in sequestration to the respondents his position is that the agreement did not extend to the fixtures and fittings which the respondents appropriated and sold. He now claims that he is entitled to payment from the respondents in respect of the sale of the fixtures and fittings from the shop premises, plus interest. As can be seen from the nature of the claim, if it had any merit or basis in law, it is fact specific.

[16] Furthermore the law in relation to the approach to be taken to the effect of sequestration on prescription is well settled. Even if there had been a competent ground of appeal directed against the sheriff's decision on prescription it was bound to fail on the basis of the pleadings.

[17] Although the appellant focusses on para [35] of the opinion of this court that has to be read in the context of paras [32] to [36] and against the procedural background as laid out in paras [3] – [8] of the opinion of 13 March 2026.

[18] In short, the respondents' averments at Answer 4 are that subsequent to the appellant's sequestration the respondents:

> "… entered into an agreement with the trustee's agent whereby the Pursuer's lease was terminated and Shop & Save Ltd paid to take over the trustees (*sic)* interest in all of the stock and content within the heritable premises, including the fixtures and fittings."

is not met with even a general denial. Similarly the averments at Answer 7, which include averments about the start date for the prescriptive period in support of the respondents' plea in law, are not denied and must therefore be deemed admitted.

[19] The precise date of 18 August 2016 is introduced by the appellant at Articles 10, 11 and 12. Article 12 also contains an averment that:

> "The fixtures and fittings had not been sold to the defenders (and respondents) and therefore remained vested in the Pursuer's trustee to be realised for the benefit of the creditors."

Although that averment is denied by the respondents, for the purposes of the debate and assuming the appellant would ultimately be able to prove that factual position, any right or claim to the fixtures and fittings arose on that date.

[20] Article 13 avers that following that date the respondents were the only persons with access to the shop and therefore control of the fixtures and fittings, and the respondents admit that the trustee's agent left the fixtures and fitting in the shop.

[21] On the basis of those averments the appellant's own position is that by 18 August 2016 the respondents had sole possession of the fixtures and fittings with the knowledge of the trustee in sequestration. In the event that the appellant is correct and they were not entitled to them then the right to recover them vested in the trustee in sequestration at that date.

[22] The appellant avers that he did not know about any of this until 8 November 2023 and therefore could not have brought the action sooner. He claims that his sequestration prevented him from enforcing the right without the consent and concurrence of his trustee during the period he was sequestrated. That argument was made before the sheriff and rejected.

Notwithstanding there was no relevant ground of appeal, the same proposition was advanced in the written submissions prepared for this court dated 30 January 2026 at para [11].

[23] Those written submission also referred to duties on the respondents to provide an accounting for abandoned property in terms of Part 12.3 of the lease between the appellant and the respondents. That lease was terminated on the appellant's sequestration, which is admitted. There was no relevant claim thereafter for any accounting for the fixtures and fittings arising from the terms of the lease by the trustee. That argument forms no part of the sheriff's decision at first instance. In any event the same prescription arguments would apply. His application for permission to appeal simply reiterates the same arguments.

[24] As the sheriff explained at para [13] of his note and this court confirmed at para [36] of its opinion, the appellant's contention (that computation of the prescriptive period began when he personally became aware of any right as a result of obtaining the financial statement from his trustee on his discharge on 8 November 2023) is a misunderstanding of the law on the appellant's part.

[25] Section 11 of the 1973 Act provides that any obligation to pay damages (whatever the source of the obligation) for loss, injury or damage shall be regarded for the purposes of section 6 of the 1973 Act as having become enforceable on the date when the loss, injury or damage occurred. In turn, section 6 provides that where an obligation has subsisted for a continuous period of five years since it became enforceable then the obligation shall be extinguished (if certain circumstances are not met). Taken together, if the appellant suffered loss on 18 August 2016 (the date upon which the respondents are said to have misappropriated the appellant's property/breached the lease) then the appellant had until 18 August 2021 to commence an action (ie cite the respondents) otherwise his right to damages prescribed.

[26] The appellant seeks to argue that section 6(4)(b) of the 1973 Act applies to suspend the prescriptive period for the time the appellant was subject to sequestration as his sequestration amounted to a legal disability. For the reasons given by the sheriff, that contention is ill founded. Section 15 defines legal disability as "legal disability by reason of nonage or unsoundness of mind". The sequestration of the appellant did not give rise to any of these conditions. Therefore, the "clock did not stop".

[27] Rather, the appellant was prevented from bringing an action by the law of sequestration. As the appellant was sequestrated on 30 July 2016, the Bankruptcy (Scotland) Act 1985 ("the 1985 Act") which was then in force applies (rather than the Bankruptcy (Scotland) Act 2016 per sections 234(3) and 236). Section 31(1) of the 1985 Act provides that the whole estate of the appellant vests in his trustee as at the date of sequestration for the benefit of the appellant's creditors. That is in line with the appellant's own averments. In accordance with section 39(2) of the 1985 Act, the trustee may bring, defend or continue any legal proceedings relating to the estate of the debtor. The right to raise proceedings for patrimonial loss, pertaining to some underlying obligation owed to the appellant, vests in the trustee (*Muir's Trustee* v *Braidwood* 1958 SC 169 at 175).

[28] Applying this to the facts, any obligation to pay damages arose as a result of actions occurring on 18 August 2016 (which was after the appellant's sequestration). That right, if it existed at all, vested in the trustee in terms of section 32(6) and (10) of the 1985 Act at that date (ie not at sequestration but subsequent to sequestration). As this was part of the estate vested in the trustee, it was for the trustee to determine whether to raise an action in terms of section 39(2). The appellant could have sought consent from the trustee to raise an action but that decision remained one for the trustee. The right to payment of any damages recovered would also have vested in the trustee. The trustee allowed any claim to prescribe prior to the

appellant being discharged. In other words, any obligation that subsisted was for the trustee to do with as they pleased as the trustee stood in the shoes of the appellant for the entirety of the relevant prescriptive period. It is the trustee's knowledge of the existence of the right which matters and not the appellant's knowledge that the trustee had a right which the trustee did not enforce.

[29] The current action was served on 23 September 2024. The defences lodged on 28 October 2024 included a preliminary plea to the effect that claim had prescribed in terms of section 6 and schedule 1 of the 1973 Act. The matter proceeded to debate on this point on 7 April 2025. Based on the pleadings the sheriff upheld the preliminary plea. He was correct to do so. The right itself is no more. It cannot now be enforced. His decision was not challenged in the adjusted note of appeal which the appellant was allowed to lodge but, even if it had been, he was correct for the above reasons.

[30] The appellant also invited this court to consider an invoice which was produced alongside the written submissions of 30 January 2025. That invoice is again produced in support of this application for permission to appeal to the Court of Session. It purports to be an invoice dated 18 August 2016 issued to Shop & Save Ltd by a company called Future Remarketing Ltd and refers to the sale of stock items within shop premises formerly owned and operated by the appellant. It is not lodged. There is an averment by the appellant at Article 11 of condescendence that "an invoice was issued to Mr Anees (defender) by the pursuer's trustee's agent confirming the sale/purchase of the stock held in the Shop and Save in Methilhill, Main Street KY8 2DJ". It may be that this is a reference to the same invoice but as the invoice is not incorporated it cannot form part of the pleadings for the purposes of debate or appeal. No formal attempt was made to lodge it or to amend. In any event the invoice (a) does not align with the averments (b) does not establish what the respondents, as individuals and

owners of the heritable property, agreed with regard to the fixtures and fittings. At its highest it could evidence that a third-party company acquired the stock. It does not assist the appellant for the purposes of the appeal. Because it was neither referred to in its full terms nor incorporated for the sake of brevity and lodged, the respondents' position in relation to it is not known and they could not lead any evidence about it if the appellant were to attempt to refer to it at proof. I considered it irrelevant to the grounds of appeal which were before the Sheriff Appeal Court, focussed as they were on the identity of the landlord and defenders and the decision of 1 April 2025.

[31] On that basis the appeal raises no important point of principle or practice. It is not argued that there is any other compelling reason why permission should be granted. The grounds advanced have no prospects of success.

[32] Permission to appeal is therefore refused as the appropriate test in terms of section 113 of the 2014 Act is not met. The expenses associated with the application fall to be awarded in favour of the respondents.