



SHERIFF APPEAL COURT

[2026] SAC (Civ) 8

Sheriff Principal G A Wade KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL GILLIAN WADE KC

in the appeal in the cause

AW

Pursuer and Respondent

against

KM

Defender and Appellant

Pursuer and Respondent: Party
Defender and Appellant: Allison, advocate; Harrison Legal Limited

23 January 2026

Introduction

[1] This matter called on 12 January 2026 in relation to a question of competency. The question which arises is whether a sheriff's decision to grant commission and diligence can be appealed to this court without leave having been granted, in terms of section 110(1)(b)(iii) of the Courts Reform (Scotland) Act 2014, on the basis that such an order is an order *ad factum praestandum*.

Procedural history and factual background

[2] This action commenced in January 2020 and concerns the arrangements for contact and residence of the parties' three children. The respondent seeks an order for contact with the children. The appellant seeks an order for residence of the children and interdict to prevent the removal of them from her care.

[3] The action has a long procedural history. For the purposes of this appeal, it is sufficient to note that the respondent lodged a motion (no 7/31 of process) moving the court to approve a specification of documents and to grant commission and diligence for the recovery of documents, namely all records held by the local authority's social work department in respect of each of the parties' three children. The appellant opposed that motion.

[4] At the opposed motion hearing on 13 November 2025, the sheriff granted the respondent's motion, approved the specification of documents and granted commission and diligence. The appellant lodged a Note of Appeal against the sheriff's interlocutor; without seeking leave to do so from the sheriff.

[5] Following consideration of the papers, the clerk referred a question as to the competency of the appeal to the procedural appeal sheriff. The procedural appeal sheriff agreed that a question of competency arose, namely:

“Can the sheriff's interlocutor of 13 November 2025 be competently appealed to the Sheriff Appeal Court without leave in terms of section 110(1)(b)(iii) of the Courts Reform (Scotland) Act 2014 on the basis asserted in the note of appeal, namely that the decision appealed against is an order *ad factum praestandum* because, execution of the diligence compels production of the document?”

[6] For the reasons outlined in this opinion, the court answers that question in the negative.

Legislation

[7] Section 110 of the Courts Reform (Scotland) Act 2014 provides:

- “(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.”

Submissions for the appellant

[8] As the sheriff’s interlocutor was an order which granted commission and diligence, the effect of that order was to compel a haver, in this instance, a local authority, to produce documents. Such an order was an order *ad factum praestandum* and, therefore, was appealable without the leave of the sheriff (section 110(1)(b)(iii)).

[9] This court had previously held in *MD v JM* [2020] SAC (Civ) 25 that an order refusing commission and diligence was an order which required leave to appeal (which was consistent with *Mowbray v Secretary of State for Scotland* 1992 SLT (Sh Ct) 84). The appellant sought to distinguish *MD* and *Mowbray* on two grounds: (i) both of those cases concerned the refusal (rather than the grant) of commission and diligence; and (ii) each case concerned whether refusal of commission and diligence limited the mode of proof, thereby allowing an appeal under what is now section 110(1)(b)(v). In relation to the first point, it was accepted

that an interlocutor refusing commission and diligence could never be an order *ad factum praestandum* as it had the opposite effect to an order which granted it.

[10] *AT v NK* 2025 SLT (SAC) 59; [2025] SAC (Civ) 9 [63] - [82] provided a comprehensive review of what constituted an order *ad factum praestandum*. The appellant sought to distinguish this appeal from *AT* on the basis that this appeal concerned an interlocutor allowing commission and diligence.

[11] As to the question of what could be said to amount to the necessary underlying legal obligation *ad factum praestandum* to be enforced by the interlocutor of 13 November 2025, the appellant submitted that, as the haver was also a data controller in terms of the Data Protection Act 2018, the interlocutor engaged statutory obligations owed by the haver under the 2018 Act.

[12] The haver from whom the respondent sought documents was a local authority. It is a data controller in terms of the social work records of each of the children. As such, the local authority exercised obligations and duties as to the retention, disclosure and use of records under the provisions of the 2018 Act. But, for the sheriff's order, the 2018 Act would have regulated what relevant personal information of the children, if any, was to be disclosed to the respondent. The relevant personal information would not be disclosed to the respondent without a Subject Access Request (SAR) and, even then, it would not be disclosed without the consent of the persons to whom the information relates (ie the appellant and the children). The effect of the grant of commission and diligence was to elide those restrictions by both permitting and compelling the local authority to produce the documentation. Understood in that way, where a sheriff's interlocutor has the effect of regulating the way in which statutory duties are performed, the grant of commission and

diligence for the production of documents, held by a data controller such as a local authority, is one which meets the requirements of an order *ad factum praestandum*.

[13] Counsel accepted that a reclaiming motion against an interlocutor granting commission and diligence in the Court of Session was not competent without leave but, he submitted, that arose by virtue of the terms of the rule in the Court of Session (Rule 38.2(6) of the Act of Sederunt (Rules of the Court of Session 1994) 1994/1443) which was drafted in different terms to the legislative provision which Parliament had laid down for this court.

Submissions for the respondent

[14] There were several criteria that were required to demonstrate that an order was an order *ad factum praestandum*. These were that: it was a coercive order; it had to be an order against a party within the court action; it was an order to perform a specific act; and that it enforced a pre-existing legal obligation. Counsel for the appellant had failed to demonstrate that the interlocutor of 13 November 2025 was a coercive order. Nor had he dealt with the fact that the obligation to disclose documents was owed by the haver, namely the local authority. The terms of the interlocutor did not create an obligation. It granted authority to the respondent to recover the documents by means of commission and diligence if necessary. In this regard it was argued that it was at least questionable whether the terms of the order of 13 November 2025 ordered anyone to do anything without further procedure being invoked.

[15] As for the contention that the pre-existing obligation was an obligation owed by the haver under the 2018 Act, the respondent submitted the obligations owed by the local authority under the 2018 Act were owed to the data subject, in this instance, the children.

Had a SAR been made by the respondent, the local authority could have refused to disclose, subject to the terms and conditions of the 2018 Act.

[16] An order for commission and diligence was a procedural mechanism. In so far as the 2018 Act creates any obligation that is owed to the data owner or the person about whom the haver holds data there is no obligation for the data holder to do anything. On the contrary there is an obligation not to do anything ie disclose the information to a third party. It was accepted that there were exceptions where the court authorised release of information for the purpose of legal proceedings but that did not create an obligation to share the information. The underlying obligation had to be pre-existing. Any obligation arising now only does so because of the court procedure.

[17] There would be an inherent absurdity if courts orders were to be characterised as orders *ad factum praestandum* simply because they compelled a party to do something. The result would be that all sorts of orders would be rendered appealable without leave which is not what Parliament intended.

Decision

[18] In *MacSporran and Young, Commission and Diligence*, (1995) at paragraph 3.66, the authors reviewed the right to appeal against an interlocutor granting or refusing commission and diligence. The position in the Court of Session, where an action had called, was that it could be reclaimed only with leave of the Lord Ordinary within 14 days (as currently reflected by the terms of Rule 38.2(6) of the Rules of the Court of Session). The position in relation to appeals from ordinary actions before the sheriff court was noted to have been less certain. With respect to an interlocutor granting commission and diligence in the sheriff court, the authors' position was that:

“... such an interlocutor does not fall within the exceptions mentioned in section 27 [of the Sheriff Courts (Scotland) Act (‘the 1907 Act’)] and therefore leave must be obtained”: *Commission and Diligence*, paragraph 3.67.

Their justification for that position was the decision of the First Division in *Stewart v Kennedy* (1890) 17 R 755.

[19] Similarly, in Macphail, *Sheriff Court Practice*, 4th Edition, (2022) at paragraph 15.66 it is stated that an interlocutor granting diligence is not appealable without the leave of a sheriff.

The authority for that proposition is given as, again, *Stewart*, and *Baikie v Douall* (1908) 24 Sh Ct Rep 211. The appellant’s submission directly contradicts the statements contained in both *Commission and Diligence* and *Sheriff Court Practice*, 4th Edition.

[20] In *Stewart*, the Lord Ordinary (Kinnear) granted diligence against havers upon the defender’s motion for a recovery of the documents specified within a specification of documents. The pursuer asked the Lord Ordinary for leave to reclaim; however, he refused leave on the basis that he did not think it was required. The pursuer proceeded to reclaim. The First Division held the reclaiming motion to be incompetent. The Lord President (Glencorse) considered that an interlocutor granting diligence for the recovery of documents was not within the scope of either section 27 or section 28 of the Court of Session Act 1868. He stated that the policy aim of the 1868 Act was to prevent reclaiming notes against such orders. Lord Shand, Lord Adam and Lord McLaren agreed.

[21] In *Baikie*, Sheriff McLennan followed *Stewart* and determined that the interlocutor of the sheriff-substitute granting diligence for recovery of documents was not an interlocutor allowing or refusing a proof and that it could not be reclaimed without leave: *Baikie* at p 212. The same position has been followed in several subsequent judgments given by sheriffs principal (see, for example, *Dick v Town Council of Blairgowrie* (1911) 27 Sh Ct Rep 243; *Buchan Supply Stores v Morgan* 1954 SLT (Sh Ct) 7; *Mowbray* (above)). However all of those

cases turned on the construction of section 27 of the 1907 Act which, as Sheriff Principal Turnbull, (as he then was), noted at para [14] of *MD* (above) is no longer of relevance; the position now being governed by section 110 of the 2014 Act.

[22] There is no dispute that an interlocutor which grants or refuses commission and diligence cannot be appealed, without leave, based on the exemption contained at section 110(1)(b)(v). In order to appeal the sheriff's interlocutor without leave the appellant recognises that she must bring the appeal under one of the other exceptions contained in section 110(1)(b). The appellant's submission seeks to draw a distinction between the instant case and the authorities cited above. Her position is that an interlocutor granting commission and diligence is an order *ad factum praestandum* and that, consequently, leave to appeal is not required standing the exemption contained at section 110(1)(b)(iii).

[23] The appellant accepted that a necessary requirement for an order *ad factum praestandum* was that it had to seek to enforce a pre-existing contractual or statutory obligation. That concession was correctly made standing the terms of this court's opinion in *AT* (at [74]). The pre-existing obligation which the appellant submitted was engaged here was the statutory obligation imposed on the haver of the documentation sought by the respondent, in this instance, the local authority which held the childrens' social work records, by virtue of the Data Protection Act 2018.

[24] At para [73] of *AT*, this court cited Professor Walker's definition of a decree *ad factum praestandum* from Walker, *Civil Remedies*, (1974), at 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."

[25] The pre-existing obligation, as defined by Walker, must be an obligation in existence as between the parties to the action. Self-evidently, the local authority is not a party to this action. Moreover, the local authority owes no obligation to disclose information to any party unless it receives either a SAR or a court order for disclosure of the documentation.

[26] A further difficulty for the appellant is the terms of the sheriff's interlocutor. The sheriff approved the specification of documents and granted commission and diligence; however, the sheriff's action in granting the interlocutor, in and of itself, does not create an obligation upon the haver to disclose the documentation contained in the specification of documents. The obligation of a haver to disclose is created by service of the specification of documents upon the haver, alongside the interlocutor authorising the same. That point is exemplified by the possibility that a party who obtains authority from the court to serve a specification of documents then decides not to serve that upon the haver. In that scenario, the haver's obligation to disclose does not arise.

[27] The appellant conceded that, had the sheriff issued an interlocutor refusing to grant commission and diligence, leave to appeal would have been required. That concession was correctly made (see *MD* (above) [15]). However, it underscores the fundamental point that there is no underlying or pre-existing obligation owed by the haver and any duty to provide the documents only arises when certain procedural steps are taken in implementation of the court's interlocutor granting commission and diligence. It is illogical for the appellant to argue that the creation of a pre-existing obligation *ad factum praestandum*, and consequently an order *ad factum praestandum*, depends upon whether the sheriff determines the motion for commission and diligence for or against the party seeking that order. Indeed, it demonstrates that the appellant has failed to show that any pre-existing obligation is engaged such as to establish that an order *ad factum praestandum* was made by the sheriff.

[28] In addition, if the appellant were correct, it would mean that a party in the position of the appellant would be able to appeal an interlocutor granting commission and diligence in the sheriff court, but not in the Court of Session. This court observed in *AT*, albeit in relation to an incidental order under section 14 of the Family Law (Scotland) Act 1985, that there was no logical reason 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. I consider the same observation is equally applicable to an appeal challenging an interlocutor granting commission and diligence (*AT*, [85]).

[29] As a consequence an interlocutor allowing commission and diligence for the recovery of documents is not an order *ad factum praestandum*. As this appeal does not fall within any of the classes of case set out in section 110(1)(b), permission to appeal is required in terms of section 110(2). On that basis, I will answer the question of competency in the negative.

Disposal

[30] Permission to appeal against the sheriff's interlocutor of 13 November 2025 not having been granted, the present appeal is accordingly incompetent. The appeal is refused as incompetent in terms of Rule 6.10(1)(a) of the SAC Rules 2021. The case will be remitted to the sheriff to proceed as accords.

[31] Neither the written nor the oral submissions address the question of expenses of this appeal. I shall therefore afford the parties 7 days from the date of this decision to lodge written submissions in this regard.