

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT INVERNESS

[2021] SC INV 51

INV-F66-19

JUDGMENT OF SHERIFF IAN HAY CRUICKSHANK

in the cause

DM

Pursuer

against

CM

Defender

Pursuer: Thompson, Thompson Family Law, Solicitors, Glasgow

Defender: Ferguson, Messrs. R & R Urquhart, Solicitors, Forres

Inverness, 3 August 2021

The Sheriff having resumed consideration of the cause Refuses pursuer's motion number 7/13 of process; Grants defender's motion number 7/12 of process and in terms thereof ordains the pursuer to pay to the defender expenses in the sum of one thousand one hundred and seventeen pounds and twenty-two pence Sterling (£1,117.22) as awarded in terms of interlocutor dated 17 October 2019, or otherwise to reach an agreement in relation to payment of that sum in terms acceptable to the defender, as a condition precedent of the pursuer proceeding to proof; *ex proprio motu* Discharges the Proof Management Hearing assigned for 18 August 2021 and in lieu thereof assigns 25 August 2021 as a procedural hearing to determine further procedure in the cause; reserves the question of expenses occasioned by these motions until 25 August 2021.

Sheriff Ian Hay Cruickshank

NOTE**Introduction**

[1] This case called before me at Inverness on 30 July 2021 by way of a hearing in relation to the following opposed motions for both parties:

1. Defender's motion 7/12 of process –

“To ordain the pursuer to pay to the defender the award of expenses to which he was found liable on 12 March 2021 and 17 October 2019 as a condition precedent of the pursuer continuing to proof in the matter”

2. Pursuer's motion 7/13 of process –

“To modify the expenses awarded against the pursuer in respect of the interlocutor of 12 March 2021 and 17 October 2019, to nil”

[2] The pursuer was not legally aided when this action was raised in late February 2019.

He subsequently applied for, and was granted, legal aid. In no part of the process is the pursuer designed as “assisted person”. The legal aid grant of special urgency, legal aid certificate and extension to the certificate were not lodged in process until included in the pursuer's Third Inventory of Productions which was received by the Sheriff Clerk's office on 23 July 2021. The pursuer does not have the benefit of legal aid for all matters which he has sought to pursue in this cause. The extent of the pursuer's legal aid cover is as outlined below. The defender does not have the benefit of legal aid.

[3] Having heard parties' submissions in relation to these motions I reserved judgement.

Prior to reserving judgement the cause was appointed to a Proof Management Hearing assigned for 18 August 2021.

Relevant procedural history

[4] The initial writ was lodged on 27/02/19. The pursuer's craves sought (1) a contact order in relation to the parties' three children, (2) divorce on the grounds of unreasonable behaviour, (3) an order for the sale of the matrimonial home, to find and declare that net free proceeds of sale be divided between the parties with the sum of £11,200 being paid to the defender's father to reimburse him for a property deposit and parties to receive thereafter one half of free proceeds each and (4) to make such further order expedient to give effect to the principles set out in section 9 of the Family Law (Scotland) Act 1985.

[5] The pursuer applied for special urgency cover under regulation 18(1)(b) of the Civil Legal Aid (Scotland) Regulations 2002. Special urgency cover was granted on 2 September 2019 to allow instruction of a social work report as ordered *ex proprio motu* by the court. The pursuer was granted legal aid with the effective date of the certificate shown as 13 November 2019. The legal aid certificate shows the nature of proceedings as "Contact".

The legal aid certificate states:

"This is to certify that subject to the provisions of the Legal Aid (Scotland) Act 1986 and any regulations made thereunder, legal aid has been made available to the person designed below as the assisted person effective from the date shown hereon and for any urgent or specially urgent work undertaken before that date under Regulation 18 of the Civil Legal Aid (Scotland) Regulations 2002, provided that all the necessary conditions imposed by or under that regulation have been complied with. The legal aid made available is also subject to any conditions, provisions, limitations, amendments and other terms endorsed thereon or on any certificate of endorsement issued relating hereto."

[6] By interlocutor of 29 July 2019 the pursuer's Minute of Amendment was received and numbered 14 of process. It sought to insert two new craves. These craves sought (1) a residence order in relation to the children and (2) interdict and interim interdict against removal of the children from the pursuer's care and control. On 7 August 2019, on pursuer's

motion, *interim* interdict was granted against removal and matters were continued to a Child Welfare Hearing on 9 August 2019.

[7] By interlocutor of 9 August 2019 the interim interdict was recalled and the defender was granted a residence order in relation to the children. The said interlocutor also included the following:

“... Ordains the pursuer to deliver the said children to the defender and in the event of him failing so to do Grants warrant to officers of law to uplift the said children and to open shut and lockfast places so to do ...”

[8] Defender’s production, number 6.5 of process, is a copy of an invoice from Sheriff Officers dated 13 August 2019. The invoice outlines the work undertaken by Sheriff Officers in executing the warrant and returning the children to the care of the defender. The invoice is in the sum of £1,117.22.

[9] Interlocutor of 17 October 2019 includes the following :

“... Grants defender's motion no. 7/4 of process and in terms thereof, Finds the pursuer liable to the defender in expenses in the sum of one thousand one hundred and seventeen pounds and twenty-two pence Sterling (£1117.22) being the expenses incurred to Messrs Scott & Co, Sheriff Officers in the course of implementing the terms of interlocutor dated 9th August 2019 requiring the instruction of sheriff officers to deliver the children to the defender, the pursuer having failed to voluntarily obtemper the terms of said interlocutor ...”

[10] On 12 August 2020 the pursuer lodged a Minute of Amendment forming number 24 of process. In terms thereof the pursuer sought to delete the divorce crave based on unreasonable behaviour and substitute a crave seeking divorce on the ground of non-cohabitation for a period exceeding two years. The pursuer also sought to introduce a crave for residence of the children. The defender’s Answers to the said Minute of Amendment form number 25 of process. (It is not entirely clear from the process what happened procedurally to the pursuer’s earlier Minute which sought to incorporate a crave for residence)

[11] An extension to the pursuer's legal aid certificate is dated 2 September 2020. The extension states new proceedings as "Capital sum, Divorce on the grounds of two years separation". The extension further states in relation to proceedings refused -

"Interdict against removal of child/other – It is unreasonable to grant legal aid in the circumstances, The need for this crave or to oppose the counterclaim in this regard has not been sufficiently addressed.";

"Residence – It is unreasonable to grant legal aid in the circumstances. Prospects of success remain to be sufficiently addressed taking into account that a residence order has been made by the Court." and

"Orders under Family Law (Scotland) Act – It is unreasonable to grant legal aid in the circumstances. No orders appear to be sought in relation to sale of matrimonial home and this crave is therefore refused as unnecessary."

[12] By interlocutor of 11 September 2020 the pursuer's motion number 7/8 of process was refused *in hoc statu* and the pursuer was found liable to the defender for the expenses of the motion as taxed. The pursuer's motion had sought decree for the sale of the former matrimonial home.

[13] Interlocutor of 23 October 2020 includes the following :

"... Finds the Pursuer liable to the Defender for the expenses occasioned by the whole amendment procedure, numbers 24 and 25 of process, as taxed and Allows an account thereof to be given in and Remits same when lodged to the Auditor of the Court to tax and to report ..."

[14] Interlocutor of 12 March 2021 is in the following terms:

"The sheriff, Approves the auditor's report on the account of expenses for the defender and in terms thereof, Decerns against the pursuer for payment to the defender of the sum of £5,784.69 (five thousand seven hundred and eighty four pounds and sixty nine pence sterling) being the taxed amount thereof".

(This taxed account related to expenses occasioned by pursuer's motion 7/8 of process and expenses occasioned by the amendment procedure. Following receipt of the auditor's report no objections were received.)

[15] At a continued Proof Management Hearing on 13 July 2021 a joint minute was received and authority interponed thereto. In terms thereof the interlocutor granted a residence order in favour of the defender and granted a contact order in favour of the pursuer in detailed terms. The Proof Management Hearing was continue to 18 August 2021. Accordingly, with contact and residence resolved, as I understand matters, divorce is not defended on the merits. The remaining issues for proof are as follows:

1. Division of free proceeds of sale of the matrimonial home currently held on joint deposit and consideration of such order as may be expedient to give effect to the principles set out in section 9, or any other order to be made under section 8 of the Family Law (Scotland) Act 1985.
2. The defender's crave to interdict the pursuer from removing or attempting to remove the children from the care and control of the defender.

[16] On record the pursuer accepts that the defender's father contributed a deposit of £11,200 for the purchase of the matrimonial home and that this sum should be repaid to him. The pursuer avers that division of net free proceeds of sale in equal proportions is justified and reasonable having regard to the resources of the parties. Further, on record, it appears that the only other financial assets of the parties are modest pensions and a bank account all in the sole name of the pursuer.

[17] I was advised by the defender's agent at the opposed motions hearing that the former matrimonial home had been sold and free proceeds of sale amounting to £23,387.23 were held on deposit by selling agents pending agreement between the parties or further order of court. Given the pursuer admitted on record that the deposit sum of £11,200 was due to be repaid to the defender's father the balancing sum for division between the parties was £12,187.00. This led, on equal division, if the pursuer's argument in relation to division

was successful, to each party receiving a share amounting to £6,093.00. These figures were not disputed by the pursuer's agent.

Pursuer's submissions

[18] In support of the pursuer's motion, number 7/13 of process, Mr Thompson submitted that the awards of expenses were granted during a period in which the pursuer had been covered by either legal aid for special urgency work or covered by his legal aid certificate. At all relevant stages the pursuer was a legally assisted person. Whilst accepting that the pursuer did not have legal aid for all matters in dispute he fell within the definition of "legally assisted person" in terms of section 16 of the Legal Aid (Scotland) Act 1986. That definition was not qualified in any way. As such the pursuer could apply for modification of expenses from the date of the grant of special urgency provided a certificate was subsequently granted (*Bell v Inkersall Investments* [2007] CSIH 60). With further reference to the case of *Bell* it was submitted that the court should not modify to nil or to a nominal figure as a matter of course, but the court should not modify to a figure beyond the assisted person's resources even if his conduct had been improper (per Lord President Gill at paragraph 30).

[19] Mr Thompson also referred me to the case of *Dobbie v Patton* [2019] SAC (Civ) 39 where the Sheriff Appeal Court considered Lord President Gill's dicta to be binding on them and that any improper conduct was irrelevant when considering a motion for modification. In any event it was not a case that the pursuer's conduct had been improper. He had sought residence and then changed his position and ultimately sought an order for contact.

[20] It was further submitted that the pursuer had extremely limited means with which to meet his liabilities. A schedule of income and expenditure together with a recent bank

statement had been lodged with the pursuer's Third Inventory of Productions. This showed the pursuer's income was £1, 871.32 net per month with outgoings of £1,737.95 per month. Mr Thompson submitted that it would be improper to consider the capital in dispute when considering the means of the pursuer.

[21] In relation to the failure to lodge the legal aid certificate it was submitted that this was no more than a circumstance in the case and did not change the authority binding on this court, namely, *Bell*. It was not accepted that the right to seek modification was incompetent given there had been decerniture of the taxed expenses. It was submitted that the interlocutors here were not final and could be subject to modification (*NB v EL* [2017] SC Dun 62 – the sheriff's conclusions in that case having been approved by the Sheriff Appeal Court in *Dobbie*). In any event it was not accepted that there had been decerniture for the award of £1,117.22. It was further submitted that the use of the word "Decerns" in the Sheriff Court had no special meaning and was different from its use in the Court of Session. As such the cases of *Gilbert's Trustee v Gilbert* 1988 SLT 680 and *Stewart v Stewart* 1989 SLT 80 referred to by the defender were not binding. The motion to modify liability for expenses was not too late and remained competent. Whilst not stated in the case of *Dobbie*, Mr Thompson had been involved in that case and advised that the awards of expenses to be modified had been to taxation and the interlocutors had thereafter used the wording "decerns". The Sheriff Appeal Court had not considered this to be an issue in relation to the matter of modification.

[22] In opposition to defender's motion, number 7/12 of process, in the event I found the pursuer to remain liable for expenses, by making payment of these expenses a condition precedent of proceeding to proof, it would mean that the pursuer did not have access to

disputed capital. It would in any event be an extraordinary motion to grant in a family action. Granting such a motion would not be in the interests of justice.

Defender's submissions

[23] In opposition to the pursuer's motion, number 7/13 of process, Miss Ferguson submitted the motion was incompetent because the court had decerned for payment of expenses. The motion came too late (*Gilbert's Trustee v Gilbert* 1988 SLT 680, *Stewart v Stewart* 1989 SLT 80). In any event, modification would only be competent in respect of expenses incurred during legally aided parts of the case (regulations 34 and 35 of the Civil Legal Aid (Scotland) Regulations 2002). Because of the pursuer's failure to follow regulations and lodge confirmation of legal aid cover the extent of cover was not known. Whereas the defender's solicitor had received communications from the Scottish Legal Aid Board about the pursuer's legal aid the correspondence had been contradictory and difficult to keep track of. Despite repeated requests to have a copy of the legal aid certificate the pursuer had failed to provide this until the documentation was lodged in court shortly before the opposed motions hearing. The pursuer was in default of the relevant regulations (Rule 3 of the Act of Sederunt (Civil Legal Aid Rules) 1987).

[24] It was submitted that the pursuer did not have legal aid to pursue a number of matters, in particular residence. The bulk of the expenses had been occasioned as a result of the pursuer seeking to obtain an order for residence. To state that the pursuer could rely on the statutory definition of "legally assisted person" for the purposes of seeking modification of expenses would be a perverse reading of the legislation and unfair on the defender. Miss Ferguson further submitted that modification of a legally assisted person's liability would be to such amount as the court considered reasonable in all the circumstances

including the means of all the parties and their conduct in connection with the dispute (section 18(2) of the Legal Aid (Scotland) Act 1986). In the event that modification remained competent after decerniture of expenses no modification should be granted given the pursuer's conduct in relation to:

- (1) failure to obtemper previous interlocutors of court to return the children which necessitated the involvement of Sheriff Officers and led to the expenses incurred of £1,117.22;
 - (2) refusal or failure to pay monthly mortgage payments since ordered to do so by interlocutor of 17 October 2019;
 - (3) refusal to accept the clear recommendations of two social work reports provided to the court in 2019 and 2021 that the children should reside with the defender and continue to seek residence;
 - (4) refusal to concede and allow payment of the sum of £11,200 to the defender's father from the free proceeds following sale of the matrimonial home despite admissions on record that this was agreed;
 - (5) lodging two appeals followed by abandonment on each occasion causing delay in the court process and additional expense to the defender;
 - (6) failure to respond in a reasonable way to attempts to negotiate issues relating to both the children and finances despite numerous attempts by the defender's agents to reach overall agreement;
 - (7) failure to make any offer of payment of awards of expenses to the defender from free proceeds of sale;
 - (8) failure to date to produce vouching of the pursuer's financial circumstances;
- and, in all the circumstances,

(9) taking account of the fact that the defender was not legally aided and was of modest resources.

[25] In support of the defender's motion, number 7/12 of process, Miss Ferguson submitted given the awards of expenses in question the defender should not have to proceed further in the court process and incur more expense until the pursuer had settled previous awards made against him. The pursuer continued to insist in proceeding to proof on the remaining financial issues and the defender would potentially incur further cost which was disproportionate to the value of the property involved.

[26] In support of the defender's motion Miss Ferguson conceded that she had not experienced a Sheriff Court case where a motion making payment of expenses a condition precedent to proceeding to proof had been granted. Miss Ferguson had experienced this in Court of Session litigation. Miss Ferguson submitted that such an order was competent and could be made if it was just and equitable that all or part of the expenses incurred should be paid before the action proceeded further (*MacPhail, Sheriff Court Practice, Third Edition* paragraph 11.89).

[27] Miss Ferguson submitted that, given all the circumstances of this case, the motion should be granted as it was reasonable that payment of awards of expenses to date should be a condition precedent of the pursuer being entitled to proceed to proof. At no time prior to lodging this motion had the pursuer sought to have expenses modified to nil. It was believed that the pursuer was financially capable of paying these expenses.

Decision

[28] These motions bring a timely reminder as to the provisions, conditions and regulations which must be complied with by a legally assisted person in civil proceedings.

From my own recent experience I have seen a noticeable decline in observance of the requirements which are not only expected but should be obligatory in every case.

[29] Section 16 (2) of the Legal Aid (Scotland) Act 1986 (hereinafter “the 1986 Act”) defines a “legally assisted person” as “a person in receipt of civil legal aid in the proceedings in question, or a person in receipt of assistance by way of representation in any proceedings to which this part applies”. Rule 1(2) of the Act of Sederunt (Civil Legal Aid Rules) 1987 (hereinafter “the 1987 Rules”) defines “assisted person” as “a person who is in receipt of civil legal aid in the cause in question”. Finally, Regulation 2 of the Civil Legal Aid (Scotland) (Regulations) 2002 (hereinafter “the 2002 Regulations”) defines “assisted person” as “a person in receipt of legal aid in the proceedings in question”.

[30] Rule 3 of the 1987 Rules, so far as relevant, is in the following terms:

“3.— Marking of papers of assisted person and notices to be given by such persons

(1) The words “Assisted Person” shall follow the name of the assisted person on every step of process in the proceedings to which he is a party.

(2) ...

(3) ...

(4) Where a person who is a party to a cause becomes, during the dependence of that cause, an assisted person, he shall forthwith lodge in process the legal aid certificate issued to him and intimate the lodging of it to all other parties to that cause.

(5) Where a person, who is a party to a cause, ceases to be an assisted person or the conditions upon which he has been granted civil legal aid have been varied, he shall forthwith serve notice of his ceasing to be an assisted person or the variation (but in the case of variation of a contribution, not the amount), as the case may be, by registered or recorded delivery letter on all other parties to the cause.”

[31] The clear expectation is that an assisted person must comply with the requirements of Rule 3 of the 1987 Rules. It is, in my judgement, primarily for the assistance of the court to allow ready identification as to whether all or any parties to an action have the benefit of

legal aid. It is equally important, again for the assistance of the court, that all special urgency grants, legal aid certificates and variations to legal aid cover are lodged in process so that there is ready material for the court to appreciate the extent of legal aid cover during the lifetime of an action. This is particularly important when it comes to the assessment of liability for, and modification of, expenses against an assisted person in favour of an unassisted person. That said, I consider I am bound by the decision in *Dobbie v Patton* which held that the terms of Rule 3 are directory rather than mandatory and, where the other party is aware that their opponent is a legally assisted person, the omission to either lodge a legal aid certificate or to mark up process to demonstrate that a party is a legal aided person, is not fatal to an application for modification of expenses (*Dobbie* at paragraph 12). In reaching this decision the Sheriff Appeal Court in *Dobbie* approved the sheriff's reasoning in *NB v EL* that, in the absence of any identifiable prejudice arising from a breach of regulation 3, failure to lodge the legal aid certificate did not preclude an application to modify expenses.

[32] In the present case the defender's solicitor conceded that there had been correspondence from the Scottish Legal Aid Board which confirmed that the pursuer had been granted legal aid. Whilst I accept that the correspondence received might well have been contradictory and confusing, with some hesitation, I find that there was no identifiable prejudice to the defender by the pursuer failing to comply with regulation 3. Accordingly, this failure in itself would not be fatal to the pursuer's application to modify expenses in this case. That being so, the remaining matters for determination then become first, whether the application to modify is incompetent as being too late, secondly, whether there is any other basis upon which the application to modify is incompetent or inappropriate and thirdly, if not incompetent whether modification is reasonable in the circumstances.

[33] Sections 18 and 20 of the Legal Aid (Scotland) Act 1986, so far as relevant, are in the following terms:

“18.— Expenses of unassisted party.

[...]

(2) The liability of a legally assisted person under an award of expenses in any proceedings shall not exceed the amount (if any) which in the opinion of the court or tribunal making the award is a reasonable one for him to pay, having regard to all the circumstances including the means of all the parties and their conduct in connection with the dispute.

(3) None of the following, namely a legally assisted person's house, wearing apparel, household furniture and the tools and implements of his trade or profession shall—

(a) be taken into account in assessing his means for the purposes of subsection (2) above ...”

20.— Provisions supplementary to sections 18 and 19.

(1) ...

(2) ...

(3) ...

(4) It shall be competent, at any time within such period after the making of an award of expenses to which section 18(2) of this Act applies as may be prescribed by regulations made under this section, for any party concerned with the award to apply to the court or tribunal which made the award for re-assessment of its amount, on the ground that since the award was made there has been a relevant change of circumstances, and on such application the court or tribunal may make such re-assessment of the amount of the award as seems to them proper.”

[34] The operation of section 18(2) of the 1986 Act, for present purposes, is subject to the terms of Regulations 34 and 35 of the 2002 Regulations. The time within which a re-assessment can be sought in terms of section 20(4) of the 1986 Act is subject to Regulation 38 of the 2002 Regulations. These regulations are in the following terms:

“34. Liability of assisted person where legal aid received in part of matter

Where, after proceedings have been instituted in any court, a party thereto becomes an assisted person, the provisions of section 18(2) of the Act shall apply to so much of the expenses of the proceedings as were incurred while that party was an assisted person.

35. Liability of assisted person where legal aid ceases in part of matter

... where at any stage in the proceedings a party ceases to receive legal aid, that party shall be deemed to be an assisted person for the purpose of any award of expenses made against that party to the extent that those expenses were incurred before the party ceased to receive legal aid.”

38. Application for revision of award of expenses against assisted person

Where an award of expenses has been made by a court or tribunal under section 18(2) of the Act, the period within which it shall be competent for any party concerned in the award to apply to the court for reassessment of the amount of the award, on the grounds that since the award was made there has been a relevant change of circumstances, shall be one year after the date of the award.”

[35] A reasonable interpretation of section 18(2) of the 1986 Act is that in every case where a court is asked to make an award of expenses in favour of an unassisted party the court has a duty to consider the legally assisted person’s liability to ensure, in the opinion of the court that the award does not exceed an amount which is reasonable having regard to all the circumstances including the respective means of the parties and their conduct. This appears to be a duty imposed on the court irrespective of whether an application to modify is made, albeit I accept that the conventional method by which this becomes an issue for the court is following a motion to remit to nil or other proportion being made. This is another reason why observance of Regulation 3 of the 1987 Regulations is so important. It puts the court on notice as to whether there is a duty to observe section 18(2) of the 1986 Act.

[36] Whereas there appears to be no statutory time limit to seek modification there is a time limit in which to seek a reassessment of liability. Any reassessment must be made within one year of the date of the award of expenses.

[37] In the present case no explanation has been given as to why the motion for modification comes late in the day. In relation to the award of expenses granted by interlocutor of 12 March 2021 this followed decerniture for payment which itself followed taxation of expenses to which no objection was taken. The cases of *Gilbert's Trustee v Gilbert* and *Stewart v Stewart* could support the conclusion that the pursuer's motion comes too late. But both cases dealt with Court of Session procedure. They further dealt with sections 2(6) and 2(7) of the Legal Aid (Scotland) Act 1967 although these provisions are remarkably similar in their terms to sections 18(2) and 20(4) respectively of the 1986 Act. The cases also dealt with Court of Session rules then in force regarding awards of expenses and taxation. The rules specifically included that where an assisted person had been found liable in expenses an application was to be made within 14 days after the date of the report of the Auditor by motion for an assessment under section 2(6)(e) of the 1967 Act or reassessment under section 2(7) of the 1967 Act as to the amount of expenses which had to be paid (referred to in the cases as Rule 349(8)).

[38] It is no longer necessary for the word "decerns" to be used in a Sheriff Court interlocutor in order for it to be extracted. It continues to be used in practice to mark the fact that the interlocutor is final on the subject and shows that the interlocutor is meant to be, and is, extractable (*MacPhail*, paragraph 17.15).

[39] In terms of the Ordinary Cause Rules relating to taxation of expenses (OCR, Chapter 32) there is no reference to the requirements of a legally assisted person having a time limit following taxation and audit in which to apply for modification in terms of section 18(2) as did the Court of Session rules considered in the cases of *Gilbert's Trustees* and *Stewart*. Ultimately, I consider that I do not require to determine whether, in this case, the motion is

incompetent given its timing. This is because I consider that the motion for modification in relation to both awards of expenses fails for the following reasons.

Pursuer's motion to modify expenses in respect of interlocutor dated 17 October 2019

[40] Determination of this part of the motion is relatively straight forward. The expenses relate to the Sheriff Officer's invoice for work carried out on or before 13 August 2019. By virtue of being granted legal aid the pursuer became a legally assisted person as from 2 September 2019 being the date of the grant of special urgency cover. By applying regulation 34 of the 2002 Regulations although the motion to award expenses was granted after the date upon which the pursuer became an assisted person the expenses were incurred on a date before the pursuer became an assisted person. The important factor is the date the expenses were incurred not the date when the motion for expenses was granted. As such, I do not consider that the pursuer is entitled to rely on the provisions of section 18(2) of the 1986 Act and seek modification of this award of expenses.

Pursuer's motion to modify expenses in respect of interlocutor dated 12 March 2021

[41] Determination of this part of the motion is more complex. The expenses incurred were during the period when the pursuer was entitled to the benefit of legal aid. It has been submitted that the pursuer is therefore entitled to seek modification in terms of section 18(2) of the 1986 Act as he falls under the definition of a legally assisted person as provided for by section 16(2) of the 1986 Act even although the expenses incurred relate to parts of the process for which, in reality, the pursuer does not have the benefit of legal aid.

[42] None of the cases to which I have been referred assist in deciding whether a legally assisted person can seek modification of expenses in circumstances where expenses are

occasioned in the pursuit of matters to which legal aid has not been granted. These cases are silent as to the extent of the legal aid certificate being considered as against the modification being sought.

[43] In my judgement the answer lies in the wording of the pursuer's legal aid certificate. This states that legal aid has been made available to the pursuer as the assisted person subject, amongst other matters, to any limitations endorsed on the certificate or on any certificate of endorsement issued in relation thereto. Accordingly, in this case, the pursuer has the benefit of legal aid, subject to the limitations of his legal aid certificate, namely, in relation to contact, divorce on the ground of two years separation and pursuit of a capital sum. In terms of the extension to the legal aid certificate dated 2 September 2020 the pursuer does not have the benefit of legal aid to pursue residence. More importantly the extension to the legal aid certificate specifically refuses the benefit of legal aid to pursue residence. The award of expenses, subject to taxation and audit, sought to be modified to nil relate almost exclusively to the issue of residence as sought by the pursuer.

[44] By my interpretation of the 1986 Act, and regulations made thereunder, the pursuer is an assisted person subject to the limitations of his legal aid certificate. If an award of expenses is made against the pursuer for matters within the limitations of his legal aid certificate he is entitled to seek modification in terms of section 18(2) of the 1986 Act. In this case the pursuer has incurred expenses in pursuing matters outwith the limitations of his legal aid certificate. It is a logical conclusion that if a legal aid certificate has limitations within the context of the disputed subject matter of a cause then the rights and protections of an assisted person should also be subject to the same limitations. In my opinion it is not permissible for the pursuer to seek modification in terms of section 18(2) of the 1986 Act to seek to restrict liability for expenses incurred for matters where he does not have the benefit

of legal aid. That would give “assisted person” as defined by statute too wide an interpretation in my judgement. To be able to do otherwise would be entirely unfair to the defender in the particular circumstances of this case.

[45] I do of course accept that the pursuer’s Minute of Amendment also changed the ground of divorce to the ground included in his legal aid certificate as from 2 September 2020. That said, a Minute restricted to that matter would have been uncontentious. The defender’s Answers, and the procedure which followed, was contentious only in relation to the pursuer’s crave for residence. Any legitimate basis upon which the pursuer could seek to invoke the provisions of section 18(2) of the 1986 Act relating to him being an assisted person because of legal aid cover for the ground of divorce would have no material impact on the expenses incurred.

Defender’s motion 7/12 of process

[46] Having refused the pursuer’s motion to modify the awards of expenses it is necessary to give consideration to the defender’s motion to find payment of the expenses a condition precedent on the pursuer proceeding to proof. As has been noted the matters remaining for determination at proof are limited. The lengthy and acrimonious dispute in relation to residence and contact has finally been resolved.

[47] The defender’s motion is unusual. As has been conceded it is not a motion often encountered in the Sheriff Court. It does, however, appear to be a competent motion. Whereas interim decree for expenses may be extracted and enforced before an action is concluded, payment of an interim award of expenses is not a condition precedent of a pursuer’s being allowed to proceed with an action unless the court specifically orders. In modern practice such an order is made only where there has been a failure or delay on the

part of a litigant or his solicitor of such a nature that, although decree by default is inappropriate, it is just and equitable that all or part of the expenses incurred by an opponent should be paid before the action proceeds further. The financial capability of complying with the order is an important consideration. It would be incorrect to make such an order if the practical consequence would be termination of the action due to the impecuniosity of the party (*MacPhail*, paragraph 11.89).

[48] I have a great deal of sympathy for the defender but to make it a condition precedent on proceeding to proof that the pursuer pay all expenses awarded to date might well lead to an unreasonable halt on the action given the unresolved issue of division of the remaining capital following the sale of the matrimonial home. The defender has an extract decree for the expenses in the sum of £5,784.49. It was not suggested that the defender had taken any formal enforcement action to recover that sum. So far as this award of expenses is concerned the defender has the option to do so. Failing agreement on the payment of this award of expenses I deem the usual route of enforcement the proper avenue for the defender to follow should she wish to do so.

[49] The pursuer's conduct has been open to judicial criticism already in this action. That is why he was found liable to reimburse the Sheriff Officer expenses occasioned by refusing to return the children to the care of the defender. It could be argued that the interlocutor finding the pursuer liable to reimburse these expenses is not an interlocutor which is extractable for the purposes of enforcement. Whereas the pursuer is of limited means he is not impecunious. Based on the information available to me at this time I do not consider it would be either unreasonable or impossible for the pursuer either to make payment or reach agreement on payment of the sum awarded against him on 17 October 2019. It is for that reason that I consider it is just and equitable that the pursuer either pays the sum of

£1,117.22 to the defender as a condition precedent on proceeding to proof or at the very least reaches an agreement in relation to payment of that sum in terms acceptable to the defender before allowing proof to be assigned.

Further Procedure

[50] Given that I have determined the pursuer should pay, or reach agreement on payment, in the sum of £1,117.22 to the defender as a condition precedent on proceeding to proof, in order to save the defender the expenses of preparing further for proof at this time I have discharged the Proof Management Hearing assigned for 18 August 2021. The case will call on 25 August 2021 to determine further procedure in the event that no agreement has been reached on payment. The matter of expenses occasioned by these motions will also be determined on that date.