SHERIFF APPEAL COURT

2020 SAC (Civ) 9
LER-F55-17

Sheriff Principal M Stephen QC
Appeal Sheriff S Murphy QC
Appeal Sheriff N McFadyen

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M STEPHEN QC

in appeal by

B

Appellant:

in the cause

A

Pursuer and Respondent:

against

B

Defender and Appellant:

Appellant: Cartwright, Advocate; A J Gordon & Company, solicitors
Respondent: Shewan, Advocate; Harper Macleod LLP

17 July 2020

[1] In this action of divorce the husband and defender, B, appeals the interlocutors of the sheriff at Lerwick of 24 January and 20 February 2020.

[2] The interlocutor of 24 January was pronounced at a pre proof hearing when the defender failed to appear or be represented. The sheriff found the defender to be in default, dismissed the defender's pleas in law through want of insistence and allowed the cause to

proceed as undefended by way of affidavit evidence in terms of Part II of Chapter 33 of the Ordinary Cause Rules 1993 ("OCR"). The defender was found liable for the expenses of process to that date. By virtue of the subsequent interlocutor of 20 February 2020 the sheriff, having considered the pleadings; and affidavits and the pursuer's minute for decree, found it established that the marriage had broken down irretrievably and divorced the defender from the pursuer with a finding of no expenses due to or by either party.

Background

[3] In this divorce action the wife and pursuer advances two craves: first, for divorce on the ground that the marriage had broken down irretrievably as established by the defender's behaviour and second, for the expenses of the cause. In his defences the defender admits that the marriage has broken down irretrievably but denies that this was as a result of his own unreasonable behaviour. In Articles 3 to 11 of Condescendence the pursuer makes averments of serious sexual, psychological and physical violence and abuse at the hands of the defender culminating in a serious assault perpetrated by the defender on 8 or 9 September 2017. This resulted in injuries for which the pursuer required treatment at hospital. The defender was arrested for this assault and became subject to special conditions of bail which prevented him from returning to the address where the parties had lived during the marriage. That marked the parties' separation. These detailed averments are met in the main with the answer that they are 'not known and not admitted'. The answer to Article 9 of Condescendence which contains averments of the defender's verbal emotional abuse after consuming alcohol is a bald denial. In answer 11 the defender admits his arrest for assault but otherwise denies the pursuer's averments relating to the serious assault which led to the separation.

[4] The defender craves orders in respect of contact with the children of the marriage and also seeks a capital sum of £150,000. In answer 13, the defender makes certain fairly inspecific averments relating to goods and services he provided during the marriage claiming that he has been economically disadvantaged whilst the pursuer has been correspondingly advantaged, financially from his efforts. He has been prevented from occupying the property since the separation on 9 September 2017.

[5] The defender's second crave relates to an order for contact with the children in terms of section 11 of the Children Scotland Act 1995. It is understood that the arrangements for contact between the defender and the children of the marriage have been agreed. The children usually reside with the pursuer.

Procedural history

[6] This action was raised in Lerwick Sheriff Court in December 2017. An examination of the procedural history points to there having been little vigour expended on defending the cause. Before the first options hearing could take place the action was sisted in March 2018 on the defender's motion to enable his application for legal aid to proceed. More than 14 months later the pursuer's motion to recall the sist was granted with a procedural hearing fixed for 31 May 2019 when the defender was ordained to lodge defences no later than 14 June. An options hearing was scheduled for 16 August. Defences were not lodged timeously; however, on 13 August a motion by the defender to allow his defences late was allowed. The options hearing had to be discharged with another options hearing fixed for 13 September which was continued to 11 October and then to 8 November 2019 (despite the terms of OCR 9.12(5)). Before the continued options hearing could take place in November the agent for the defender withdrew from acting and the options hearing on 8 November

also became a peremptory diet at which the defender appeared on his own behalf. The record was closed and a proof assigned for 24 March 2020 with a pre-proof hearing on 24 January 2020. As there were no preliminary pleas the sheriff was bound to assign a proof in terms of OCR 9.12(3)(a).

[7] The interlocutor pronounced by the sheriff on 24 January 2020 is essentially the decision now appealed. The defender failed to appear or be represented at the pre-proof hearing. The pursuer was represented by her solicitor who sought dismissal of the defences allowing the cause to proceed as undefended. The sheriff granted that motion for the reasons given in his note. The sheriff had presided over the various procedural hearings as he was the resident sheriff in Lerwick. His reasoning may be found at paragraphs [13] and [14] of the note. The sheriff was aware from the options hearing of 8 November 2019 that the defender was seeking alternative legal representation. He had given a forthright account of his position and also of the financial claim he was seeking. The sheriff had assigned a proof for a date later than would ordinarily have been the case to allow the defender time to obtain alternative legal assistance. The defender was present when the dates were given and the sheriff reports: "*I stressed to the appellant the significance of the hearings which had been assigned and reinforced the importance of trying to secure legal representation as quickly as possible*." The sheriff was unaware that the defender may have had any mental health difficulties. At the hearing on 24 January 2020 the sheriff enquired of the pursuer's agent with regard to any contact with the appellant or other agents instructed by the appellant. The pursuer's agent provided the sheriff with a copy of an email sent to the appellant on 20 January reminding him of the pre-proof hearing and seeking clarity on the issues for proof and advised the sheriff that she had had no substantive contact from the defender or any agent acting on his behalf. The sheriff concluded that the defender was in

default and allowed the divorce crave to proceed as undefended, dismissing the defences in terms of OCR 33.37(2)(a) and (d). Decree of divorce followed on 20 February 2020 after the pursuer's agent lodged the minute for decree with supporting affidavits and productions.

Appeal procedure

[8] We were informed that an attempt had been made to appeal the decision of the sheriff dated 24 January 2020, however the note of appeal was lodged late by which time the interlocutor of 20 February 2020, which constituted final judgment in these proceedings, had been pronounced and was thus appealable.

[9] This note of appeal was lodged with the Sheriff Appeal Court on 16 March 2020. It seeks standard procedure with urgent disposal of the appeal on the basis that the appeal involved section 11 orders on the welfare of children. However, it is understood that any questions relating to contact arrangements have now been agreed between the parties.

[10] At the appeal hearing on 9 July counsel for the appellant raised two preliminary matters. Firstly, she moved an amendment to the note of appeal which had been lodged on 16 March 2020. The amendment added a new ground of appeal at paragraph 7. This amendment sought to deal with the criticism made by the respondent in her answers to the effect that the note of appeal contained no specific ground of appeal which pointed to error on the part of the sheriff in his decision making on 24 January. The amendment was opposed by counsel for the respondent, on the basis that it came too late (on the eve of the appeal hearing); and that it was based on a mis-application of the Ordinary Cause Rules. The allowance of proof involved no determination by or analysis of the pleadings by the court. The court had not, as the appellant suggested, determined that the appellant had a stateable defence or basis to support his claim for a capital sum. It was not necessary for the

pursuer to challenge the inadequacy of the defender's pleadings at the options hearing. The pursuer is not legally aided. She had no appetite for debate together with the expense and delay that entailed. If the defender failed to amend his skeletal defence to the action he would have difficulty asserting his claim for a capital sum at proof. Having considered these submissions we decided that the note of appeal could be amended by inserting a new paragraph 7 comprising the legal proposition set out in the first sentence of the proposed amendment. We refused to allow the remaining part of the amendment as it came too late but particularly the amendment as originally proposed appeared to advance a misinterpretation of the sheriff's powers and responsibilities at the options hearing as set out in OCR 9.12. In the absence of preliminary pleas the sheriff was bound to assign a proof. In assigning a proof the sheriff was doing as the rules required. (OCR 9.12(3)(a)). It is inaccurate to suggest that failure on the part of one party to challenge the adequacy of an opponent's pleadings involves tacit acceptance that the opponent's case constituted a stateable and properly pled defence. The pursuer's decision not to seek debate or challenge the pleadings was a perfectly understandable one, not only due to her being a fee paying litigant but also because she came under no obligation to point out to her opponent the deficiencies in his pleadings. Accordingly, the appellant was allowed to amend his note of appeal but only to the extent of adding a new paragraph 7 as follows:-

> *"7. The sheriff erred in the exercise of his discretion when he dismissed the defences to the action, allowed the defender to withdraw defences (there being no motion to that effect before him) allowed the pursuer's action to proceed by way of affidavit evidence and found the appellant liable in the expenses of the action."*

[11] Counsel for the appellant presented her written submissions but proposed to adopt and adhere to the written note of argument for the appellant lodged earlier in these proceedings by her instructing solicitor. However, at paragraph 2 of the appellant's

submission Ms Cartwright wished to formally withdraw the concession made in the earlier note of argument that the appellant's averments on record are skeletal and will require amendment (paragraph 6 fourth bullet point). The withdrawal of this concession was opposed by counsel for the pursuer. The pursuer was entitled to prepare for the appeal on the basis of the concession made in a document which was a formal part of the appeal process. The concession was of some materiality.

[12] Whether leave to withdraw a concession should be granted is a matter for the discretion of the court. The concession forms no part of the pleadings but once made becomes an integral part of the conduct of the litigation. In this case the concession was made in the course of the appeal process. Accordingly, we are not dealing with concessions made in pleadings as these are governed by the rules of procedure. The concession made in the current appeal is of some materiality given that the duty of the appellate court in appeals against decree by default involves careful consideration of the entire facts and circumstances including the nature of any defence. The concession made in this appeal is not a mere incidental matter. It relates to the pleadings. It involves a matter of both fact and law. The pursuer was entitled to prepare for the appeal on the basis that the concession was properly made and indeed reflects the pursuer's counsel's own contention as regards the nature of the defender's pleadings. This court has previously considered the character of a concession and its place in litigation together with the procedure to be adopted in seeking to withdraw a concession (see *Promontoria (Henrico) Limited* v *Wilson* [2018] (SAC) [Civ] 21). Standing the stage at which the defender seeks to withdraw the concession; the nature and materiality of the concession we were not inclined to exercise our discretion in favour of the appellant in relation to the withdrawal of the concession.

Appellant's submissions

[13] The appellant's position is that the appeal raises a short point namely, the ability of the appeal court to do justice in a case where otherwise a party in the appellant's position would have none. Had the sheriff been aware of the appellant's mental health difficulties that might have persuaded him not to grant decree by default on 24 January 2020.

[14] When considering an appeal against decree by default the appellate court has a general discretionary power to do justice between the parties and also to have regard to any relevant new material which may not have been available to the sheriff (Macphail paragraph 18.113). Reliance is placed on the decision of Sheriff Principal Macphail (as he then was) in *Canmore Housing Association Limited* v *Scott* 2003 SLT (ShCt) 68 a case directly in point. That case related to a failure by a solicitor to appear at a diet in a case involving the repossession of heritable property. In that decision Sheriff Principal Macphail set out the proper procedure to be adopted when a party fails to appear or be represented at a diet and the sheriff is unaware of the reason for the absence. It was submitted that the sheriff in this case had no material on which to base his decision as to the reasons for the absence of the defender. The sheriff ought to have ordered a peremptory diet for the defender to attend and explain his failure and his intentions in respect of his defence to the divorce action.

[15] It was accepted by the appellant that he was present at the hearing in November when the pre proof hearing of 24 January was fixed. He received the email from the pursuer's solicitor reminding him of the hearing and that he failed to appear at the hearing. It was accepted that the averments on record are essentially skeletal and would require considerable adjustment.

[16] According to the appellant the crux of the matter is the defender's mental health problems and whether they are sufficient to explain, excuse or mitigate his failure to appear

in court. We were asked to reach the view that they are material and shed light on the appellant's failure to attend. Ms Cartwright referred to an email from a consultant psychiatrist and the defender's CPN dated 31 March 2020 which confirm that the appellant has significant mental health problems. It is described as an adjustment reaction to complex social stresses and evidence of post-traumatic stress symptoms. He is prescribed medication. Although the appellant accepts receiving the email from his wife's solicitor on 20 January it is suggested that he may have either delayed opening it or the opening of it may have caused him stress. Although present in court when the hearing on 24 January was fixed he had mistakenly thought he should appear on 24 February. The defender was unlikely to mention a sensitive issue such as a mental health problem to the sheriff in open court. However, an examination of the pleadings especially the last three sentences of Article 10 of Condescendence disclose concerning averments indicative of mental illness. It was further suggested that the deficiencies in the defender's pleadings can readily be explained by his failure to obtain legal representation and the absence of legal aid throughout a significant part of the case. There were now no solicitors on the Shetland Isles who act in civil legal aid cases.

[17] We were asked to allow the appeal, recall the interlocutors of 24 January and 20 February 2020 and remit to the sheriff at Lerwick for further procedure.

Submissions for the respondent

[18] Counsel for the respondent opposed the appeal, and invited us to refuse the appeal and to adhere to the interlocutors complained of.

[19] The pursuer's primary submission is that the defender has failed to identify and address the correct legal test in relation to the recall of the decree of divorce and secondly,

the appellant has failed to set out a proper defence to the action such that it is not in the interests of justice that the decree should be recalled. The appellant is unable to point to any error on the part of the sheriff in granting decree by default on 24 January.

[20] The defender was fully aware of the requirement to attend at the pre-proof hearing. He was present in person when the sheriff set the dates and explained in the clearest possible terms to the parties including the defender that they must attend and that the defender must, as a matter of urgency, obtain alternative legal representation. Although it appears that the defender was without legal representation in January he was able to obtain legal assistance in order to lodge a note of appeal against the decree of divorce timeously.

[21] The first basis of the appeal is that the sheriff made his decision on 24 January in the absence of knowledge of crucial facts about the appellant's mental health which directly impacted his ability to engage in the legal process. The sheriff has observed that the defender, at no stage, disclosed the existence of mental health difficulties and instead gave a strong indication that he was actively engaged in securing alternative legal representation. He was able to give a forthright account of his position. There is no evidence of mental health difficulties that would have prevented him from obtaining alternative legal advice or appearing in court. He was aware of the date and he received the email from the pursuer's solicitor to remind him.

[22] The correct test in appeals against decree granted by default is that referred to in Macphail on Sheriff Court Practice at paragraphs 14.14 and 14.15. The propositions which can be derived from Macphail and the authorities are that the onus is on the appellant to satisfy the court that the decree should be recalled. The matter is a discretionary one for the court and if decree is recalled it may be on conditions relating to expenses. The court will be reluctant to allow the decree by default to stand where there appears to be a proper defence

to the action. The overriding consideration is that the court must do what the ends of justice require (*Mahmood* v *Mahmood* 2007 SLT (ShCt) 176 - a case involving an appeal against decree in absence in a consistorial case - see also *Fernandez* v *Fernandez* 2007 SC 547 (at para 34)). These cases in turn refer to the older cases of *Hyslop* v *Flaherty* 1933 SC 588 and *McKelvie* v *Scottish Steel Scaffolding Co* 1938 SC 278. Again, the guiding principle is that the court should seek to do justice between the parties in all the circumstances of the case. Where there is a *prima facie* defence the interests of justice will, in the absence of exceptional circumstances, militate in favour of giving the defender an opportunity to vindicate his defence and accordingly against granting decree by default. The issue remains one of discretion in all the circumstances of the case, however, there is no rule that a defender must be allowed the opportunity to vindicate a *prima facie* defence.

[23] That being the correct test the defender in this case does not set out a stateable defence or any basis on which it is in the interests of justice that the decree be recalled. Counsel for the pursuer went on to examine the pleadings. The pursuer had simply craved decree of divorce together with the expenses. In his defences the defender sought orders relating to contact with the children and a capital payment.

[24] However, there is no basis in law or fact set out in the defences which would allow the court to calculate any capital payment and indeed whether any such payment is due to the defender. He makes no reference to any assets held in his name and fails to aver or specify the work he did in respect of the matrimonial property and the value of that work. He gives no indication of any training or skills possessed by him which would have qualified him or enabled him to carry out substantial construction work. He fails to specify what financial contributions were made by him to the build costs of the property. There is no supporting documentation or vouching and this is in face of clear averments in answer

by the pursuer about the source of the funds used to build the property. The appellant has not set out a *prima facie* defence (basis for seeking the capital sum craved). The appellant concedes that his pleadings in respect of the financial crave requires considerable adjustment.

[25] It follows that the grant of decree of divorce did not automatically follow when the defences were repelled. The sheriff required to be satisfied that there was evidence to support the irretrievable breakdown of the marriage. There is therefore a two stage route to decree. That, of course, is a safeguard which allows the sheriff to consider the affidavit evidence and decide whether to grant decree only after the pursuer minutes for decree.

Decision

[26] The sheriff's interlocutors of 24 January and 20 February 2020 in this divorce action essentially constitute the two stages of decree by default. On 24 January 2020, the sheriff, on the pursuer's motion, in the absence of the defender, in effect, repels the defences and allows the action to proceed as undefended in terms of Part II of Chapter 33 of the Ordinary Cause Rules. In giving consideration to the consequences of the defender's failure to appear at the pre-proof hearing the sheriff required to have regard to OCR 33.37(1)(c) and then OCR 33.37(2)(a). In reaching the decision he did on 24 January the sheriff required to consider the pursuer's motion and the material available to him. The sheriff, of course, had the benefit of having presided over all but one of the relevant steps of procedure in this case and was well aware that the defender had appeared in person on 8 November 2019 at the options hearing and peremptory diet and had been made aware, not only of the date of the pre-proof hearing, but also of its importance. Therefore, the sheriff had almost unique knowledge of all relevant steps of process, the procedural history and the representations

made on behalf of the pursuer on 24 January together with the email from the pursuer's solicitor to the defender on 20 January reminding him of the pre-proof hearing. Having regard to all these factors and no explanation for the defender's non-attendance the sheriff granted decree by default in terms of rule 33.37. The result, of course, is not decree of divorce but rather he allowed the action to proceed as undefended. When the pursuer's solicitor minuted for decree and presented affidavit evidence in support of the crave for divorce the sheriff was satisfied that the marriage had broken down irretrievably and granted decree of divorce on 20 February 2020. He found no expenses due to or by either party.

[27] In this appeal against the granting of decree by default the Appeal Court must do what the ends of justice require. That involves the court exercising its discretion having regard to the whole circumstances of the case and do justice to both the defaulter and the other party who, in this case, is the defender's wife.

[28] The test to be applied is one which has been distilled over many years and is conveniently set out in Macphail on Sheriff Court Practice at paragraphs 14.14 and 14.15. An important factor which the court will consider is whether there is a *prima facie* defence. The court must examine that defence and the strength of that defence. There is, however, no rule that the defender must be given the opportunity to vindicate even a stateable or *prima facie* defence (*Fernandez* para [34] and *McKelvie* v *Scottish Steel Scaffolding* (*supra*)). The existence of and strength of that defence is a relevant and important consideration yet is but one of the factors which the court must take into account.

[29] The appellant complains that the sheriff reached his decision on 24 January in ignorance of an important and material factor namely, his mental health difficulties. New material has been tendered at the appeal hearing from the defender's community psychiatric

nurse and a locum consultant psychiatrist. The two emails are to a significant extent identical and indicate that the defender has been diagnosed as suffering from adjustment reaction to complex social stresses and there is evidence of chronic post-traumatic stress symptoms. There is a narrative of certain symptoms and an indication that the last medical review was on a date in May last year. The note of argument prepared for the appellant seeks at paragraph 11 to offer evidence of the effect on the defender and provide an explanation why he did not attend on 24 January. However, there is nothing in the medical note offered to the court which suggests for a moment that the defender was not able to give instructions to a solicitor or appear in court whether on 24 January 2020 or indeed, over the two years prior to that when he was engaged in this litigation. At the appeal hearing we were informed that the defender had failed to appear at the pre proof hearing as he had it in his mind that the date was 24 February.

[30] Counsel for the appellant placed significant reliance on the decision of Sheriff Principal Macphail in *Canmore Housing Association Limited* v *Scott*. That case also involved an appeal against the granting of decree of dismissal by default. The defaulter was a Housing Association who, through a diary error, had failed to appear or be represented at a peremptory diet which had been fixed due to the defender's solicitor having withdrawn from acting. In the past the defender had failed to follow the rules of court and had been reponed from a decree in absence. The facts in *Canmore* are specific to that case. It appears to be accepted that the sheriff who presided was clearly sympathetic to the defender who had been ill and had difficulties with housing benefits. However, the sheriff ignored or appeared to ignore the circumstances of the pursuer namely the Housing Association who had followed proper procedure until the unfortunate error in failing to diarise and attend at the peremptory diet arranged for the defender. This case and other cases serve to

demonstrate that an Appeal Court considering whether to recall a decree by default must take into account the whole circumstances of each case. In *Canmore* the Sheriff Principal was informed of the full circumstances and in turn exercised his own discretion which is the function of any appeal court in this type of appeal. Much was made of the dicta of the Sheriff Principal in *Canmore Housing Association* at para [7] and in that case, of course, the sheriff was unaware of the reason for the pursuer's absence. In this appeal the sheriff, as we have observed, was the resident sheriff in an island court who had conducted all relevant hearings in these divorce proceedings. He was well aware of the history; of the defender's position and that he had been told explicitly of the need to attend the hearing on 24 January. *Canmore* is not authority for the proposition that the sheriff must assign a peremptory diet rather than proceed to decree by default. In this case the sheriff was in a position to judge whether to grant decree of default. He was addressed by the solicitor for the pursuer and had seen the email reminding the defender of the diet. He had seen and spoken to the defender himself on 8 November 2019 all as referred to in his note. He had material on which to base his decision. It cannot be argued that the sheriff was unable to come to a rational or reasoned decision when he repelled the defences and allowed the action to proceed as undefended. It is also significant that this is a consistorial action and *Canmore* proceeded on the basis of OCR 16.2 where the sheriff had a binary choice to grant decree or not. Here the sheriff in effect found the defender in default and cleared the way for divorce to be granted on an undefended basis, as the rules require him to do. He could not grant the final decree and therefore it remained open to the defender to appeal the interlocutor of 24 January 2020.

[31] An analysis of the procedural history allows us to reach the rather bleak conclusion that over a period of approximately two years the defender was unwilling to provide full

and proper instructions to his solicitor resulting in defences which are lacking in candour, vague and wholly inspecific. The answers to the very specific averments about his behaviour which are matters either within his knowledge or are capable of explanation or specific denial are met with the frankly disingenuous riposte of 'not known and not admitted'. Crucially, the averments in support of the defender's own crave relating to a capital sum, although somewhat more extensive, can be characterised as vague assertions relating to the property in which the parties formerly lived and his involvement in its construction. The defender's case in support of this crave provides no adequate basis upon which the court might make an award of a capital sum in terms of the Family Law (Scotland) Act 1985. The defender fails to aver either his assets or liabilities at the relevant date. This can be contrasted with the very specific averments made on record by the pursuer at Article 13 of Condescendence.

[32] Parties separated in September 2017. Divorce proceedings were raised by the pursuer a few months later. From the early part of 2018 the defender had the benefit of legal representation and ought to have been in a position to give full instructions to his solicitor with regard to his defence to the divorce crave and also regarding his own crave in respect of financial provision. As has been pointed out the case was sisted for more than a year. When the sist was recalled the defender was ordained to lodge defences. He failed to do so timeously and the defences which are largely skeletal in nature were lodged and allowed on 13 August 2019. The defender continued to be represented by a solicitor until October 2019 when his then solicitor withdrew from acting. During that period there was no adjustment of the defences and therefore no attempt to set out the basis on which the defender proposed to justify his financial claim. Viewed from that perspective we cannot agree that the defender has been prejudiced to any extent by lack of legal representation in the

presentation of his case for a capital sum. He had more than ample time to instruct his solicitor fully as regards his financial claim yet the pleadings remain vague. It is noteworthy that the defender's skeletal defence to the divorce does not simply involve repetition of 'not known and not admitted', although answers 3 through to 8 and 10 do. Answer 9 is a straight denial. Answer 11 contains an admission. This is a clear indication that the defender was capable of giving specific instructions to his solicitor. It therefore cannot be suggested that the defender's original solicitor merely lodged 'holding' defences containing either a denial or 'not known and not admitted' without any input from the defender. No proper explanation is given why he could not provide his solicitor with instructions on these matters which are clearly within his own knowledge or ought to be. It was conceded that the defender's case on record would require amendment before he could proceed to proof on his capital claim. The pursuer, on the other hand, promptly sought to resolve the very difficult consequences of her marriage to the defender by seeking divorce following the events which led to the separation in September 2017. The action has been delayed, in effect, by inaction on the part of the defender for the greater part of 18 months. The pursuer is entitled to expect the court to resolve her unhappy matrimonial circumstances within a reasonable period. She has offered to lead evidence in support of very serious averments relating to physical and sexual assault and to rebut the defender's inspecific averments in support of a capital sum. The court must have regard to the pursuer's position as well as the defender's. When we balance the entire circumstances in the case the ends of justice point to the appeal being refused. Standing the circumstances of the parties an award of expenses will not suffice. Accordingly, we will refuse the appeal and adhere to the sheriff's interlocutors of 24 January and 20 February 2020.

[33] The pursuer is entitled to the expenses of the appeal as taxed. The appeal is suitable for the instruction of junior counsel.