SHERIFF APPEAL COURT

[2020] SAC (Civ) 10
DNF-F17-18

Appeal Sheriff Braid
Appeal Sheriff Murphy QC
Appeal Sheriff Holligan

OPINION OF THE COURT

delivered by APPEAL SHERIFF PETER J BRAID

in an appeal in the cause

CAROL MARGARET HILLAN OR NEILL OR NEILL

Pursuer and Respondent

against

ALLAN NEILL

Defender and Appellant

Act: Cheyne, advocate, instructed by Robert F MacDonald Solicitors
Alt: Cartwright, advocate, instructed by Cockburn McGrane

28 May 2020

Introduction

[1] This is an action of divorce on the grounds of the defender's unreasonable behaviour, in which the pursuer and respondent ("the pursuer") seeks orders for financial provision against the defender and appellant ("the defender") in the form of a transfer of the defender's one half *pro-indiviso* share in the former matrimonial home, capital sum and periodical allowance, all in terms of the Family Law (Scotland) Act 1985 ("the 1985 Act"). For his part, the defender also has a crave for transfer of the matrimonial home to him,

failing which a crave for sale of that property. The craves for financial provision are opposed. The crave for divorce is unopposed.

[2] Following proof, the sheriff granted decree of divorce together with an order for the transfer to the pursuer of the defender's half share in the matrimonial home and a periodical allowance of £750 payable monthly in advance for a period of 6 months. He also found the defender liable in the expenses of the action. Although the defender has conceded that he is not opposed to being divorced in principle, he has appealed against all of those disposals.

The appeal

[3] The first ground of appeal is that the sheriff erred in allowing additional affidavit evidence to be lodged which was neither intimated to, nor seen by, the defender following the closing of the case and the case being taken to *avizandum*. The second and third grounds of appeal, read short, are that the sheriff erred in the manner in which he arrived at his decision to order transfer of the defender's share of the matrimonial home to the pursuer. The fourth ground of appeal is that the sheriff erred in law in awarding expenses to the pursuer.

The sheriff's approach

[4] On any view, the proof took an unusual course. Evidence in relation to the merits had previously been allowed to be given by affidavits of the pursuer and her mother, although the action had not been allowed to proceed as undefended insofar as the crave for divorce was concerned. Affidavits were duly lodged and the pursuer also gave parole evidence. The parole evidence led at the proof was primarily focused on the financial craves, and neither the pursuer nor her mother was cross-examined in relation to their

affidavits. At the conclusion of the evidence, the sheriff made *avizandum*. He subsequently formed the view that the evidence on the merits was insufficient to justify divorce on the grounds of the defender's behaviour. This resulted in the sheriff clerk sending an email to parties (item 13 of the Appendix) in the following terms:

> "[The sheriff] has asked me to contact you regarding the above divorce, he is not minded to grant decree of divorce as he is unable to ascertain which party was at fault. He has suggested that you may want to put in a minute of amendment to change the grounds to one year with consent which he would be happy to grant. Please let me know your thoughts on this."

[5] The pursuer's agent initially embraced this proposed approach, by sending a minute of amendment amending the grounds of divorce as suggested, along with the relative motion and form of consent to the defender's agent, who replied stating that she would take instructions, but that "there clearly may be an issue re expenses" and she would be unable to revert until "next week at earliest". Not having received any further response after 7 days, the pursuer's agent prepared supplementary affidavits of the pursuer and her mother, which she lodged, without intimating copies of them to the defender's agent, although she did send a further email in which she stated: "I have just lodged Supplementary Affidavits so your client will not require to take any action here". The sheriff subsequently issued the judgment now appealed against. In it, he discussed the evidence given by the witnesses. In relation to the pursuer, he recorded (page 9 of his judgment):

> "She…has adopted her affidavit dated 30 July 2018 and her supplementary affidavit dated 7 June as her principal evidence in chief."

Since the supplementary affidavit was sworn after the pursuer had given her parole evidence, then the sheriff was wrong to say that that affidavit had been adopted. In relation to the pursuer's mother, the sheriff recorded (page 16 of his judgment):

> "Her evidence was given by way of affidavits dated 30 July 2019 and supplementary affidavit dated 7 June 2019."

Thus, in the case of each witness, both the affidavit and the supplementary affidavit contained evidence which the sheriff ostensibly took into account in his assessment of the evidence as a whole. The sheriff did not expressly deal with credibility and reliability in his judgment; but was critical of the defender in the following passage at page 63 (in which he is discussing, not the merits, but financial provision):

> "I would question the defender's position in relation to this action given the substantial difference in income between the parties and the continuing standard of lifestyle he enjoys. To regard as reasonable the terms of his proposed agreement, which he wished the pursuer to sign and which would have negated the pursuer's rights under the law, exemplifies his arrogant and dismissive attitude towards the pursuer."

[6] Insofar as his approach to financial provision was concerned, the sheriff found in fact that the net value of the matrimonial property at the relevant date was £482,000, of which the pursuer had retained a net figure of £199,500 and the defender £282,500 (findings in fact 27, 33 and 34). For there to be an equal sharing, the defender had to pay £41,500 to the pursuer ("the balancing payment") (finding in fact 35). He also found that the matrimonial home, which was jointly owned by the parties, had a value of £180,000 (finding in fact 23(b)). None of those findings are challenged.

[7] Insofar as relevant, directly or indirectly, to the question of periodical allowance, the sheriff also made the following findings in fact:

> "36. The pursuer continues to reside in the former matrimonial home.
>
> 37. The defender resides in subjects owned by [a third party company].
>
> 38. The pursuer is a qualified social worker and was medically retired in 1997…
>
> 39. ..
>
> 40. The pursuer was employed as a support worker.

41. The pursuer earned £1,211 net per month until November 2018 and receives a local government pension of £708.81 per month.

42. The pursuer has said that she can survive on £2,000 per month.

43. After November 2018, the pursuer was employed by Dunfermline Athletic FC for a short time and received a payment of £125.40.

44. The defender is employed by NTS.

45. His earnings are approximately £4,000 per month.

46. The rent of £450 per month due by the defender to [the third party company] is, when it is paid, paid by NTS.

47. From 29 April 2018 the defender pays the pursuer the sum of £750 per month as *interim* aliment.

48. During the course of the marriage particularly when the defender started up his business the parties had a reasonably high lifestyle and standard of living with foreign holidays to exotic locations every couple of years.

49. The pursuer was used to regular manicures.

50. During the course of the marriage the principal carer for the children of the marriage was the pursuer.

51. The defender continues to enjoy the same standard of living he had during the parties' marriage.

52. He is living rent free.

53. Following the parties' separation the pursuer has a pension income of £708 per month and requires aliment of £750 per month from the defender just to live.

54. She is capable of earning in excess of £1,000 from employment but is presently seeking work.

55. The pursuer has suffered financial hardship as a result of the separation and shall continue to suffer such hardship following the divorce.

56. The pursuer has been dependent to a substantial degree on the income provided by the defender during the course of the marriage.

57. It is fair that the pursuer should receive periodical allowance from the defender of £1,000 per month for 5 years totalling £60,000 commuted to £45,000 as a lump sum.

> 58. The sum of £41,500 due by the defender to the pursuer together with the capitalised sum of £45,000 is roughly equivalent to the defender's share in the matrimonial home.
>
> 59. The pursuer needs a further six months to adjust to her circumstances following the separation.
>
> 60. It is fair that the defender should pay £750 per month to the pursuer for a period of six months following the date of decree."

[8] Strictly speaking, findings in fact 57 and 60 are findings in fact and law, finding in fact 58 is true but adds little if anything to findings in fact 23(b) and 35, and finding in fact 59 sits uneasily with findings 55 and 57, but we have included them as they are crucial to an understanding of the sheriff's approach, which can be summarised as follows. He concluded that the pursuer was entitled to a periodical allowance of £1,000 per month for 5 years, which he capitalised at £45,000. He also awarded a further periodical allowance of £750 per month for a period of 6 months. He also noted that the capitalised figure of £45,000, when added to the balancing figure of £41,500, approximately equated to the value of the defender's share in the matrimonial home, valued at £90,000. His thinking is set out at page 64 of his judgment:

> "The pursuer is seeking an unequal division of the matrimonial property or periodical allowance in terms of section 9(1)(d) and (e) of the 1985 Act of £1,000 per month. Under section 9(1)(d) for three years from the date of decree and under 9(1)(e) for the following two years at a rate of £1,000 per month. *Any such award in terms of section 13(2) of the 1985 Act should be capitalised unless the court was satisfied that such award would be insufficient and inappropriate to satisfy the terms of section 8(2) of the 1985 Act* (emphasis added). The pursuer seeks in effect £60,000 which she concedes if paid as a lump sum should be reduced to £45,000. This sum together with the sum of £41,500 which the defender requires to pay to the pursuer to have equal division of the net matrimonial property is equivalent roughly to the defender's interest in the matrimonial home, (90,000). Accordingly, if the court were to make an order in terms of crave 5 of the pursuer's craves there would appear to be no further monies paid by the defender to the pursuer. I do not consider this to be fair as the pursuer requires a continuing period to adjust to the separation, the parties have not been separated for more than two years, and to regaining employment after a considerable period during the marriage in which she had none (*sic*). I would consider that in terms of sections 9(1)(d) and (e) there should be

periodical allowance for a period of 5 years at £1,000 per month capitalised to £60,000. Given the benefit to the pursuer of receiving this sum in a lump sum this would be reduced to £45,000. This sum together with the balancing sum of £41,500 is roughly equal to the defender's share in the matrimonial home. Accordingly I have granted the fifth crave for the pursuer in lieu of the balancing sum and the capitalised periodical allowance. I have further granted periodical allowance of £750 per month for a period of six months from the date of decree of divorce."

The law

[9] Section 8 of the 1985 Act, insofar as material, and as it applies to this action, provides:

"**8.— Orders for financial provision**.

(1) In an action for divorce, either party to the marriage…may apply to the court for one or more of the following orders—
(a) an order for the payment of a capital sum to him by the other party to the action;
[
(aa) an order for the transfer of property to him by the other party to the action;
]
(b) an order for the making of a periodical allowance to him by the other party to the action;
[
(
(2) Subject to sections 12 to 15 of this Act, where an application has been made under subsection (1) above, the court shall make such order, if any, as is—
(a) justified by the principles set out in section 9 of this Act; and
(b) reasonable having regard to the resources of the parties.
(3) An order under subsection (2) above is in this Act referred to as an *'order for financial provision'*."

[10] Section 9 of the 1985 Act, insofar as material, and as it applies to this action, provides:

"**9.— Principles to be applied.**

(1) The principles which the court shall apply in deciding what order for financial provision, if any, to make are that—

(a) the net value of the matrimonial property should be shared fairly between the parties to the marriage;

(b) fair account should be taken of any economic advantage derived by either person from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other person or of the family;

(c) any economic burden of caring, should be shared fairly between the persons–

(i) after divorce, for a child of the marriage under the age of 16 years;
…

(d) a person who has been dependent to a substantial degree on the financial support of the other person should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from–

(i) the date of the decree of divorce, to the loss of that support on divorce;

…

(e) a person who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.

(2) In subsection (1)(b) above and section 11(2) of this Act—

'economic advantage' means advantage gained whether before or during the marriage and includes gains in capital, in income and in earning capacity , and 'economic disadvantage' shall be construed accordingly;

'contributions' means contributions made whether before or during the marriage; and includes indirect and non-financial contributions and, in particular, any such contribution made by looking after the family home or caring for the family."

[11] Section 10 of the 1985 Act, insofar as material and as it applies to this action, provides:

"**10.— Sharing of value of matrimonial property**.

(1) In applying the principle set out in section 9(1)(a) of this Act, the net value of the matrimonial property shall be taken to be shared fairly between persons when it is shared equally or in such other proportions as are justified by special circumstances.
(2) Subject to subsection (3A) below, the net value of the property shall be the value of the property at the relevant date after deduction of any debts incurred by one or both of the parties to the marriage —
(a) before the marriage so far as they relate to the matrimonial property, and
(b) during the marriage,
which are outstanding at that date.
(3) In this section '*the relevant date*' means whichever is the earlier of—
(a) subject to subsection (7) below, the date on which the persons ceased to cohabit;
(b) the date of service of the summons in the action for divorce.
…
(4) Subject to [subsections (5) and (5A)][11] below, in this section and in section 11 of this Act '*the matrimonial property*' means all the property belonging to the parties or

either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party)—
(a) before the marriage for use by them as a family home or as furniture or plenishings for such home; or
(b) during the marriage but before the relevant date.
…"

[12] Section 11 of the 1985 Act, insofar as material and as it applies to this action, provides:

"**11.— Factors to be taken into account.**

(1) In applying the principles set out in section 9 of this Act, the following provisions of this section shall have effect.
(2) For the purposes of section 9(1)(b) of this Act, the court shall have regard to the extent to which—
(a) the economic advantages or disadvantages sustained by either person have been balanced by the economic advantages or disadvantages sustained by the other person, and
(b) any resulting imbalance has been or will be corrected by a sharing of the value of the matrimonial property or otherwise.
(3) For the purposes of section 9(1)(c) of this Act, the court shall have regard to—
(a) any decree or arrangement for aliment for the child;
(b) any expenditure or loss of earning capacity caused by the need to care for the child;
(c) the need to provide suitable accommodation for the child;
(d) the age and health of the child;
(e) the educational, financial and other circumstances of the child;
(f) the availability and cost of suitable child-care facilities or services;
(g) the needs and resources of the persons; and
(h) all the other circumstances of the case.
(4) For the purposes of section 9(1)(d) of this Act, the court shall have regard to—
(a) the age, health and earning capacity of the person who is claiming the financial provision;
(b) the duration and extent of the dependence of that person prior to divorce;
(c) any intention of that person to undertake a course of education or training;
(d) the needs and resources of the persons; and
(e) all the other circumstances of the case.
(5) For the purposes of section 9(1)(e) of this Act, the court shall have regard to—
(a) the age, health and earning capacity of the person who is claiming the financial provision;
(b) the duration of the marriage;
(c) the standard of living of the persons during the marriage;
(d) the needs and resources of the persons; and
(e) all the other circumstances of the case.

(6) In having regard under subsections (3) to (5) above to all the other circumstances of the case, the court may, if it thinks fit, take account of any support, financial or otherwise, given by the person who is to make the financial provision to any person whom he maintains as a dependant in his household whether or not he owes an obligation of aliment to that person.
(7) In applying the principles set out in section 9 of this Act, the court shall not take account of the conduct of either party to the marriage unless—
(a) the conduct has adversely affected the financial resources which are relevant to the decision of the court on a claim for financial provision; or
(b) in relation to section 9(1)(d) or (e), it would be manifestly inequitable to leave the conduct out of account."

[13] Section 13 of the 1985 Act, insofar as material and as it applies to this action, provides:

"**13.— Orders for periodical allowance.**

(1) An order under section 8(2) of this Act for a periodical allowance may be made—
(a) on granting decree of divorce;
…
(2) The court shall not make an order for a periodical allowance under section 8(2) of this Act unless—
(a) the order is justified by a principle set out in paragraph (c), (d) or (e) of section 9(1) of this Act; and
(b) it is satisfied that an order for payment of a capital sum or for transfer of property, or a pension sharing order or pension compensation sharing order, under that section would be inappropriate or insufficient to satisfy the requirements of the said section 8(2).
(3) An order under section 8(2) of this Act for a periodical allowance may be for a definite or an indefinite period or until the happening of a specified event.
(4) Where an order for a periodical allowance has been made under section 8(2) of this Act, and since the date of the order there has been a material change of circumstances, the court shall, on an application by or on behalf of either party to the marriage or his executor… have power by subsequent order—
(a) to vary or recall the order for a periodical allowance;
(b) to backdate such variation or recall to the date of the application therefor or, on cause shown, to an earlier date;
(c) to convert the order into an order for payment of a capital sum or for a transfer of property.
…
(5) The provisions of this Act shall apply to applications and orders under subsection (4) above as they apply to applications for periodical allowance and orders on such applications.
(6) Where the court backdates an order under subsection (4)(b) above, the court may order any sums paid by way of periodical allowance to be repaid.
(7) An order for a periodical allowance made under section 8(2) of this Act—

(a) shall, if subsisting at the death of the person making the payment, continue to operate against that person's estate, but without prejudice to the making of an order under subsection (4) above;
(b) shall cease to have effect on the person receiving payment–
(i) marrying,
(ii) entering into a civil partnership, or
(iii) dying,
except in relation to any arrears due under it."

Defender's submissions

First ground of appeal

[14] Counsel for the defender adopted his written submissions. In relation to the first ground of appeal, he submitted that the sheriff had erred in asking for, and then having regard to, further affidavits. It was incompetent to do so following the making of *avizandum: Ahmed* v *Iqbal* 2014 Fam LR 93. Moreover, the additional evidence was not seen by the defender, who had no opportunity of disputing its accuracy, which he would have done, particularly in relation to the supplementary affidavit of the pursuer's mother. It was extremely damaging to his general character, and matters raised in it were taken into account by the sheriff in his assessment of the defender's character, in particular his assessment of the defender as "arrogant and dismissive" towards the pursuer. That fed into, and vitiated, the sheriff's approach to the financial craves. Counsel accepted that the sheriff's approach, which he described as "extraordinary", was only relevant in relation to the manner in which the sheriff had dealt with those craves. If upholding this ground of appeal, he invited us to recall the decree in its entirety and to remit the cause back to the sheriff court to proceed as accords (although this last submission was later departed from, as will be seen below).

Second and third grounds of appeal

[15] There was no reasoned basis either for the decision to award periodical allowance for a period of 5 years and subsequently to commute it to a capital sum of £45,000 or for the decision then to make an order for the transfer of the defender's interest in the former matrimonial home. Although the sheriff had referred to the appropriate legislation it was impossible to discern the reasoning which led to the award being for a period of 5 years. Moreover, there had been no evidence as to the present day value of periodical allowance of £1,000 per month over that period and therefore no basis for the sheriff capitalising it at any figure, let alone the one he chose. The sheriff had clearly decided what result he wanted to achieve - transfer of the house - and worked back from that result in a manner which did not conform to the principles laid down in the 1985 Act. Notwithstanding the foregoing submissions, counsel for the defender, in the course of the appeal, appeared to accept that had the sheriff simply awarded periodical allowance of £1,000 per month for 5 years, and left it at that, the defender could have had no complaint. However he pointed out that if that had been done, the defender would have been entitled to return to court at any time during that period seeking to have the award varied, in the event of a change in circumstances, such as the pursuer regaining employment. That right had been lost by the sheriff's approach.

[16] If upholding these grounds of appeal (but not the first ground), counsel invited us to recall the order for the transfer of the defender's share in the matrimonial home, and to replace it with a capital sum for the balancing payment.

Fourth ground of appeal

[17] Although it was conceded that expenses were uniquely discretionary, there was nothing in the defender's conduct to justify an award of expenses against him. The sheriff had formed a poor view of the defender's conduct largely as a result of reading the affidavits which the defender had been unable to answer.

Pursuer's submissions

First ground of appeal

[18] Counsel for the pursuer also adopted her written submissions. In relation to the first ground of appeal, she submitted that the sheriff had not erred by considering the supplementary affidavits. He had a discretion as to whether or not to seek further evidence, which he could not be said to have exercised unreasonably. The divorce was in effect undefended on the merits, and it was always open to the court to seek further evidence in an undefended action: *Paterson* v *Paterson* 1958 SC 141. In any event the sheriff had not called for further evidence, so much as suggested to the parties that they might consider amending the ground of divorce. The pursuer's agent had been concerned about there being further delay, hence the decision to prepare and lodge supplementary affidavits. The defender accepted that the marriage had broken down irretrievably. He had not cross-examined the pursuer or her mother on the original affidavits. The pursuer's agent had intimated the fact of lodging the supplementary affidavits to the defender's agent and no objection had been taken, nor a request made for sight of those affidavits. It was clear from reading the sheriff's judgment as a whole that his adverse view of the defender was based upon matters other than the supplementary affidavits, in particular upon the defender's approach to financial division. He had not been improperly influenced by the supplementary affidavits. There

was no causative link between those affidavits and his decision. It was in the interests of justice that the appellant should be precluded from challenging the merits of the divorce in the appellate court.

Second and third grounds of appeal

[19] It was well established that the judge at first instance had an extremely wide discretion when applying the principles set out in the 1985 Act: *Little* v *Little* 1990 SLT 785. A practical approach, applying common sense, should be taken, and that was what the sheriff had done. The sheriff's findings in fact had entitled him to conclude that an award of periodical allowance for 5 years was justified, and he had set out his reasoning at pages 61 to 63 of his judgment. He had had regard to the various factors set out in section 11(5) of the 1985 Act. The decisions to make an award of periodical allowance, and subsequently to capitalise that award, were reasonably open to him in the exercise of his discretion, and the appeal court should not interfere with that simply because the sheriff had not worked through all the sections in the Act one by one. He had in any event worked through section 9(1)(d) and (e). The result at which he had arrived was fair, and in accordance with common sense. The pursuer was someone in need of ongoing financial support. It was also worthy of note that the sheriff did not wholly accept the defender's evidence on certain matters, as was apparent from page 63 of the sheriff's judgment, where he "questions" the defender's position in relation to the action given the "substantial difference" in income between the parties, the continuing standard of living which the defender continued to enjoy and his "arrogant and dismissive attitude" towards the pursuer in relation to his approach to financial provision. An appellate court should be slow to disturb the impression witnesses have made on the judge of first instance: *McGraddie* v *McGraddie* 2013

SLT 1212. Insofar as the decision to order the transfer of the defender's share in the matrimonial home was concerned, the mechanisms by which judges reach decisions as to what orders to make to reflect fair financial provision were also discretionary. Having concluded that it was fair that the pursuer should be awarded periodical allowance at £1,000 per month for 5 years, the sheriff was bound to consider whether the order should be capitalised, as mandated by section 13(2) of the 1985 Act (although counsel conceded during the appeal, as we understand it, that section 13(2) could not be read in that way). The decisions to capitalise the award and to order the transfer of the house were reasonable.

Fourth ground of appeal

[20] Finally, as regards expenses, the sheriff had not erred.

Decision

First ground of appeal - the sheriff's reliance on supplementary affidavits

[21] At the outset, it is important to note that, whatever the pursuer's agents and the sheriff appeared to think, the action had not been allowed to proceed as undefended in relation to the merits. Instead, a proof at large had been fixed, in which the pursuer had to prove that it was unreasonable for her to be expected to cohabit with the defender, by reason of the defender's conduct as averred on record. In the context of that defended proof, the pursuer had been allowed to lodge affidavits giving evidence on the merits of the action, that is, evidence about the defender's conduct. It is commonplace for evidence in defended actions to be given by affidavit. That in no way removes the right of the other party to cross-examine in relation to material within an affidavit which is disputed, or, *a fortiori*, the right to receive intimation of any affidavit so that he is aware of the evidence which his

opponent proposes to lead. That is such a fundamental tenet of natural justice that it need hardly be stated, but it appears to have been overlooked in this case, to the extent that we were informed during the appeal that not even the original affidavits were intimated when they were lodged. That said, the defender did not make an issue of that, either at the time, or subsequently, although his agents did borrow out those affidavits prior to the proof and were at least aware of what they contained prior to the proof.

[22] Having observed that the proof was one at large on the merits and financial provision (albeit the defender did not oppose divorce on the merits), we next observe that the usual rules of procedure applied to it. Again, this might be thought to be so self-evident as not to need saying, but again it appears to have been overlooked. The pursuer led such evidence, including the affidavit evidence, as she thought was necessary to establish her case, and then, presumably, closed her proof in accordance with usual practice. The defender then led his evidence before closing his proof. Parties made submissions and the sheriff made *avizandum.* The defender's primary submission is that it was thereafter incompetent for either party to lead further evidence. That issue is not determined by the case referred to by the defender, *Ahmed* v *Iqbal*, *supra*, where the issue was whether or not, after a proof following which he had made *avizandum*, the sheriff was entitled to continue the case without disposing of all pleas in law, the sheriff principal holding that he was not. Here, however, the sheriff has issued a final judgment disposing of all pleas-in-law and the issue is whether he was entitled to do so by having regard to evidence which was not led in the course of the proof. The defender submitted, on the authority of *Paterson* v *Paterson*, *supra*, that it was always open to the court in an undefended action of divorce to seek further evidence on the merits, but that is to overlook that the present action was not undefended, and there was no question of any decree being a decree in absence, as in *Paterson*. We were

not referred to any authorities directly in point, but the question of whether or not a sheriff has the power to allow additional proof in a defended action is discussed in *Macphail*, Sheriff Court Practice, at paragraph 16.97. The view of the author is that the suggestion in some of the authorities that it is incompetent to allow additional proof is wrong in principle; and indeed, had the sheriff convened a hearing with both parties present and voiced his concerns about the evidence on the merits, we do not see that such a course of action could have been viewed as incompetent, but would have been one which was certainly consistent with the spirit of *Paterson* even though that case is not directly in point. To be fair to the sheriff, he did not request further evidence on the merits, but suggested that the grounds of divorce be changed (and, since it is open to a party to amend his pleadings at any time, there could have been no objection if that course of action had been followed). (Since the sheriff had the affidavits available to him from the outset of the proof, one might ask why any concerns he had about the merits of the action had not been raised with the pursuer during submissions. Had that been done, the present point in controversy is likely not to have arisen). If the sheriff clerk's email accurately relays the sheriff's thinking, alarm bells are also sounded by the reference to the sheriff's not being able to "ascertain" which party was "at fault", since fault is not a relevant consideration, even in a behaviour divorce: the question for the court is whether the defender's behaviour is such that the pursuer can no longer reasonably be expected to reside with him, not whether one or other party is at fault - it may be, in any given case, that the behaviour of both parties is equally unreasonable, so that both may be "at fault"; or one party may be "at fault" for the breakdown of the marriage but not have behaved unreasonably. Be all that as it may, there was no request for further information by the sheriff, and nothing he did until the point of the email can be categorised as incompetent.

[23] The true issue, however, is not one of competence but of whether the course precipitated by the sheriff breached the principles of natural justice. The sheriff clerk's email was the catalyst for what happened next, which was for the pursuer's agent, rather than allow the defender's agent what appeared to be the reasonable time she had requested to take further instructions, instead to prepare, have sworn and lodge supplementary affidavits describing the defender's behaviour in greater detail, the content of which was not seen by the defender's agent. Although these affidavits had not been requested by the sheriff, he clearly read them and took them into account in reaching his decision and making his overall assessment of the case (as is made clear by the passages from his judgment which we have quoted at paragraph 5 above).

[24] There is no doubt that it is contrary to natural justice for a judge to have regard to evidence which has effectively been obtained behind the back of one of the parties and on which that party has no opportunity to comment: *R* v *Deputy Industrial Injuries Commissioner ex parte Jones* [1962] 2 All ER 430. While the sheriff did not ask in terms for supplementary affidavits, it was his enquiry which led to their being lodged. The more difficult question is what effect, if any, the breach of that principle has on the decision reached by the sheriff.

[25] The pursuer argues that the supplementary affidavits were of no consequence because they merely put the flesh on the bones of the original affidavits, and were anyway directed only to the merits of the action which were unopposed. That argument is not without its attractions, not least as the defender did not oppose the merits of the divorce, which of necessity entailed the sheriff making findings which were potentially adverse to him in relation to his behaviour during the marriage. If the action *had* been allowed to proceed as undefended in relation to the merits, the pursuer's argument may have been unanswerable. However, we do not consider that the action can be compartmentalised in

that way when, as we have observed, the proof was at large and where the sheriff was, on his own account, uncertain which party was "at fault" before the supplementary affidavits were submitted. Given that he clearly thereafter expressed an adverse view of the defender, how can it be said that he was not influenced to an extent by the material in the supplementary affidavits? The fact is that the sheriff was not satisfied on the merits before he had read the supplementary affidavits, but was so satisfied having done so.

[26] Further, how can it be said that the adverse view of the defender has no bearing on the decision that the sheriff reached that it was fair that the defender should transfer his half share in the matrimonial home to the pursuer? Justice must not only be done but be seen to be done. Accordingly, we do not accept that it is appropriate to examine the sheriff's judgment in order to ascertain whether there is a causal link between the supplementary affidavits and the sheriff's ultimate conclusions. While it may well be that he would have formed the same view on the defender's character and on what financial provision was appropriate on the basis of the evidence which he heard at the proof, that is nothing to the point. The fact is that the sheriff, in reaching a view on what financial provision he considered to be fair, has made adverse comments on the character of the defender, having read pejorative material which the defender did not see, against a background where he was unable to make his mind up about which party was at fault on the basis of the evidence as it stood at the conclusion of the proof. The pursuer's argument is essentially that the sheriff's findings on the merits have no relevance to financial provision and that there is no cross-over between the two. That argument might have carried more weight had not the sheriff himself referred to the defender's arrogant and dismissive attitude towards the pursuer, in the passage which we have quoted above at the end of paragraph 6.

[27] We conclude, therefore, that there is merit in the first ground of appeal. However, counsel for the defender made clear that the defender's true complaint is not in relation to the granting of divorce *per se*, but to the orders for financial provision which he made, which he claims were tainted by what we accept is a breach of natural justice. Before reaching any decision as to disposal, it is now appropriate to turn to that aspect of the sheriff's judgment in more detail.

The second and third grounds of appeal

[28] The material provisions of the 1985 Act which govern financial provision on divorce are set out above at paras [9] to [13]. They may be summarised as follows. Net matrimonial property at the relevant date (the date of separation) is to be divided fairly. "Fairly" generally means equally, or in such other proportions as is justified by special circumstances. Fair account must also be taken of any economic burden or advantage, suffered or enjoyed by the parties. Sharing of the net matrimonial property can be achieved in a variety of ways, which include: allowing the parties to keep what they retained following separation, if the value generally balances; awarding a capital sum; or making an order for the transfer of property by one party to the other; or a combination of the foregoing.

[29] Instead of, or as well as, making one of the foregoing orders, the court may also award periodical allowance. However, such an award must be justified by one or more of the principles in section 9(1)(c) to (e), namely: that the economic burden of caring for children after divorce should be shared fairly (9(1)(c)) (which has no application in the present case); or, material to this case, that a person who has been dependent to a substantial degree on the financial support of the other person should be awarded such

financial provision as is reasonable to enable him to adjust over a period of not more than 3 years from the date of divorce (9(1)(d)); or that a person who at the time of divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period (9(1)(e)).

[30] As the description "periodical" allowance suggests, it is of its very nature that it is a sum paid periodically. It would appear to run contrary to that notion to suggest that it should, if possible, be capitalised; and yet, the submission to the sheriff, accepted by him as being correct (in the sentence which we have emphasised above at paragraph 8), repeated in the pursuer's note of arguments presented to this court, was that that was the effect of section 13(2) of the 1985 Act. However, as counsel for the pursuer came to accept during the course of the appeal, section 13(2) cannot be read in that way. Indeed, it has precisely the opposite effect. The terms of that section are set out above, but we repeat them here for convenience, but this time with emphasis added:

> The court shall *not* make an order for a periodical allowance under section 8(2) of this Act *unless*—
> (a) the order is justified by a principle set out in paragraph (c), (d) or (e) of section 9(1) of this Act; *and*
> (b) it is satisfied that an order for payment of a capital sum or for transfer of property, or a pension sharing order or pension compensation sharing order, under that section would be *inappropriate* or *insufficient to satisfy the requirements* of the said section 8(2).

[31] The meaning could not be clearer: the court shall not make an order for periodical allowance unless such an order is both justified by one of the principles referred to and the court is satisfied that an order for payment of capital or for transfer of property (etc) would be inappropriate or insufficient to satisfy the requirements of section 8(2) - which, reading short, are that the order is justified by the section 9 principles and is reasonable having

regard to the parties' resources. Putting that another way, if possible the court is to achieve the section 9 principles by making an order for payment of capital (in the broadest sense); only if that cannot be achieved, either because such an order would not be sufficient to achieve the principles, or would be inappropriate, is the court to make an order for periodical allowance. Not only does the section not provide that an order for periodical allowance should be capitalised where possible, it would be illogical to the point of absurdity were it to do so. If an award of periodical allowance can be capitalised in such a way as to achieve the section 9 principles, and the order of payment of capital is reasonable, then the court is prevented by section 13(2) from making an award of periodical allowance in the first place. The illogicality of the sheriff's approach is further exemplified by the submission of counsel for the pursuer that that approach was reasonable given that the pursuer was someone in need of ongoing financial support, the irony being that the award which was made had the effect of depriving her of that very support.

[32] It follows that the sheriff's approach was plainly wrong. That being so, it is unnecessary to do any more than comment briefly on the other criticisms made of it. First, as counsel for the defender submitted, there was no evidence from which the sheriff was entitled to conclude that payment of the sum of £1,000 per month over 5 years could be capitalised at £45,000. That is essentially an actuarial question. The figure chosen has the whiff of being no more than one of convenience to justify the transfer of the house. Second, if periodical allowance is justified, and awarded, it is unfair to deprive the paying party (or, for that matter, the party in receipt of the award) of the right which they have, by virtue of section 13(4)(a) to seek variation upon a material change in circumstances. Third the sheriff's approach was self-evidently illogical since having decided that periodical allowance

at £1,000 per month was appropriate and capitalised it, he then awarded periodical allowance a second time, at the rate of £750 per month for a period of 6 months.

[33] Since the sheriff erred in his interpretation of the statutory provisions which governed his decision, and arrived at a decision which was plainly wrong, it follows that his decision, although a discretionary one, is amenable to review by this court. This case is easily distinguishable from *Little,* where the Lord Ordinary did not err in his approach to the 1985 Act. Here, the entire basis of the sheriff's reasoning which resulted in his decision to order the transfer of the defender's share in the matrimonial home to the pursuer was so fatally flawed, for the reasons set out above at paragraph 29, that that decision cannot be allowed to stand. The effect of that decision is that the matrimonial property has in fact been divided unequally; and since counsel for the pursuer expressly disavowed any argument that special circumstances existed justifying unequal division, it is difficult to see that the order for the transfer of the house to the pursuer achieves a fair distribution of the matrimonial property in accordance with section 9 of the 1985 Act. The appeal therefore falls to be allowed.

Disposal of the appeal

[34] The question remains as to how this court should dispose of the appeal. We invited further written submissions from the parties, which we duly received and which we have considered. Parties are agreed that the case should not be remitted back to the sheriff court for reconsideration, but that the matter is at large for us to consider, and to make the appropriate orders. Parties also made further submissions, at our invitation, as to what those orders should be. We will now consider each of the issues in turn.

The merits

[35] Since the sheriff took into account the supplementary affidavits, which he ought not to have done, the decree of divorce falls to be recalled, and the merits considered of new. The defender submitted that the pursuer should amend the grounds of divorce by seeking divorce on the grounds that the parties have now been separated for more than 2 years, but no such amendment has been moved. Although the sheriff took the view that the evidence in the original affidavits was insufficient to found decree of divorce, it is plain that he misdirected himself by asking which party was at fault, when that is not a relevant consideration. In our view, contrary to that of the sheriff, there was sufficient material in the original affidavits to justify decree of divorce on the grounds of the defender's behaviour. The material is admittedly somewhat general, but that reflects the general nature of the averments on record, and there is no plea to the relevancy and specification of those averments. In addition, counsel for the appellant was unable to point to any specific finding in fact in relation to the defender's behaviour which was tainted by reliance on the supplementary affidavits. We will, therefore, grant decree of divorce of new, the unreasonable behaviour ground having been established by the evidence (leaving out of account the supplementary affidavits), on the basis of the unchallenged findings in fact made by the sheriff in relation to the defender's behaviour towards the pursuer.

Capital sum

[36] The parties are agreed, on the basis of the sheriff's findings in fact, that in order to achieve a fair division of the matrimonial property the defender, having retained the greater share of that property, requires to make payment to the pursuer of the balancing sum of £41,500. The pursuer has not argued that special circumstances exist such as to justify an

unequal division of the matrimonial property. We are not asked by the defender to defer payment, and, as the pursuer has submitted, the defender appears on the findings in fact to have sufficient resources with which to raise the necessary funds to effect payment. We shall accordingly award a capital sum of £41,500 in favour of the pursuer, with interest as craved from the date of decree until payment.

The former matrimonial home

[37] The parties have competing craves for transfer of the matrimonial home into their sole name, failing which the defender craves its sale. The defender no longer seeks transfer of the pursuer's share in the house to him, but is insisting in an order for sale. Whereas the pursuer states that she would prefer that it not be sold, she is not in a position to make payment to the defender of the sum which she would require to pay him to achieve that outcome and she accepts that (short of capitalising any award of periodical allowance, which for the reasons explained above, is not a course open to us) the house will require to be sold. That is the reality of the situation, and we have therefore granted decree in terms of the defender's second crave. We do not have sufficient information ourselves to decide upon such matters as who should be appointed to effect the sale, or what procedure should be followed should parties be unable to agree on matters such as the upset price or how the property should be marketed. We hope that such details can be agreed by parties, but, in case not, we shall include in our order a provision remitting to the sheriff to proceed as accords in relation to any outstanding matters which require to be dealt with in order to give effect to the sale of the house.

Periodical allowance

[38] This is the only matter with which we require to deal which is truly contentious. The pursuer invites us to proceed upon the basis of the sheriff's finding in fact 56 that it is fair that the pursuer should receive periodical allowance of £1,000 per month for a period of 5 years, and to make the same award as did the sheriff, pre-capitalisation; whereas the defender submits that an award of £250 per month for 6 months would enable the pursuer to make the adjustment provided for in section 9(1)(d) of the 1985 Act, and that no award is appropriate under section 9(1)(e).

[39] Although counsel for the defender accepted at the hearing before us that had the sheriff simply awarded a periodical allowance of £1,000 per month for a period of 5 years, that would have been unchallengeable, we are not persuaded that he was correct to do so (and that position was departed from in the additional written submissions subsequently received). The sheriff's analysis in terms of section 9(1)(d) and (e) is at best superficial and we observe at this stage that the criterion in the latter provision of *severe* financial hardship has not been met, since the sheriff's finding in fact 55 is of mere financial hardship. For the same reason, apart from the fact that the sheriff's finding of fairness may have been tainted by his view of the defender, gleaned in part from the supplementary affidavits, it would in any event be wrong of us to proceed as the pursuer submitted by leaving the first part of finding in fact 56 intact, since "fairness" is not the criterion for an award under section 9(1)(d) or (e). Moreover, as we have already pointed out, finding in fact 56 is strictly speaking a finding in fact and law rather than simply a finding in fact.

[40] In considering whether to make an award of periodical allowance it is important to have regard to the language of section 9(1)(d) and (e). In the context of divorce, the former provision allows the court to make such award as is reasonable to enable a spouse who has

been dependent to a substantial degree on the financial support of the other spouse to enable (in this case) her to adjust over a period of not more than 3 years from the date of decree of divorce to the loss of that support. By way of contrast, section 9(1)(e) provides for an award of to be made to a spouse who at the time of divorce seems likely to suffer serious financial hardship, the award being such as is reasonable to relieve that spouse of hardship over a reasonable period. Such an award is not limited to 3 years but could be for a longer period. An award of periodical allowance might be justified by one or other of the principles set out in section 9(1)(d) and (e), or by both (for an example of a case where periodical allowance was awarded under both, see *Smith* v *Smith* 2010 SLT 372). In either case, of course, the court should make an award only if an award of capital would be either inappropriate or insufficient to satisfy the requirements of section 8(2: section 13(2)(b).

[41] Applying that to the circumstances of this case and to the sheriff's findings in fact, findings in fact 38, 42, 43, 47, 48 and 49 all point to, and justify, the conclusion reached in finding in fact 56 that the pursuer has been dependent to a substantial degree on the income provided by the defender during the course of the marriage. In deciding whether to make an award on the basis of section 9(1)(d), and if so, of how much and for how long, section 11(4) requires the following factors to be taken into account: age, health and earning capacity of the person claiming the financial provision; the duration and extent of the dependence; any intention on the part of the pursuer to undertake a course of education or training; the needs and resources of both parties; and all the other circumstances of the case. While we are conscious that we must have regard to the pursuer's earning capacity, rather than her *per se,* the fact is that the parties enjoyed a reasonably high life style and standard of living with exotic foreign holidays over the course of a marriage which lasted for nearly 28 years, and since separation the pursuer has been reliant upon aliment of

£750 per month from the defender, who continues to maintain an affluent lifestyle (findings in fact 37, 44, 45, 46, 51 and 52). We are satisfied that the pursuer requires to adjust to separation and that this adjustment cannot be achieved by means of an award of capital. The pursuer is likely to use such capital as she has, and will have, in order to purchase a new house. However, we are not persuaded on the facts that the pursuer requires more than the £750 per month she has been receiving from the defender for a significant period of time in order to adjust to the separation. The question then becomes for how much longer she should receive that sum. We are conscious, of course, that the sheriff awarded £750 for a period of 6 months, apparently to enable her to adjust (see findings in fact 59 and 60), but that was in a context where he had already awarded the pursuer £1,000 per month for 5 years, ostensibly under both sections 9(1)(d) and (e), drawing no distinction between the two, and the sheriff's reasoning is at best unclear. We also take into account that the pursuer has apparently been continuing to receive the monthly sum of £750 from the defender since the date on which the sheriff granted decree of divorce, 29 July 2019, albeit that interlocutor will now be recalled and divorce granted of new. In all the circumstances, we consider that she should continue receiving that sum for a further period of 2 years from the date of our interlocutor, such an award being justified by the section 9(1)(d) principle.

[42] Turning to section 9(1)(e), the question essentially becomes whether the payment of periodical allowance should be extended beyond the period of the section 9(1)(d) award (and if so, on what terms), on the basis that it can be said that the pursuer is likely to suffer serious financial hardship. That question is to be assessed by having reference to the factors set out in section 11(5) which are the same as those which are relevant in assessing a section 9(1)(d) award, with the exception of any intention to undertake education or training (which does not arise in relation to the pursuer in any event). It follows that such matters as

the duration of the marriage and the parties' standard of living during it are relevant, so that serious hardship must be assessed having regard to the parties' particular circumstances and not according to some objective or uniform standard of poverty. However, even on this analysis we can see no basis for interfering with the sheriff's finding in fact 55 which is of mere financial hardship. That is insufficient to justify an award under section 9(1)(e). No further award of periodical allowance can be justified under that principle.

[43] For these reasons, we shall award the pursuer periodical allowance of £750 per month, payable monthly in advance for a period of 2 years from the granting of new of the decree of divorce.

Expenses

[44] Insofar as expenses are concerned, these were dealt with by the sheriff in his interlocutor of 16 September 2019, which awarded the defender the expenses of "the minute of amendment procedure, previously reserved in interlocutors of 19 September 2018 and 7 January 2019" and thereafter found the defender liable to the pursuer in the expenses of the action as taxed. Having perused the interlocutors, it would appear that there were two minutes of amendment, nos 19 and 30 of process, and it might have been preferable had the interlocutor specified that. We further note that the expenses of a previous discharged proof were reserved by interlocutor of 24 August 2018 and apparently never subsequently dealt with. Be all that as it may, we see no reason to interfere with the sheriff's award of expenses *quoad* the amendment. As regards the expenses of the proof, that is also at large for us to reconsider standing our recall of the sheriff's interlocutor in relation to the merits of the action. The normal rule that expenses should follow success does not apply with its full rigour in family actions: *Little*, Lord Hope at p 790C to D. That said, both parties have had

some degree of success, the pursuer succeeding in relation to her claim for periodical allowance, the defender in obtaining an order for sale of the house. In the circumstances we consider that the appropriate order in relation to the expenses of the action (save for the said amendment procedure) is none due to or by either party.

[45] As far as the appeal is concerned, expenses should follow success and we will award the expenses of the appeal in favour of the defender.

[46] The pursuer has intimated an intention to seek modification. Any motion should be intimated in the normal way, and should be accompanied by the pursuer's legal aid certificate (if not already in process), which we have not yet seen.

Disposal

[47] In summary, having recalled the sheriff's interlocutor of 29 July 2019, we shall sustain the pursuer's first, eighth and tenth pleas in law; sustain the defender's first and fifth pleas in law (the latter, insofar as it pertains to the defender's second crave only), and repel all other pleas in law; and thereafter, we shall grant decree of divorce in terms of crave 1; award the pursuer a capital sum of £41,500 in satisfaction of crave 7; award the pursuer periodical allowance of £750 per month for a period of 2 years, in satisfaction of crave 8; and grant decree for the sale of the former matrimonial home in terms of the defender's crave 2. The sheriff does not tell us what orders were sought, if any in terms of the pursuer's remaining craves (which broadly sought protective remedies) but for completeness we shall refuse all other craves as not insisted upon. We shall also deal with the expenses as set out above.