



**SHERIFF APPEAL COURT**

**[2021] SAC (Civ) 31  
PAI-F43-21**

Sheriff Principal C D Turnbull

**OPINION OF THE COURT**

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal in the cause

MARY McMASTER

Pursuer and Appellant

against

JOHN McMASTER

Defender

**Pursuer and Appellant: Hunter & Robertson**

11 October 2021

**Introduction**

[1] In this action, the pursuer craves divorce; an incidental order under section 14(2)(a) of the Family Law (Scotland) Act 1985 for the sale of a house in Paisley (hereinafter referred to as “the property”); and payment of a capital sum. The defender craves payment of a capital sum; an incidental order under section 14(2)(a) of the Family Law (Scotland) Act 1985 for the sale of the property; and an accounting by the pursuer of her intromissions in a limited company.

[2] The pursuer and appellant (who I will refer to as “the pursuer” in this opinion) appeals, without permission, against the sheriff’s decision of 2 September 2021 which, *inter*

*alia*, (i) granted parts 3 and 4 of the defender's motion, no 7/1 of process, and in terms thereof, granted an incidental order for the sale of the property and authorised the solicitors for the defender to market the property forthwith and to appoint such estate agent or any other agent for sale purposes as to said firm seemed fit or as was agreed between the parties; and (ii) discharged the continued Options Hearing assigned for that day and purported to sist the cause; assigning a review of the sist and a continued options hearing for 9 December 2021.

[3] As procedural Appeal Sheriff, I am required to determine a question about the competency of the appeal, namely, whether or not it can proceed in the absence of the permission of the sheriff. At my direction, the clerk raised the issue of competency with those acting for the pursuer. Written submissions were made on behalf of the pursuer in support of the competency of the proposed appeal.

#### **Submissions for the pursuer**

[4] The pursuer submits that the decision of 2 September 2021 falls within the category of a final judgment in civil proceedings. She acknowledges that the grant of one of the substantive craves in the action does not amount to a disposal of the action, however, submits that the decision of 2 September 2021 nevertheless amounts to a final determination of a specific crave in the action and therefore is a final judgment on that issue. Although the order is termed "an incidental order" it nevertheless amounts to a substantive crave and the sheriff's decision amounts to a final disposal of that crave.

[5] The pursuer also submits that the sheriff's decision amounts to an order *ad factum praestandum*. The sheriff making the order has worded it in a particular way, however, the order is granted in terms of the second crave of the defences, which

constitutes an order *ad factum praestandum* in as much as the sheriff has ordered sale of the property and accordingly ordained the parties to meet certain obligations which are necessary in order to complete the sale of the property (for example executing and delivering to the purchaser a disposition of their interest in the property). The order imposes an obligation on the parties to do certain things.

[6] The pursuer also submits that the sheriff's interlocutor amounts to an order sisting the cause. The sheriff closed the record, discharged the continued Options Hearing and sisted the action. On closure of the record the sheriff has to order further procedure. In this action the sheriff had two options on closure of the record - he would either fix a proof or a diet of debate. There was an extant preliminary plea for the pursuer, supported by a note. Instead the sheriff sisted the cause. He ordered a review of the sist. The pursuer contends that the sheriff did not indicate that he was fixing a continued Options Hearing, and merely stated that he was sisting the action and set a date for the review of sist. The action ceased to be a pending action, in as much as further procedure which should have been ordered, was not ordered, and the action effectively ceased to be a pending action until the sist was reviewed. The sheriff should have ordered further procedure on closure of the record but did not do so other than to put that procedure "on hold" by sisting the action until a date which he thought suitable for review.

### **Discussion**

[7] Appeals from a sheriff to this court are regulated by section 110 of the Courts Reform (Scotland) Act 2014 ("the 2014 Act"). In so far as relevant for present purposes, that section provides:

“(1) An appeal may be taken to the Sheriff Appeal Court, without the need for permission, against—

- (a) a decision of a sheriff constituting final judgment in civil proceedings, or
- (b) any decision of a sheriff in civil proceedings—
  - (i) granting, refusing or recalling an interdict, whether interim or final,
  - (ii) granting interim decree for payment of money other than a decree for expenses,
  - (iii) making an order ad factum praestandum,
  - (iv) sisting an action,
  - (v) allowing, refusing or limiting the mode of proof, or
  - (vi) refusing a reponing note.

(2) An appeal may be taken to the Sheriff Appeal Court against any other decision of a sheriff in civil proceedings if the sheriff, on the sheriff's own initiative or on the application of any party to the proceedings, grants permission for the appeal.”

[8] An appeal to this court is competent, without leave, against all final judgments of the sheriff (see 2014 Act, s.110(1)(a); and s.136(1)). The 2014 Act defines a final judgment as a decision which, by itself, or taken along with previous decisions, disposes of the subject matter of the proceedings, even though judgment may not have been pronounced on every question raised or expenses found due may not have been modified, taxed or decerned for. The pursuer's argument that the sheriff's decision is a final judgment is misconceived. The pursuer's craves for divorce and payment of a capital sum have yet to be determined. Similarly, the defender's craves for payment of a capital sum and an accounting are still to be determined. The sheriff's decision of 2 September 2021 is not a final judgment, in respect that it did not dispose of the subject matter of the proceedings and that it did not contain a finding regarding expenses (see *Ludlow v Strang* 1938 SC 551; *D.McLaughlin & Sons Ltd v Linthouse Housing Association Ltd* 2021 SAC (Civ) 10).

[9] An order *ad factum praestandum* is sought to enforce the performance of an act other than the payment of money (see *White & Carter (Councils) Ltd v McGregor* 1962 SC (HL) 1, per Lord Morton of Henryton at 16). That is not what is sought (by both parties) in the present action. Both parties seek an incidental order in terms of section 14(2)(a) of the Family Law (Scotland) Act 1985, that is an order ancillary to a decree of divorce or of dissolution of a civil partnership. It is not an order *ad factum praestandum* as contemplated by section 110(1)(b)(iii).

[10] On the face of the sheriff's decision of 2 September 2021, it is a decision which sists the action. Such a decision is appealable to the Sheriff Appeal Court without leave (see 2014 Act, s. 110(1)(b)(iv)). However, in determining whether or not a decision sists an action, the appellate court looks at the realities or practical effect of the decision and not at its mere words (see *Watson v Stewart* (1872) 10 M. 494; *Derber v J. Smith Stewart & Co Ltd* 1957 S.L.T. (Sh. Ct) 53).

[11] In the present case, the decision records that the sheriff discharged the continued Options Hearing and assigned a continued Options Hearing for 9 December 2021. Notwithstanding the allowance of a continuation of the Options Hearing for a period well in excess of that specified on OCR, r. 9.12(5), the practical effect of the sheriff's decision was to carry on the action, not to sist it (see Macphail, "*Sheriff Court Practice*", 3<sup>rd</sup> edition at para. 18.41). The court is fortified in that view by the fact that the sheriff subsequently pronounced an interlocutor on 21 September 2021 (approving the appointment of a selling agent) without recalling any sist.

**Disposal**

[12] Permission to appeal against the interlocutor of 2 September 2021 not having been granted, the proposed appeal is accordingly incompetent. The court will, therefore, refuse to receive the proposed appeal.