SHERIFF APPEAL COURT

[2025] SAC (civ) 39
GLW-A224-21

Sheriff Principal A Y Anwar KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL AISHA Y ANWAR KC

in the appeal in the cause

ALBERT KINLOCH as Executor-Nominate for the late Patricia Kinloch

Pursuer and Respondent

against

DOUGLAS FERRY KINLOCH as Executor-Nominate for the late John Woods Ferry

Defender and Appellant

Pursuer and Respondent: Crook; Campbell & McCartney Solicitors
Defender and Appellant: Party

14 November 2025

Introduction

[1] The appellant and the respondent are brothers. Their uncle, John Woods Ferry ("JWF"), died on 25 October 2008. The appellant was appointed executor to JWF's estate. The sole beneficiary of JWF's estate was his sister, the parties' mother, Patricia Kinloch ("PK"). PK died on 18 June 2013. The respondent was appointed executor to PK's estate.

[2] These proceedings have a protracted procedural history. In 2021, the respondent raised an action of count, reckoning and payment *qua* executor to PK's estate. He sought production of an account of the appellant's intromissions with JWF's estate and payment of

the balance found due. The appellant admitted that he had a duty to account for his intromissions and lodged an account in January 2023. The respondent lodged a note of objections. The note of objections and answers thereto were considered at a diet of proof in June 2024.

[3] The sheriff granted the respondent's pleas in law, ordained the appellant to make payment to the respondent in the sum of £45,254.84 with interest thereon from the date of citation until payment, together with the net value of shares held by JWF's estate.

[4] The appellant appeals against that decision.

The account of intromissions and objections thereto

[5] The account produced by the appellant noted the net value of JWF's estate as being £103,935. It noted a payment of £7,000 in cash "to [PK]" in November 2009 and various payments to family members on PK's instructions between November and December 2009 in the total sum of £62,000. Thereafter, under the heading "November 2009/2010", the account noted "several cash sums to [PK]" without specifying the amounts or the dates of payment. It noted that three holidays involving PK and various family members were paid for by the appellant on the instructions of PK. Again, no specific dates were provided and a sum of money of $5000 was attributed to only one of the three holidays. The sums said to have been expended on the remaining two holidays were unspecified. The account ended with the words "funds exhausted".

[6] The respondent challenged the entries. He averred that the account did not balance, was inaccurate and incomplete. He accepted that the sum of £62,000 was paid to family members. He objected to the remaining entries and averred that over £41,000 was unaccounted for. In short, he averred that there was a lack of specification or vouching in

relation to many of the remaining entries. He averred that the appellant had failed to account for shares which remain in JWF's estate, namely: 534 ordinary shares in Centrica plc; 428 ordinary shares in Lloyds plc; and 48 ordinary shares in United Utilities plc.

The sheriff's decision

[7] The sheriff heard evidence from the appellant and from the appellant's son. He also heard evidence from the respondent, his nephew, the respondent's son and his son's former partner. He did not find the appellant to be a credible witness. He found the respondent and the respondent's witnesses to be generally reliable and credible. He concluded that the respondent's objections were generally well made.

[8] The sheriff found that the net value of the estate, which omitted to make reference to the shares held by the estate and was said to comprise principally the proceeds of sale of heritable property, had been incorrectly noted in the account as £103,935; it ought to have been noted as £100,754.84. The sheriff found that the sum of £62,000 had been paid by the appellant to various family members and could properly be deducted as distributions made on PK's instructions as the sole beneficiary of JWF's estate.

[9] The sheriff did not accept the appellant's evidence that he had paid sums of money to PK in cash or that he had paid for various holidays on PK's instructions from the available funds in JWF's estate. The sheriff noted that had the appellant done so, he ought to have kept a record of such payments.

[10] Finally, the sheriff heard evidence in relation to a number of payments which did not appear in the account. First, the appellant sought to deduct payments made to Cragwell Finance Company Ltd, a company owned or partially owned by the appellant, from the

proceeds of JWF's estate. These payments were made from an account held in the name of JWF which had not been closed after his death. The sums did not appear as a debt in the inventory to the application for confirmation. The sheriff was not satisfied that this payment was made in satisfaction of JWF's debts. He found that the sum of £6,500 paid from JWF's estate to Cragwell Finance Company Ltd required to be added to the net value of JWF's estate. Second, the respondent had sought to add the sum of £10,659.06 to the net value of JWF's estate being sums withdrawn from an account in the name of JWF. The sheriff did not find this claim to be established on a balance of probabilities, noting that it was possible that these sums had been withdrawn by PK shortly before JWF's death.

[11] Having considered the adjustments to be made to the account produced by the appellant (the corrected value of JWF's estate being £100,754.84, to which £6,500 fell to be added and £62,000 fell to be deducted), the sheriff found the balance due by the appellant to the respondent to be £45,254.84 together with the value of the shares which remained in JWF's estate.

[12] Following the diet of proof, at a hearing on the expenses on 11 November 2024, the sheriff granted the expenses of the action in favour of the respondent, insofar as not already dealt with in terms of interlocutors dated 6 October 2021 and 11 February 2022. In an exchange of correspondence between the clerk of court and the parties following the issuing of the interlocutor, the sheriff noted that he had omitted to make reference to a prior interlocutor dated 3 July 2023 which had also granted expenses in favour of the appellant. The sheriff noted that the parties remained bound by that prior interlocutor.

Grounds of appeal

[13] The appellant appeals the sheriff's decision on the grounds that the sheriff:

1. erred in law by failing to adequately address the appellant's submission that a strict accounting was not necessary in the circumstances;
2. erred in his approach to the payment made to Cragwell Finance Company Ltd;
3. had been excessively critical of appellant's reliability and credibility;
4. had awarded expenses:
   i. without having considered fully the procedural history of the action;
   ii. having failed to take account of the fact that he had awarded a sum significantly lower than that craved by the respondent; and
   iii. had erred in awarding expenses against the appellant personally; and
5. had erred in refusing the appellant's minute of amendment.

The appellant invited the court to grant the appeal and remit the action.

Submissions for the appellant

[14] The appellant was self-represented at the hearing of the appeal. The note of appeal however appeared to have been drafted by solicitors or by counsel representing him at the time. In advance of the appeal, the appellant lodged two documents. The first document was a copy of a precognition signed by him dated 8 June 2023. This did not form part of the evidence led on his behalf at the proof and it was explained to him that the court could not have regard to its contents. The second document lodged by the appellant (described by him as "part 2" to which I shall refer as "the appellant's note of argument") set out his criticisms of the sheriff's approach which were focussed on the sheriff's assessment of the witnesses.

[15] During his oral submissions, the appellant explained that he was unable to instruct solicitors to prepare for and attend the appeal. He explained that he was a lay person and did not approach his role as executor as one which required formal records for his intromissions having regard to his relationship with the sole beneficiary of JWF's estate. He focussed his submissions on the sheriff's findings as to the credibility and reliability of the witnesses, describing his "whole appeal" as focussed on that issue. I drew the appellant's attention to the remaining grounds of appeal set out in the note of appeal. He made brief submissions, simply repeating the terms of the note of appeal.

[16] The appellant made no submissions to advance ground of appeal 4. However, the note of appeal, which bore to have been drafted by the appellant's solicitors, set out the basis for this ground of appeal in detail; the sheriff had failed to consider the procedural history of the action, the delays occasioned by the respondent and that the action had been struck from the court rolls for want of insistence when considering the issue of expenses. The sheriff had failed to consider that the appellant had not been entirely successful, his second crave which sought an alternative sum in the event that an account had not been produced, had been refused and the balance due by the appellant was significantly smaller than the sums originally sought by the respondent.

Submissions for the respondent

[17] The sheriff considered the dicta in *Ross* v *Ross* (1896) 23 R (HL) 67 and *McCormack* v *McKinnon* [2023] CSOH 70. The sheriff noted the appellant's submission that a court may make some allowances for a lay executor's accounting. He paid due regard to the authorities before him. The sheriff had been entitled to reject the appellant's claim that the sum of £6,500 fell to be deducted from the net value of JWF's estate. The sheriff considered

the facts as found established by him which included a finding that two cheques to the value of £6,500 were dated and presented a significant time after JWF's death at a time when the appellant, as executor, ought to have closed accounts belonging to JWF. The sheriff found that the appellant had acted improperly in allowing these sums to be drawn from JWF's estate.

[18] It was for the sheriff to determine matters of credibility and reliability. He had done so in a careful and reasoned manner. The appellant's note of argument which sought to challenge the sheriff's assessment of the respondent's witnesses, contained a selective and factually inaccurate summary of the evidence before the sheriff.

[19] The sheriff had awarded the expenses of the action in favour of the respondent following the diet of proof. At the time he had been unaware of a prior order for expenses dated 23 July 2023 in favour of the appellant. However, the parties were still bound by the prior interlocutor and thus there was no prejudice to the appellant. The sheriff was addressed by parties on the question of expenses on 11 November 2024 and he had considered written submissions on the issue. Whether the respondent had been "entirely successful" is generally not relevant when determining the liability for expenses (*Howitt* v *Alexander & Sons* 1948 SC 154; Macphail, *Sheriff Court Practice*, 4th edition, chapter 19; Tottell, *Court of Session Practice*, L101 to L105). The relevant issue was whether the respondent had achieved practical success. The proceedings had been raised in 2021. The appellant did not admit a duty to account until January 2023. The appellant had sought to raise a counterclaim which counsel instructed for the appellant at the time had accepted was incompetent. The appellant had sought caution. That motion was refused. The appellant had lodged a minute of amendment in January 2023 which was also refused. The sheriff was aware of the protracted nature of the proceedings. He had been entitled to find the

appellant liable in the expenses of the action, insofar as not already dealt with. He had also been entitled to find the appellant personally liable.

[20] Finally, the appellant had sought to lodge a minute of amendment in June 2022. That was opposed. The proposed amendment sought to introduce a new argument, namely that the respondent having delayed unreasonably in seeking an accounting was now barred from doing so on the grounds of mora, taciturnity and acquiescence. The hearing on the opposed motion did not take place until 13 January 2023 by which time the appellant had accepted that he had a duty to account and had produced an account. The sheriff refused the motion to allow the minute of amendment to be received. That decision had not been appealed at the time.

Decision

[21] While a number of grounds of appeal were advanced in the note of appeal, during submissions, it was clear that the gravamen of the appellant's appeal related to the sheriff's assessment of the witnesses as set out in ground of appeal 3. Assessing the various points raised by the appellant in his note of argument and oral submissions has not been without difficulty. While the extended notes of evidence were lodged, the grounds of appeal were advanced without any meaningful analysis of any particular chapter of evidence. In general, the conclusions reached by the sheriff were challenged by means of a selective approach to passages of evidence without a detailed and through reference to the extended notes.

[22] It is important to note the restricted basis upon which an appellate court will interfere with a decision at first instance after proof. The appellate court must exercise appropriate caution and must not underestimate the advantage which a court of first

instance may have had in seeing and hearing the testimony of witnesses (per Lord President (Carloway), *Woodhouse* v *Lochs and Glens (Transport) Ltd* [2020] CSIH 67, at paragraphs [31] to [33]). As explained in Macphail, *Sheriff Court Practice*, 4th edition at paragraph 18.152:

> "Where… the credibility or reliability of one or more witnesses is in dispute, the Sheriff Appeal Court attaches considerable weight to the conclusion or inference made by the sheriff with regard to the weight or balance of the evidence of the witnesses, whom the sheriff has had the advantage of seeing and hearing, and asks itself whether, not having itself seen and heard the witnesses, it is in a position to come to a clear conclusion that the sheriff was plainly wrong. In the absence of some identifiable error, such as a the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, the Sheriff Appeal Court will interfere with the findings of fact made by the sheriff on the basis that he has gone plainly wrong only if it is satisfied that his decision cannot reasonably be explained or justified. If it cannot be so satisfied, it will not disturb the sheriff's judgment."

[23] No particular finding in fact was challenged. It was not suggested that there was no basis in the evidence for any particular finding in fact, that the sheriff had misunderstood the evidence or made some other identifiable error, that his decision was "plainly wrong" or was one no reasonable sheriff could have reached. Instead, in the note of appeal, the sheriff was described as "excessively critical" of the appellant's evidence and not so of the respondent's evidence and as having failed to offer cogent or reasonable cause to justify the acceptance or rejection of evidence.

[24] I am not persuaded that is so. The sheriff provided a number of compelling reasons for rejecting the appellant's evidence. He explained that he did not find the appellant to be a credible witness. He described the appellant as being "obfuscatory and deliberately vague in answering questions where the truthful answer to a question would not best serve his cause." He considered the appellant to have used deliberately florid terms in describing people and things while describing himself in positive terms, referring to himself as "a dutiful son". The sheriff explained that he considered the appellant had sought to distract

the court from his lack of credibility. The sheriff found that in 2011, PK had become concerned over the appellant's handling of JWF's estate and had instructed a solicitor to send a letter to the appellant relating to his intromissions with the estate. He found that PK had raised a complaint with the police and had stated in her will that she did not wish the appellant to inherit any of her estate upon her death. He noted that the appellant had been the subject of a lengthy police investigation relating to his administration of JWF's estate as a result of a complaint made by or on behalf of his mother, PK. The appellant claimed not to know whether PK had provided the police with a statement in relation to the investigation. The sheriff found it wholly unlikely that the appellant was unaware that his mother had made such a statement describing this, and the appellant's insistence that he enjoyed a close relationship with PK, as examples of the appellant's lack of credibility. The sheriff noted the appellant's lack of integrity in terms of his actings as executor. He found that the appellant had pled guilty to a charge of fraud, having continued to receive payments of a pension into an account in the name of JWF for more than a year following his death. The appellant had been sentenced to a community payback order and required to repay the sum of around £10,000. The sheriff formed the view that during his evidence, the appellant sought to rely upon a faulty memory when it best suited his cause to do so.

[25] The sheriff assessed the appellant's son's evidence as being at odds with other evidence and as being designed to support the appellant's position at proof. The appellant's son, Stephen Kinloch, is a qualified heating engineer and gave evidence in relation to works he carried out to JWF's home following his death. The sheriff noted that, notwithstanding the scale of the works described, Stephen Kinloch spoke to having received only £1,000 in cash, which the sheriff noted to be a very small payment "standing the loss of income from his own work". In his note of argument, the appellant criticised the sheriff for concluding

that Stephen Kinloch had suffered any loss of income. Having reviewed the transcripts of evidence, I note that Stephen Kinloch referred to having committed 30 days to the works at weekends and during weekdays. In his written statement, which was adopted by him in his evidence, he referred to the words as "excessive" and referred to giving up his "own time" to carry out the works. It is not an unreasonable inference for the sheriff to draw that, in those circumstances, he lost the opportunity to earn elsewhere.

[26] The appellant referred to paragraphs [32] to [34] and [36] of the sheriff's judgment to advance ground of appeal 3. In these paragraphs, the sheriff sets out the submissions advanced by counsel on behalf of the appellant. These paragraphs do not contain the sheriff's assessment of the witnesses and are not relevant to that ground of appeal.

[27] The appellant submitted that the respondent and his witnesses lacked credibility. He advanced this argument on the basis of a selective reference to passages of their evidence. Properly understood, the appellant's submissions amounted to no more than a disagreement with the sheriff's assessment of the evidence. The sheriff provided clear reasons for preferring the evidence of the respondent and his witnesses. He described the respondent as credible, for the most part reliable, he did not consider him to be seeking to mislead the court, he found the respondent's descriptions of family relations to be compelling and noted that the respondent made appropriate concessions potentially against his own interests, acknowledging errors on his part. In relation to the respondent's witnesses, the sheriff explained why he found each reliable and credible with reference to particular passages of their evidence.

[28] Considerable respect requires to be afforded to the sheriff's assessment of the evidence in light of the advantage enjoyed by him of seeing and hearing the witnesses. There is no basis for this court to conclude that the sheriff's determinations on credibility

and reliability were plainly wrong or that they disclosed some other identifiable error. Accordingly, ground of appeal 3 is refused.

[29] The remaining grounds of appeal were not elaborated upon by the appellant in his note of argument or his oral submissions. Nevertheless, I have considered these. They can be dealt with in short compass.

[30] Ground of appeal 1 is misconceived. The sheriff acknowledged: that a failure to maintain proper accounts amounts to gross negligence on the part of a trustee (*McCormack* v *McKinnon);* that there is a legal burden on an accounting party to justify payments made for the benefit of a beneficiary; that where proper accounts relating to the intromission of an estate are not kept then the executor or trustee risks the application of the principle of strict accounting, that is, he is given the benefit only of such items as beneficiaries care to admit (*Polland* v *Sturrock's Executors (No. 2)* 1955 SLT (Notes) 76); and that a court may make some allowances for a lay trustee's accounting (*Ross* v *Ross* (1896) 23 R (HL) 67). The sheriff did not apply the principle of strict accounting. Properly understood, the sheriff rejected the appellant's evidence as unreliable or lacking credibility in relation to many of the entries in the account. The lack of vouching or records supported that assessment. That was the basis upon which the appellant was found liable to account for the balance. The sheriff explained that even if he were wrong in that assessment, he did not accept the submission advanced on behalf of the appellant that payments by a son to a mother from an estate in respect of which the son was an executor would not require any form of vouching or receipt. In that regard, it is clear that the sheriff correctly identified and had in mind Lord Pentland's reference in *McCormack* v *McKinnon* (at paragraph [75]) to the observation made by the Lord Chancellor (Halsbury) in *Ross* v *Ross*, a case which involved proceedings brought by a son against his mother for count and reckoning of her intromissions with his estate*:*

> "… there are some lines which must be sharply drawn, and notwithstanding that the defender is a mother, one must not diminish, if one can help it, the obligation upon a person who is managing the estate and effects of another to be able to render an account afterwards of what he or she has done."

[31] Ground of appeal 2 is refused. Properly understood, this is a disagreement with the sheriff's assessment of evidence. The sheriff found that the appellant had paid sums from JWF's estate to a company in which the appellant had an interest after JWF's death. That these sums were paid when the relevant account ought to have been closed and that the company, Cragwell Finance Company Ltd, did not appear as a creditor in JWF's estate in the application for confirmation, undermined the appellant's credibility. The sheriff was entitled to find that these sums required to be added to the net value of JWF's estate.

[32] Ground of appeal 4 is refused. An award of expenses is a discretionary decision with which an appellate court will only interfere on one or more of the conventional grounds for doing so: a failure to exercise a discretion, unreasonableness, a misdirection or error of law, the taking into account of irrelevant material or omission of relevant material or that the decision is "plainly wrong". No submissions or material had been placed before this court which might allow it to conclude that any of these conventional grounds had been made out. The respondent's submission that he had enjoyed practical success in the proceedings was sound.

[33] Ground of appeal 5 has no merit. The note of appeal simply stated that the minute of amendment sought to be lodged by the appellant in 2023 ought not to have been refused. Very little was said in submissions by the appellant to support this ground of appeal. I am unable to discern the basis upon which this ground of appeal is advanced, particularly as the decision to refuse to allow the minute of amendment was not challenged in 2023 and the matter had thereafter proceeded to a proof. The appellant lodged an account and accepted

that he was under a duty to do so. In those circumstances, it is unsurprising that the sheriff refused to allow a minute of amendment which sought to introduce a plea in law directed at whether the delays on the part of the respondent in seeking an accounting barred the respondent from now doing so on the grounds of mora, taciturnity and acquiescence.

[34] Accordingly, for the reasons set out, I shall refuse the appeal. I note that the sheriff's interlocutor of 3 October 2024 grants decree for payment in terms of the first crave in the sum of £45,254.84 "together with the net value of she [*sic*] shares referred to in parties' second joint minute as at their date of sale". No orders appear to have been sought for the sale of the shares remaining in JWF's estate at first instance and nor was I invited to grant any such orders. However, it is not appropriate for an interlocutor granting decree to refer to a minute or item of process for the terms of the decision (Macphail, *Sheriff Court Practice*, paragraph 17.21). The decree must be clear and precise and must be capable of being extracted. Accordingly, I shall vary the sheriff's interlocutor of 3 October 2024 by deleting the words "together with the net value of she shares referred to in parties' second joint minute as at their date of sale" and substitute therefor the words

> "together with the net sale proceeds arising from the sale of 534 ordinary shares in Centrica plc, 428 ordinary shares in Lloyd's plc and 48 ordinary shares in United Utilities plc forming part of the estate of the late John Woods Ferry"

and otherwise adhere to its terms. I shall adhere to the sheriff's interlocutor of 11 November 2024 and make an award of expenses in relation to these appeal proceedings in favour of the respondent. I shall grant sanction for the employment of junior counsel in relation to the appeal procedure.