SHERIFF APPEAL COURT

[2024] SAC (Civ) 42
GLW-F364-24

Sheriff Principal D C W Pyle
Appeal Sheriff W A Sheehan
Appeal Sheriff C M Shead

OPINION OF THE COURT

delivered by APPEAL SHERIFF WENDY A SHEEHAN

in the appeal in the cause

MARIANNE MCBRIDE (AP)

Pursuer and Respondent

against

GRAEME MCINNES

Defender and Appellant

Pursuer and Respondent: Aitken, advocate; McIntosh McCann Ltd
Defender and Appellant: Wylie, solicitor; Morton Fraser MacRoberts LLP

3 October 2024

Introduction

[1] This is an appeal against the interlocutor of the sheriff of 8 April 2024 which granted the respondent: (i) an interim occupancy right to the appellant's property for a period of 6 months in terms of section 18 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981; and (ii) an interim interdict preventing the appellant from selling, transferring or letting his heritable property until further order of court.

[2] Both parties agreed that the interim interdict preventing the appellant from selling, transferring or letting his heritable property was wrongly sought and granted and that part of the sheriff's interlocutor should be recalled. In consequence, this appeal is concerned with: (i) the competency and merits of the granting of the interim occupancy right to the respondent; and (ii) the competency of an order granting the occupancy right sought by the respondent.

Background

[3] The parties cohabited between 2016 and 23 May 2023, together with the respondent's children from a previous relationship (aged 17 and 14 years). During the cohabitation, the parties lived together in an enduring family relationship, latterly in the property which is the subject of this appeal. That property was bought during the course of the cohabitation and is held solely in the appellant's name.

[4] The appellant moved out of the property on 23 May 2023. The respondent and her children remain in the property. Attempts at reconciliation were made without success. In February 2024, the appellant's solicitor wrote to the respondent and advised her that both she and her children required to vacate the property by no later than 9 April 2024. The respondent then raised an action at Glasgow Sheriff Court with two craves in which she sought an occupancy right in the property for a period of 6 months and an interdict to prevent the appellant from selling, transferring or letting the property. Both craves were also sought on an interim basis.

[5] The action was warranted on 4 April 2024. The warrant of citation issued on that date fixed a post-service hearing to call on 8 April 2024 for consideration of whether interim

orders should be granted in terms of the respondent's craves. The post-service hearing took place by telephone call. In advance of the hearing, both parties lodged written submissions.

[6] The respondent's position at the post-service hearing was that the action was competent and that section 18 of the 1981 Act should be interpreted so as to grant protection to the respondent in the circumstances. An interim order should be made to protect her position: *Souter* v *McAuley* 2010 SLT (Sh Ct) 121 and *Gibb* v *Cameron* 1998 Fam LR 2. For the appellant, it was contended that the terms of section 18 of the 1981 Act were such that the court only needed to consider it if the parties were still cohabiting: *Verity* v *Fenner* 1993 SCLR 223 and *Armour* v *Anderson* 1994 SC 488. As the parties ceased to cohabit on 23 May 2023, there was no basis upon which the action could be held to be competent.

[7] The sheriff held that the appellant's interpretation of section 18 of the 1981 Act ran contrary to its purpose. Cohabitation is a question of fact and intention. The sheriff considered that the parties required to have been living together "as husband and wife" or as civil partners at the time of the conduct giving rise to the application. Having considered the respondent's averments and the parties' submissions, the sheriff determined that the respondent, as a non-entitled partner, may competently establish occupancy rights in the appellant's property following proof. In order to protect her position in the meantime, he granted both of the respondent's craves on an interim basis.

Legislation

[8] The provisions of the 1981 Act relevant to this appeal are:

> **"3— Regulation by court of rights of occupancy of matrimonial home**
> (1) Subject to section 1(7) of this Act, where there is an entitled and a non-entitled spouse, or where both spouses are entitled, or permitted by a third party, to occupy a matrimonial home, either spouse may apply to the court for an order—
> (a) declaring the occupancy rights of the applicant spouse;

(b) enforcing the occupancy rights of the applicant spouse;
(c) restricting the occupancy rights of the non-applicant spouse;
(d) regulating the exercise by either spouse of his or her occupancy rights;
(e) protecting the occupancy rights of the applicant spouse in relation to the other spouse.

(2) Where one spouse owns or hires, or is acquiring under a hire-purchase or conditional sale agreement, furniture and plenishings in a matrimonial home, the other spouse, if he or she has occupancy rights in that home, may apply to the court for an order granting to the applicant the possession or use in the matrimonial home of any such furniture and plenishings; but, subject to section 2 of this Act, an order under this subsection shall not prejudice the rights of any third party in relation to the non-performance of any obligation under such hire-purchase or conditional sale agreement.

(3) The court shall grant an application under subsection (1)(a) above if it appears to the court that the application relates to a matrimonial home; and, on an application under any of paragraphs (b) to (e) of subsection (1) or under subsection (2) above, the court may make such order relating to the application as appears to it to be just and reasonable having regard to all the circumstances of the case including—

(a) the conduct of the spouses in relation to each other and otherwise;
(b) the respective needs and financial resources of the spouses;
(c) the needs of any child of the family;
(d) the extent (if any) to which—
(i) the matrimonial home; and
(ii) in relation only to an order under subsection (2) above, any item of furniture and plenishings referred to in that subsection, is used in connection with a trade, business or profession of either spouse; and
(e) whether the entitled spouse offers or has offered to make available to the non-entitled spouse any suitable alternative accommodation.

(4) Pending the making of an order under subsection (3) above, the court, on the application of either spouse, may make such interim order as it may consider necessary or expedient in relation to—

(a) the residence of either spouse in the home to which the application relates;
(b) the personal effects of either spouse or of any child of the family; or
(c) the furniture and plenishings:

Provided that an interim order may be made only if the non-applicant spouse has been afforded an opportunity of being heard by or represented before the court.

18 — Occupancy rights of cohabiting couples

(1) If a man and a woman are living with each other as if they were man and wife or two persons of the same sex are living together as if they were civil partners ('in either case a cohabiting couple') in a house which, apart from the provisions of this section—

(a) one of them (an 'entitled partner') is entitled, or permitted by a third party, to occupy; and
(b) the other (a 'non-entitled partner') is not so entitled or permitted to occupy,

the court may, on the application of the non-entitled partner, if it appears that the entitled partner and the non-entitled partner are a cohabiting couple in that house, grant occupancy rights therein to the applicant for such period, not exceeding 6 months, as the court may specify:

Provided that the court may extend the said period for a further period or periods, no such period exceeding 6 months.

(2) In determining whether for the purpose of subsection (1) above two person are a cohabiting couple the court shall have regard to all the circumstances of the case including—

(a) the time for which it appears they have been living together; and

(b) whether there is any child—

(i) of whom they are the parents; or

(ii) who they have treated as a child of theirs.

(3) While an order granting an application under subsection (1) above or an extension of such an order is in force, or where both partners of a cohabiting couple are entitled, or permitted by a third party, to occupy the house where they are cohabiting, the following provisions of this Act shall subject to any necessary modifications—

(a) apply to the cohabiting couple as they apply to parties to a marriage; and

(b) have effect in relation to any child residing with the cohabiting couple as they have effect in relation to a child of the family,

section 2;

section 3, except subsection (1)(a);

section 4;

in section 5(1), the words from the beginning to 'Act' where it first occurs;

section 13; and

section 22,

and any reference in these provisions to a matrimonial home shall be construed as a reference to a house.

(4) Any order under section 3 or 4 of this Act as applied to a cohabiting couple by subsection (3) above shall have effect—

(a) if one of them is a non-entitled partner, for such a period, not exceeding the period or periods which from time to time may be specified in any order under subsection (1) above for which occupancy rights have been granted under that subsection, as may be specified in the order;

(b) if they are both entitled, or permitted by a third party, to occupy the house, until a further order of the court.

(5) Nothing in this section shall prejudice the rights of any third party having an interest in the house referred to in subsection (1) above.

(6) In this section—

'*house*' includes a caravan, houseboat or other structure in which the couple are cohabiting and any garden or other ground or building attached to, and usually occupied with, or otherwise required for the amenity or convenience of, the house, caravan, houseboat or other structure;

'*occupancy rights*' means the following rights of a non-entitled partner—

(a) if in occupation, a right to continue to occupy the house;

> (b) if not in occupation, a right to enter into and occupy the house; and, without prejudice to the generality of these rights, includes the right to continue to occupy or, as the case may be, to enter and occupy the house together with any child residing with the cohabiting couple
>
> '*entitled partner*' includes a partner who is entitled, or permitted by a third party, to occupy the house along with an individual who is not the other partner only if that individual has waived his or her right of occupation in favour of the partner so entitled or permitted."

Submissions for the appellant

Competency of order for interim occupancy right

[9] Even if the order for the occupancy right was competent, it was not competent for it to be granted on an interim basis. In *Smith-Milne* v *Gammach* 1995 SCLR 1058 Sheriff Kelbie held it was not competent to make an interim award of occupancy rights and instead sought to expedite the action: *Smith-Milne* at p.1059B-C. There was no specific provision for making an interim order in terms of section 18 of the 1981 Act. That was to be contrasted with the provision in section 3(4) of the 1981 Act which pertained to the granting of interim orders for spouses in relation to a former matrimonial home.

[10] In the present action, the sheriff had not explained why he concluded that an interim order was competent. The sheriff did not set out any basis upon which to distinguish the present case from *Smith-Milne*.

[11] The respondent acknowledges that, on a literal reading of section 18, an interim order is not competent. For that reason, she proposes a purposive interpretation. However, it is clear from the terms of the statute that Parliament considered cohabitants were not to be afforded the same rights that a spouse would be. The Scottish Law Commission recommended amendment of the Family Law (Scotland) Act 2006 to include additional remedies when the court makes an order for financial provision on cessation of a cohabiting relationship. One of the recommendations was for the court to be provided with the power

to grant an incidental order (including on an interim basis) to regulate occupancy of the family home: *Report on Cohabitation*, Scottish Law Commission, Report No 261, (2022), paragraph 5.77. Nonetheless, the present position in the law was that an interim order for an occupancy right for a cohabitant is not competent.

Competency of order for occupancy right

[12] In *Verity* v *Fenner* 1993 SCLR 223, both the sheriff and sheriff principal held that a court may only grant occupancy rights to a non-entitled partner who was a cohabitant if the parties were still cohabitating at the date of proof by virtue of the fact that section 18 of the 1981 Act is written in the present tense. The appellant submitted that this interpretation was developed upon by the First Division in *Armour* v *Anderson* 1994 SC 488. Under reference to the *obiter dicta* of the Lord President (Hope) in *Armour* at p.497D, the test that the sheriff ought to have applied in assessing the competency of the respondent's first crave was whether the cohabitating couple in question were living with each other as if they were man and wife in the house at the date of the conduct which gave rise to the application.

[13] However, in the present case, the parties were not living with each other as if they were man and wife on the date of consideration of the application. The parties are former cohabitants who had been separated for over 10 months on the date that the action was warranted. The respondent herself averred that the parties ceased to cohabit on 23 May 2023. She has lived in the property owned by the appellant since their separation. The respondent did not pray in aid any conduct during the parties' cohabitation which gave rise to this application. The only conduct which gave rise to the application was the request from the appellant to the respondent in February 2024 to vacate the property by 9 April 2024.

[14] A non-entitled party can only rely on *Armour* if there was domestically abusive conduct and where that conduct occurred during the cohabitation. The sheriff failed to explain what conduct he considered brought this action within the terms of section 18. The respondent had pled no averments of domestically abusive conduct on the part of the appellant towards her.

[15] Whilst it was conceded that the First Division had adopted a purposive approach to section 18(3) in *Armour,* if the respondent's interpretation of section 18 were to be accepted by this court, a non-entitled partner who is a former cohabitant would have an indefinite right to seek to establish an occupancy right against the entitled partner. Moreover, such an interpretation would potentially encourage non-entitled cohabitants to take no steps following separation to find new accommodation which runs contrary to the policy intention of the legislation.

Merits

[16] The post-service hearing only addressed the issue of competency. The sheriff proceeded to grant the interim orders without affording the appellant a further opportunity to challenge whether an interim order should be granted on the merits. No submissions were made in relation to the appellant's circumstances and no consideration given by the sheriff to the consequences of such an interim order being granted against him. The balancing exercise required of the sheriff was not undertaken in the absence of this opportunity. As such, the sheriff erred.

[17] It was also contended that the sheriff had reached a conclusion that no other sheriff would have done. However, that submission was made without any ground of appeal substantiating it within the Note of Appeal.

Submissions for the respondent

Competency of interim order for occupancy right

[18] Counsel accepted section 18 does not, in its own terms, make provision for an interim occupancy right. However, applying a purposive interpretation to section 18(3), it should be considered competent for interim orders to be made in relation to occupancy rights for cohabitants, as it is for spouses. Section 18(3)(b) provides that, for the regulation of occupancy rights of cohabitants, other parts of the 1981 Act are to be applied which includes section 3, with the exception of section 3(1)(a). As such, section 3(4) was applicable subject to any necessary modifications. Reading section 3(4) and section 18(3) together, counsel submitted that, pending the making of an order under section 18(1), a non-entitled partner may seek an interim order for an occupancy right.

[19] Counsel accepted there was a difficulty with the proposed interpretation, standing the use of the phrase "is in force" at section 18(3). Those words appeared to only allow section 3(4) to engage when an order for occupancy rights "is in force". Sheriff Kelbie in *Smith-Milne* considered that phrase meant there was no basis upon which to grant an interim order. Nonetheless, counsel submitted that, applying a purposive interpretation, it was clear that Parliament intended to allow section 3(4) to be available to cohabitants; otherwise it would have been explicitly excluded, as had section 3(1)(a).

[20] While such a purposive interpretation was liberal, it was no more so than the interpretation that the First Division had applied to section 18 in *Armour*. On that basis, it was submitted that *Smith-Milne* was wrongly decided.

[21] If, by contrast, a strict interpretation of section 18 was applied, it would not be possible for a non-entitled party, such as the respondent, to seek any remedy in respect of

their occupation of the property for many months after the parties separated and following a diet of proof. The purpose of the 1981 Act of "family protection" in the "matrimonial home", would, in reality, be frustrated for cohabitants in a way which it was not for spouses. It would create a significant risk of eviction for cohabitants who were non-entitled partners.

[22] In terms of Part 33 of the Ordinary Cause Rules 1993 ("OCR"), the usual practice is that a proof will not be fixed until a Full Case Management Hearing has taken place: O.C.R. 33.36P(4)(a). That hearing will not be earlier than 20 weeks after the last date for lodging defences: OCR 33.36J(4)(b). If an interim order for an occupancy right is not competent, then, standing the usual practice, the determination of an order for an occupancy right, such as that sought by the respondent, could take in excess of 6 months to be granted after an action is warranted.

[23] Although OCR. 33.33B(3) allows for an accelerated timetable, that is the exception and not the rule. Even an expedited timetable would take weeks. As such, the remedy lay in affording a non-entitled partner interim protection and the 1981 Act ought to be interpreted in a flexible manner to allow for that.

Competency of order for occupancy right

[24] Section 18 of the 1981 Act is given a purposive, rather than a literal, interpretation: *Armour* at p.495D. *Verity* pre-dated *Armour*. As its reasoning is in direct conflict with *Armour*, it had to follow that *Verity* was impliedly overruled by the First Division in *Armour*.

[25] As to the *obiter dicta* of the Lord President at p.497D of *Armour*, it had to be remembered that *Armour* was concerned not with section 18(1) but with the granting of an exclusion order in terms of section 4 and section 18(3) of the 1981 Act: *Armour* at p.493E-H. A strict adherence to the *obiter dicta* of the Lord President was inconsistent with what is

required to secure an order under section 18(1). There is no requirement to prove any "conduct" on the part of a defender. It could not be the case that a non-entitled party who had suffered domestic abuse was entitled to a purposive interpretation of section 18, standing *Armour*, whereas a non-entitled party who had not suffered domestic abuse had a strict interpretation of section 18 applied for their action. A non-entitled partner only had to prove that the parties had cohabited at one point in time to be able to seek an occupancy right against the entitled partner.

Merits

[26] The appellant chose to challenge the orders sought by the respondent primarily on the basis of competency. If the appellant had submissions to make on the merits of the granting of the orders, he ought to have done so at the post-service hearing. There was nothing in the conduct of the sheriff which indicated an intention on his part to conduct a two-stage approach to determine matters. There was no basis upon which to hold that the sheriff erred.

[27] As for the appellant's submission that the sheriff erred in the exercise of his discretion, no such ground of appeal was stated in the Note of Appeal. Absent amendment of the Note of Appeal, the appellant had no basis to argue the point. In any event, there was no basis upon which to argue the sheriff had in fact erred in the exercise of his discretion.

Decision

Competency of interim order for occupancy right

[28] The competency of an interim order for an occupancy right under section 18 of the 1981 Act was considered by Sheriff Principal Hay in *Byars* v *McDonald* 1990 GWD 28-1610.

The report in Green's Weekly Digest only contains a summary of the sheriff principal's judgment but we have been provided with a full copy of the judgment he issued at Paisley Sheriff Court on 12 July 1990. Within that judgment, the sheriff principal stated:

> "…Section 18 of the Act makes no provision for declarator of occupancy rights and in this respect differs from section 3(1)(a) which regulates the position between spouses. Section 18(1) provides that on application by the non-entitled partner of a cohabitating couple the court may grant occupancy rights for up to six months with the possibility of subsequent extension. Unlike section 3, there is no provision in section 18 for interim orders. Section 3(4) provides that, pending the making of an order under section 3(3) the court may make interim orders in favour of a non-entitled spouse in relation to residence in the home, personal effects and furnishings. However, section 3(4) takes effect in relation to a cohabitating couple only when the non-entitled partner has been granted occupancy rights in the house in which they are living."

[29] In *Smith-Milne,* Sheriff Kelbie was aware of *Byars.* However, he did not have access to a copy of the sheriff principal's judgment, nor the report contained in Green's Weekly Digest. He understood that *Byars* was to the effect that an interim order for an occupancy right for a cohabitant was incompetent: *Smith-Milne* at p.1061B-D. Had he had access to the sheriff principal's judgment, his understanding would have been formally confirmed. Moreover, *Byars* was binding on him. Notwithstanding his lack of access to *Byars*, Sheriff Kelbie stated the following at p.1060:

> "…The question is whether, upon an application in terms of section 18, the court is entitled to make any interim order. There is certainly no specific provision for doing so and that is to be contrasted with other provisions in the Act for the granting of interim orders. Where the Act makes specific provision for the granting of certain interim orders, as it does, for example, in section 3(4) or section 4(6) but makes no such provision in relation to an application in terms of section 18, the clear implication must be that no power to make an interim order in terms of section 18 is granted. Indeed, Mr Patience sought to rely upon section 3(4) as giving the court power to make an interim order, section 3 being applicable in terms of section 18(3). The problem is, however, that section 3 can only apply to the pursuer 'while an order granting an application under subsection (1)... is in force'. Since the provisions of section 3 can only apply if and when an application is granted under section 18(1), it cannot constitute the authority for the grant of the application itself."

[30] We consider *Byars* and *Smith-Milne* were correctly decided. It is not competent for an interim order for an occupancy right in terms of section 18 of the 1981 Act to be granted. Although the respondent urged this court to adopt a purposive interpretation of section 18, we, like Sheriff Kelbie, consider that the phrase "while an order granting an application under subsection (1)... is in force" in section 18(3) leads to the conclusion that the remedies contained in section 18(3) can only be engaged where an application has already been granted under section 18(1). Accordingly, on this ground the appeal must be allowed and the interlocutor granting the respondent an interim occupancy right recalled.

[31] As a consequence, a non-entitled partner who is a cohabitant requires an order to be issued granting them an occupancy right to remain in the property. The fact that the court cannot competently consider an interim order does not mean, however, that the court cannot make an order under section 18 expeditiously, without the need for proof, having considered affidavits and submissions.

[32] With a view to providing a solution to this issue, in *Byars* at p.5 of his judgment, Sheriff Principal Hay considered that article 5(4) in the Act of Sederunt (Applications under the Matrimonial Homes (Family Protection)(Scotland) Act 1981) 1982 provides a sheriff with a discretionary power to expedite an application for an order for occupancy rights sought under section 18:

> "…[article] 5(4) bears to give the court a wide discretionary power to regulate procedure in relation to applications under the Act, and this must include all applications under section 18. This may be what is contemplated in [article] 5(1) in the clause 'except as otherwise provided in this Act of Sederunt'.
>
> In my opinion, the discretionary power can properly be exercised in any application under section 18 so as to bring the parties before the court for an early hearing and, in an appropriate case, to make an order granting occupancy rights. Such an order, which can be for a period of up to a maximum of 6 months at a time, is in practical terms an order regulating the rights of the parties ad interim. As it appears to me, the provisions of section 18 which, more often than not, will be invoked in a 'crisis

> situation' between the parties, are likely to prove ineffective unless the court is prepared to adopt an enabling approach to procedure in terms of [article] 5(4)."

[33] We consider that his proposal is an appropriate starting point to addressing the issue. Article 5(4) remains in force; however, since the sheriff principal gave his judgment in 1990, family court procedure has moved on and it is appropriate that guidance relevant to the current rules be given.

[34] The Ordinary Cause Rules in relation to family actions underwent significant change upon the coming into force of the Act of Sederunt (Ordinary Cause Rules 1993 Amendment) (Case Management of Defended Family and Civil Partnership Actions) 2022 on 25 September 2023. Under these rules, ordinarily an Initial Case Management Hearing must be assigned no sooner than 21 days and no later than 49 days after expiry of the notice period. After the Initial Case Management Hearing, the sheriff will fix a Full Case Management Hearing and then, thereafter, a proof, proof before answer or debate is fixed. One of the aims of the new procedure is that, where possible, the same sheriff will preside over the case management hearing (initial and full), the pre-proof hearing, any child welfare hearing and any proof, proof before answer or debate: OCR 33.36Q.

[35] We agree with the respondent that this timeline is unrealistic in circumstances where a non-entitled partner is seeking an urgent determination of the issue of their occupancy rights following the end of a cohabitation. Such a delay would not meet the policy intention of the legislation which is to allow a non-entitled partner to secure occupancy rights for a period of up to 6 months (whilst they secure alternative accommodation) following the breakdown of a relationship. However, it is open to the sheriff *ex proprio motu* or on the motion of a party, under OCR 33.33B(3), in exceptional circumstances, to "disapply any rule mentioned in this Part of this Chapter" to depart from this timetable and to expedite resolution of an application. Ordinarily such applications would be determined at a

post-service hearing following consideration of affidavits, productions and detailed submissions regarding the parties' cohabitation and their respective circumstances.

Competency of order for occupancy right

[36] In *Verity* v *Fenner* 1992 SCLR 223 Sheriff Principal Ireland QC considered that for a non-entitled partner competently to seek an occupancy right the parties required to still be cohabitating at the date the court was considering the matter: *Verity* at p.226. Similarly, the First Division acknowledged that the language in section 18(1) and 18(2) was in the present tense and suggested an occupancy right could only be sought if the parties were still living together: *Armour* at p.493G. However, *Armour* was not a dispute which involved an entitled partner and a non-entitled partner; both parties in *Armour* were entitled to stay in the property. As a consequence, there was no need for the applicant in *Armour* to apply for an occupancy right. The distinction is made clear in section 18(3). As the Lord President noted at p.495G-I:

> "The opening words of subsec. (3) provide that an application may be made under that subsection in one or other of two circumstances. The first is while an order under subsec. (1) or an extension of such an order is in force. The second is where both partners of a cohabiting couple are entitled or permitted by a third party to occupy the house where they are cohabiting. Now there is no requirement in regard to the first alternative that the parties are still living together in the house when the application is made under any of the provisions mentioned in subsec. (3). The only prerequisite is that the applicant is for the time being entitled to occupancy rights in the house in terms of an order made under subsec. (1)."

[37] Thus, in order for the respondent in this appeal to engage the protections contained in section 18(3), an order under section 18(1) must be in force. Turning to the terms of section 18(1), the Lord President considered that in certain circumstances strict adherence to reading that subsection in the present tense was inappropriate. In *obiter dicta* in *Armour*, the Lord President said the following about section 18(1) at p.497D:

> "In our opinion the test of jurisdiction which has been adopted in England is the appropriate test for the competency of an application for occupancy rights under sec. 18(1) of the 1981 Act. Thus a partner may apply for an order for occupancy rights so long as the man and woman were living with each other as if they were man and wife in the house at the date of the conduct which gave rise to the application."

[38] We do not agree with the respondent that *Verity* was impliedly overruled by the First Division. The First Division's purpose in *Armour* was to avoid absurdity and the weakening of a system of protection that section 18(3) was clearly intended to provide: *Armour* at p.496E. Thus, where protective remedies are sought in conjunction with an application and domestically abusive conduct is averred by an applicant, the test contained in the *obiter dicta* of *Armour* (ie a purposive interpretation of section 18(1)) can be applied to that application and it is competent. However, if an application is made which does not seek any protective remedies nor aver any domestically abusive conduct by an entitled partner, then a literal interpretation of section 18(1) is appropriate.

[39] Section 18(1) requires the parties be living together as man and wife ("a cohabiting couple") when the application is considered by the court. As the sheriff noted in this case, cohabitation is not a status like marriage but is a question of fact. In determining whether the parties are a cohabiting couple, the court must have regard to matters in section 18(2):

> ''all the circumstances of the case including - (a) the time for which it appears that they have been living together; and (b) whether there is any child – (i) of whom they are parents; or (ii) who they have treated as child of theirs.''

The circumstances considered by the court would ordinarily involve the characteristics indicative of marriage such as: sexual intimacy; stable commitment; shared finances; and social acceptance as a couple as well as living together in the same household. The range of circumstances considered by the court may vary, as do the various ways people conduct their personal lives. The parties' intentions, while relevant, are not determinative of the issue; *Banks* v *Banks* 2005 Fam LR 116 per Lord Carloway at paragraph 33. As cohabitation

is a situation to be inferred from the facts of a particular case, there can be a degree of uncertainty as to when a particular cohabitation comes to an end. This may give some applicants leeway in making an application for an order in terms of section 18(1) during the breakdown of a cohabitation. However it was not Parliament's intention that the remedies afforded by section 18 remain available to a non-entitled partner long after separation, particularly in circumstances where there is no requirement for protective orders. If the position were otherwise, then a non-entitled partner would have no impetus following a separation to find new accommodation.

[40] In this case, no protective remedies are sought by the respondent, no domestically abusive conduct has been averred by her, the parties ceased to cohabit 11 months prior to the application being made and the appellant gave the respondent 2 months' notice to vacate the property which he owns. A literal interpretation of section 18(1) is appropriate in these circumstances. Accordingly, the respondent's first crave for an occupancy right is incompetent.

Merits

[41] Standing this court's finding on the competency of the respondent's first crave, the challenge in respect of the merits of the sheriff's order does not arise and accordingly we do not consider it necessary to express any view on the competing submissions.

Disposal

[42] We will allow the appeal, recall the interlocutor of 8 April 2024, repel the first and second pleas-in-law for the respondent and grant decree of dismissal. We find the respondent liable to the appellant in: (i) the expenses of process before the sheriff; and

(ii) the expenses of the appeal. As the respondent is legally aided, we will modify both awards of expenses to nil.