SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT DUNDEE

[2017] SC DUN 62

F461/15

JUDGMENT OF SHERIFF SG COLLINS QC

in the cause

NB

Pursuer

against

EL

Defender

Act: Macrae, Finlay Macrae Gilmartin Warden
Alt: Samson, Duncan & McConnell

Dundee, 28 February 2017

The sheriff, having resumed consideration of the cause, and considered the written submissions lodged on behalf of both parties, finds the defender liable to the pursuer in the expenses of process, as agreed or taxed, but restricted to 33% thereof.

Note:

[1] The parties were in a relationship with each other from around 1993. They never married. They jointly own a house in Dundee (hereinafter "the House"). They have two children aged 11 and 9. While the parties were together, the pursuer was the principal breadwinner and the defender took a substantial role in the care of the children.

[2] The parties separated in around June 2015. The separation was acrimonious. The defender subsequently committed a breach of section 39 of the Criminal Justice and

Licensing (Scotland) Act 2010 ('stalking'), to which he pled guilty on 1 July 2015. He was granted bail with special conditions not to contact or approach or contact the pursuer. He subsequently breached these conditions, was arrested, and pled guilty to a breach of bail on 7 July 2015. He was granted bail again, but again breached the conditions of bail. On 26 August 2015 the defender was made subject of a non-harassment order for a period of three years.

[3] Meantime, and notwithstanding the defender's offending behaviour, the parties had agreed that he should have regular contact with the children at his parents' house. This led to further substantial friction between them on a number of occasions in September 2015. As a result of his behaviour, the defender was arrested and in due course pled guilty to a breach of the non-harassment order.

[4] Against this background the pursuer raised the present proceedings. There are 19 craves in the initial writ. The pursuer sought (i) a residence order in respect of the children (crave 1); (ii) interdict against the defender from removing the children from her care and control (crave 2); (iii) a non-molestation interdict, with power of arrest, and a statutory determination that it was a domestic abuse interdict (craves 3 to 5); (iv) an exclusion order in respect of the House, together with ancillary orders for ejection, interdicts, powers of arrest, and statutory determinations (craves 6 – 15); (v) a declarator of entitlement to divide and sell the House, together with warrants, declarators and orders ancillary thereto (crave 16); (vi) warrants to intimate the writ on the children and to dispense with the requirement to do so (craves 17 and 18); and (vii) expenses (crave 19).

[5] On 18 September 2015 the Sheriff granted the pursuer interim interdicts in terms of craves 2 and 3 of the initial writ. Following a hearing on 24 September 2015 at which the defender was represented, these interim orders were continued, with a power of arrest

granted pursuant to crave 4 and a domestic abuse interdict determination made pursuant to crave 5. A notice of intention to defend was lodged on 29 September 2015. A child welfare hearing took place on 6 October 2015. At that hearing the defender was found entitled to contact with the children each Monday, Tuesday and Wednesday from 3:15 pm until 6 pm, each Thursday from 3:15 pm until Friday at 9 am, and each alternate weekend on Friday from 3:15 am until Sunday at 12 noon.

[6] On 26 October 2015 the defender lodged defences to the action. He craved: (i) a residence order (crave 1); (ii) contact with the children each Monday, Tuesday and Wednesday from 3:15 pm until 8 pm, from 3:15 pm on Thursday until 3 pm on Saturday in week one and from 3:15 pm on Thursday until 12 noon on Sunday in week two; and (iii) warrant to intimate the defences on the children and then to dispense with such intimation.

[7] It is apparent, therefore, that the defender was seeking contact in excess of that granted to him on 6 October 2015, indeed almost amounting to an order for residence, or at least, shared care. He made certain averments in response to the pursuer's averments relating to his criminal conduct until September 2015, but his pleas in law are all directed to the issues of residence and contact with the children. In particular the defender was not granted legal aid to defend the pursuer's craves for a non-molestation interdict (craves 3 – 5) – given the existence of the non-harassment order – and there were no averments or pleas in law directed to these craves. Nor were any substantive averments made as regards the matrimonial home or the orders sought by the pursuer in connection therewith. In reality, therefore, the action was defended only in relation to the question of residence and contact with the children.

[8] At a further child welfare hearing on 19 November 2015 the defender's entitlement to contact was varied slightly. In addition to contact each Monday, Tuesday, Wednesday and

Thursday, he was now granted contact in week one from 3:15 pm on Friday until 7 pm on Friday and in week two from 3:15 pm on Friday to 6 pm on Sunday. Thereafter the cause was sisted to allow both parties to obtain legal aid. Orders were subsequently made to vary the defender's contact during the children's Christmas and Easter school holidays, but otherwise there was no significant procedural progress in the case until 21 April 2016 at which time the record was closed and a case management hearing assigned. The minute of the prehearing conference on 4 May 2016 indicates that the principal outstanding matter in dispute remained residence and contact, it having been agreed in particular that the matrimonial home should be sold, and in which case the ancillary orders relating thereto would become redundant. Furthermore, the non-molestation interdicts and ancillary orders were not minuted as being in dispute.

[9] On 16 May 2016, the Sheriff, on the motion of the defender, appointed a child welfare reporter to provide a report on the questions of residence and contact. A proof was also assigned for 22 August 2016 with a pre-proof hearing on 4 August 2016. The welfare reporter's report was received on 17 June 2016. In short summary, but in substance, having met with both children the reporter was supportive of the status quo, that is, the pursuer having residence of the children and the defender having the extensive amount of contact already ordered.

[10] On 2 August 2016 the pursuer lodged a Minute of Amendment containing averments that the defender had further breached the non-harassment order on 1 July 2016 by approaching her, threatening her new partner, and attending a gig at which she was performing, all leading to alarm and distress on her part.

[11] Nevertheless, in the light of the child welfare report, a Joint Minute was entered into and lodged on 19 August 2016. By this Minute parties agreed that the action had been

settled extra-judicially, with the pursuer having residence of the children, the defender having school term contact in very similar terms to that to which he was found entitled on 19 November 2015, together with extensive Christmas, Easter and summer holiday contact. Additionally, parties agreed that craves 2, and 6 – 16 should be dismissed, along with the defender's crave for residence. While the pursuer had previously been willing to settle the action without seeking orders in relation to the non-molestation interdict (craves 3 – 5), she was no longer willing to do so standing the events referred to in the Minute of Amendment. The defender was not willing to consent to decree in terms of these craves, but agreed in the Joint Minute that they could proceed (as undefended). Parties also agreed that the pursuer's crave for expenses (19) should proceed (to a judicial determination).

[12] On 19 August 2016 the Sheriff allowed the record to be opened up and amended in terms of the pursuer's Minute of Amendment, allowed the Joint Minute to be received, discharged the diet of proof, and allowed the action to proceed as undefended in respect of the pursuer's craves 3 to 5, proof to be by way of affidavit evidence. All questions of expenses were reserved meantime. Affidavits were subsequently lodged by the pursuer. On 11 October 2016 the Sheriff interponed authority to the Joint Minute and granted decree in terms thereof. Having considered the affidavits he also granted the pursuer's motion for a non-molestation interdict in terms of craves 3 to 5. The question of expenses was continued to a hearing on 25 October 2016.

[13] At the hearing on 25 October 2016 Mr Macrae, for the pursuer, moved for the expenses of the action to be awarded in favour of the pursuer. He submitted that the normal rule was that expenses should follow success. He submitted that the substance of the action was the pursuer's claims for residence and for a non-molestation interdict. In both these she had been successful. Her claim for residence had been contested and not conceded until

July 2016. The contact which the defender had been awarded was in reality no greater than that which had been offered by way of settlement in February 2016. The action had been triggered by the need for a non-molestation interdict, given the defender's criminal harassment of the pursuer and his breach of orders of the criminal court. The craves relating to the matrimonial home were always ancillary and had been agreed at an early stage. Having been substantially successful, the pursuer was therefore entitled to an award of expenses. Mr Macrae accepted that the defender had a legal aid certificate with a nil contribution. However he submitted that the question of whether expenses should be awarded or not was a prior and distinct question from modification. In any event he indicated that although the pursuer too had a legal aid certificate, this was subject to a substantial contribution. Accordingly were his motion for expenses to be granted, he would oppose any subsequent motion by the defender for modification of the award of expenses to nil.

[14] Ms Samson, for the defender, submitted that the level of litigation set out in the initial writ had been unnecessary, and had been triggered by the pursuer terminating contact. Residence had been properly in dispute, given that during the parties' time together the defender had been the principal carer of the children and the pursuer the principal breadwinner. Ultimately the defender had secured an order for extensive contact with the children, not far short of shared care. His position in relation to residence and contact, and his conduct of the litigation, had not been unreasonable, against a background where the court's principal concern was to determine the best interests of the children, not to decide which of the parties was the 'winner' or the 'loser'. Once legal aid had been granted and a report obtained, settlement in relation to these matters soon followed, with the defender accepting the reporter's conclusions and not seeking to press the matter to a proof.

As regards the craves relating to the non-molestation interdict, Ms Samson advised that the pursuer had not been granted legal aid to resist these. Accordingly they had not been defended in any meaningful way, either on record or otherwise. Further, all the craves relating to the former matrimonial property had been dismissed. The defender had a legal aid certificate with a nil contribution, properly reflecting the fact that he had low income. His only asset was his share of the free proceeds of the matrimonial home, which fell to be divided with the pursuer in any event. In all the circumstances an award of no expenses due to or by would be inappropriate.

[15] I raised the question of when and if it would be appropriate to make an award of expenses in a residence and contact action between two legally aided parties. Mr Macrae suggested that there might be unreported case authority on the point from the Sheriff Principal, but did not have it to hand. Parties' agents having concluded their oral submissions, I therefore made avizandum, but invited Mr Macrae to provide a copy of the authority to which he was referring. On 27 October 2016, having become aware of the case of *Robertson* v *Muir* 2016 Fam LR 194, and conscious that it might have a bearing on the matter, I invited both parties' agents to lodge written submissions in relation to this case and any other relevant authorities, if so advised, within seven days.

[16] Both parties' agents did then lodge written submissions on 3 November 2016. Regrettably, and for reasons that are unclear to me, the file was not returned for my further consideration until 28 February 2017. This has led to the delay in issuing this decision.

[17] The normal rule on expenses is of course that they follow success, the cost of the litigation to fall on the party who caused it: see generally, MacPhail: *Sheriff Court Practice*, 3rd Edition, paragraph 19.07 et seq. However it has long been recognised that some modification of the normal rule on expenses may be appropriate in certain matrimonial

actions. In *Little* v *Little* 1990 SLT 785 the Lord Ordinary found in the pursuer's favour in a divorce action which went to proof on certain questions relating to the division of matrimonial property. Expenses were awarded, but only of the proof and not of the whole action. The Inner House refused to disturb the Lord Ordinary's decision. The Lord President (Hope) observed (at page 790) that:

> "The [Lord Ordinary's] error was said to lie in the failure to apply the normal principle that expenses should follow success. But that is not a principle which can be applied in its full rigour to cases of this type and it may be quite inappropriate to adopt it in a case where much trouble has been taken to achieve a fair division of the matrimonial property between the parties with the full co-operation of both sides. There is much to be said, therefore, for the view which the Lord Ordinary has taken that the parties' conduct rather than the result itself should be the principal criterion upon which to proceed. The whole matter is bound up intimately with the division of the matrimonial property itself and the effects of that division on the resources of the parties."

If a focus on the conduct of parties is the appropriate approach in relation to a dispute about the fair division of matrimonial assets, then *a fortiori* I would expect it to be applicable where the dispute is about where the best interests of children lie in relation to residence and contact. The starting point will be that parties have been unable to agree on these matters. But if they have co-operated in the conduct of the litigation, at least so as to enable these issues to be resolved appropriately and expediently, the issue of who 'won' or 'lost' relative to their initial positions may be of less importance.

[18] In *Adams* v *Adams* (No 2) 1997 SLT 150 the summons contained conclusions for divorce, aliment, custody of children and financial provision, but the contentious matter on which proof was heard was the division of the matrimonial home. The defender moved for expenses. The pursuer submitted that there should be a finding of no expenses due to or by. Lord Gill, then sitting in the Outer House, observed (at page 151) that:

"In cases under the Family Law (Scotland) Act 1985 success may not always be a straightforward matter; but even if one party is clearly successful the court may nevertheless take other considerations into account. In such cases the court's approach to expenses must be more flexible than it would be in a simple petitory action (cf. *Little* v *Little*). In exercising its discretion as to expenses the court may take into account such matters as the reasonableness of the parties' claims, the extent to which they have co-operated in disclosing, and agreeing on the value of, their respective assets, the offers they have made to settle, the extent to which proof could have been avoided and, of course, the final outcome."

Applying these considerations to the facts of the case, his Lordship concluded that while neither party could be criticised for their conduct of the case the proof was necessitated by the pursuer's insistence on two points of principle, on which she failed. Since the defender succeeded on these points he was entitled to an award of expenses, but as in *Little* this was limited to the expenses of the proof, with an award of no expenses due to or by either party being made otherwise. I would observe that just as 'success may not always be a straightforward matter' in a claim for division of matrimonial property, still less may it be in a case where the dispute is between, for example, a crave for an order for residence of children on the one hand, and on the other a final order for contact so extensive as to almost amount to shared care. A party's initial position as regards residence or contact may not be an unreasonable one to take, even if it is ultimately not accepted by the Court as being in the child's best interests. Again, therefore, a need for flexibility in relation to awards of expense is apparent.

[19] In *Hodge* v *Hodge* 2008 Fam LR 51, the Sheriff Principal (Lockhart) applied *Adams*, again in a case where parties had gone to proof on question of the appropriate division of matrimonial property. In this case the pursuer was still awarded a substantial sum, but had failed, in effect, to 'beat the tender', and the expenses of the proof were awarded against her, with both parties bearing their own expenses otherwise. The sheriff's approach was upheld, she having been fully entitled to place weight in reaching her decision on the reasonable efforts made by the defender to reach settlement without the need for proof. Again, if that is true of a financial dispute on divorce, then it seems to me so may it be relevant in the case of a dispute in relation to residence and contact. There may be a reasonable dispute as to these matters at the outset of a case. However if evidence emerges in the course of the litigation, for example a report from an independent child welfare reporter, then the court's attitude to expenses may ultimately have regard to the unsuccessful party's response to that, or in other words, whether he or she accepts it as a basis for settlement as a means to avoid proof, or ignores it and carries on regardless, only ultimately to be awarded no more contact to the parties' children than was previously offered.

[20] In *Sweeney* v *Sweeney* 2007 SC 396 the Inner House again had to consider the approach to expenses following protracted litigation in relation to financial provision on divorce. The Lord President (Hamilton) observed (at paragraph 7) that in such an action:

"Regard being had… to the principles to be applied in determining financial provision, it may be inferred that the court was expected to exercise a discretion based on considerations of fairness and of reasonableness. It is not inconsistent with the principle of fairness that a party who is put to expense in vindicating his or her rights should recover those expenses from the other party; but the 'expenses follow

success' rule, while not irrelevant, should not be applied 'in its full rigour' to disputes about financial provision on divorce... Thus the mere circumstance that a claimant has succeeded in obtaining an award modestly higher than what has been offered, judicially or extra-judicially, by the other party will not ordinarily entitle the successful party to an award of the expenses of process. What has gone before will also be of importance. Parties are to be encouraged to make full disclosure of assets and to agree, where possible, on valuations, thus narrowing as much as practicable the areas of any remaining disputes. Where both parties have co-operated in such matters, the just disposal of expenses may well be of no expenses due to or by. On the other hand where a party takes the other party to proof on an issue or issues on which he is unsuccessful to the extent of the other party's securing an award significantly greater than any outstanding offer, the expense caused to the successful party may well be recoverable by an award… While each party should be explicit as to what would be acceptable by way of settlement, it will be the relationship of the judicial award to the offer of the obligant, as prospective payee, which will ordinarily be of primary significance."

Accordingly an award of expenses in this context is not simply an arithmetical exercise which follows from 'beating the tender' at proof, or in an extra judicial settlement. A final award which is modestly, but not significantly, higher than what might have been earlier offered will not necessarily lead to an award of expenses. Much will still depend on the conduct of the parties.

[21] All the above cases relate to expenses in disputes concerning financial provision on divorce. In *Robertson* v *Muir*, however, the Sheriff Appeal Court had to consider the

application of the principles to a case where the dispute centred on whether the court should make a specific issue order to allow the defender to relocate the parties' child to Australia. The pursuer appeared to resist the application. A proof was assigned. He obtained legal representation, who later withdrew. The proof was discharged. The pursuer obtained new solicitors and instructed counsel. He intimated that he wished to seek residence of the child. A new proof diet was fixed. The pursuer's new solicitors then withdrew from acting. The new proof diet was discharged, and a third diet fixed. The pursuer attended this diet represented by counsel, but on this occasion the defender's solicitors withdrew from acting. This was because she had sold her house, was no longer entitled to legal aid, and was not prepared to pay for legal representation. The defender having indicated that she did not wish to proceed with the action, the pursuer moved for expenses. The sheriff refused this motion. Acknowledging the normal rule, but citing *Adams*, he had regard (i) to his assessment that the defender's claim was a reasonable one, necessitated by the pursuer's objection, and was only abandoned due to the withdrawal of legal aid; (ii) that the pursuer's conduct had considerably lengthened the case and increased the expense; and (iii) that the pursuer had himself introduced a crave for residence but had not proceeded with it.

[22] The Sheriff Appeal Court upheld the sheriff's decision. The discretionary nature of the decision of a sheriff in relation to an award of expenses was stressed (paragraph 17). Importantly, the Court took no issue with the applicability of the observations in *Adams* to an action involving not financial provision but craves for a specific issue order and residence in respect of a child (paragraph 18). The sheriff was held to have been entitled to rely on the factors which he did. He was entitled to find, the action having been dismissed with neither parties' craves having been upheld, that this was a case resulting in divided success (paragraph 21). Implicitly, the Court rejected the submission that the sheriff had not taken

adequate account of the normal rule that expenses should follow success (paragraphs 12, 23).

[23] The present case is an action raised by the pursuer seeking, in summary, residence of the parties' children, a non-molestation interdict, and numerous orders in relation to the parties' home. I have taken some time to set out the background, the procedural history and the authorities citied to me, but having done so my conclusions can be stated fairly shortly. I acknowledge of course the normal rule that expenses follows success. However I consider that in light of the authorities discussed above a more flexible approach is appropriate in the present case. Regard can and in my view should be had to the nature of the real issues in dispute, the reasonableness of the parties' positions thereon, the reasonableness or otherwise of their conduct of the litigation, and the extent to which what was ultimately achieved by the pursuer by way of a final disposal represents clear success in the action, to an extent justifying an award of expenses as regards part or all of it.

[24] As regards residence, this was indeed disputed by the defender in his defences, and was ultimately awarded to the pursuer. However it is clear that from the outset, and standing his significant involvement in caring for children prior to the parties' separation, that the reality of the dispute here was whether the defender should have residence or have contact so extensive that it almost amounts to shared care. Such 'success' as the pursuer achieved by this aspect of the litigation is therefore more marginal than it might otherwise appear. Furthermore I do not consider that the defender's claim for residence, or his conduct of the litigation in this aspect was unreasonable. He instructed solicitors, he attend the child welfare hearings, he sought legal aid, and when that had been obtained he moved the court to order that an independent report to be obtained to take the views of the children on residence and contact. When that report did not support his claim for residence, he

accepted it without the need for proof, and matters were soon settled. In these circumstances, had the residence and contact matters stood alone, I would have made an order of no expenses due to or by either party.

[25] As regards the non-molestation interdict, the pursuer had good grounds to seek this order, standing the defender's criminal conduct described above. A final interdict has now been granted in the terms sought, which represents success in this aspect of the litigation. I note that the pursuer's craves in this regard were never in any real sense opposed by the defender. He had neither legal aid nor private funding to enable him to pay his solicitors to do so. On the other hand, the pursuer was by early 2016 apparently willing to settle the action without seeking orders for final interdict. This was however was prior to the further events of July 2016, which led to the Minute of Amendment. Further, the defender would not consent to a final interdict being granted, and it was therefore necessary for the pursuer to obtain the relevant orders through proof by affidavit. She was put to expense to obtain a remedy necessitated by the defender's conduct and to the grant of which he did not consent. In all the circumstances relative to this aspect of the litigation, therefore, I can see no good reason why the normal rule as regards expenses should not apply.

[26] As regards the numerous craves relating to the parties' home, none of these were substantively defended and none were ultimately granted. The parties appear to have agreed at a relatively early stage in the litigation that the home would require to be sold and accordingly the orders sought became redundant. I was not satisfied on the basis of what I was told that these craves were necessitated by the defender's conduct prior to the raising of the action, but in any event there seems to have been no real difficulty in settling this aspect of matters extra judicially. There was no suggestion that the defender's conduct of this aspect of the litigation was unreasonable. And if 'success' there has been in relation to it, it

is the defender's success insofar as no orders have ultimately been made in the pursuer's favour. I can see no good reason why the pursuer should be entitled to expenses in relation to this aspect of the action.

[27] In all these circumstances, and weighing matters as best as I can, I am satisfied that the pursuer has been successful in relation to her craves for a non-molestation interdict, unsuccessful in relation to her craves in relation to the parties' home, and that such success as she has had in relation to the claims for residence and contact are not such as to justify an award of expenses, due regard being had to the conduct of the parties in the litigation. I will therefore find the pursuer entitled to an award of expenses, but only to the extent of 33% of the whole expenses of the action, as agreed or taxed.

[28] In her written submissions Ms Samson said that if expenses were awarded against the defender these should be modified to nil in terms of section 18(1) of the Legal Aid (Scotland) Act 1986. She submitted that the defender works part time, earning around £9,000 per annum with outgoings of more than £6,000. His only capital asset was his share of equity in the parties' home which was currently up for sale, but which fell to be disregarded by virtue of section 18(3). Mr Macrae submitted that if expenses were awarded against the defender then there was a procedure to be followed in relation to any motion for modification (Act of Sederunt (Civil Legal Aid Rules) 1987, regulation 4), and that the pursuer was entitled to be heard on the motion.

[29] With some reluctance I will accede to Mr Macrae's position. I accept that the question of modification under section 18 is a distinct question for consideration subsequent to the question of whether an award of expenses should be made. I accept that there is a procedure under regulation 4, and that this has not been followed as yet, or at least, the pursuer has not had the opportunity to ask the court to invoke it. I will therefore direct the

defender, if so advised, to lodge a motion for modification within 7 days of the date of issue of this judgment, together with such supporting documentation as regards the defender's income and assets as is sought to be relied on. If no such motion is lodged, today's interlocutor will become final. Should such a motion be lodged, however, the pursuer will have 7 days to lodge any opposition thereto, setting out in detail the grounds of any such opposition, providing any supporting documentation, and suggesting the procedure which she submits the court should follow in ruling on the motion. In the light of all this I will consider whether an oral hearing is required. If not, I will simply issue a further interlocutor ruling on the matter.

[30] My reluctance to follow this course is twofold. In the first place, I did not understand Mr Macrae to have any information to suggest that the defender's financial position was other than that submitted by Ms Samson. If that position can be substantiated by appropriate documentation, then a modification to nil is likely in the end to be appropriate. In the second place, I have awarded the pursuer only 33% of the expenses of process. That being so, a judicial account may be unlikely to be sufficient to cover the pursuer's agents' whole expenses and outlays, with the consequence that a legal aid account may have to be submitted in any event. Given this, the question of modification of the defender's liability for expenses, or opposition to it, may be academic from the pursuer's point of view.

Dundee, 21 April 2017

The sheriff, having resumed consideration of the cause, grants the motion for the defender number 7/3 of process; find no expenses due to or by either party in respect of this motion;

finds the defender liable to the pursuer in the expenses of process, as agreed or taxed, but restricted to 33% thereof, but then modifies this liability to nil in terms of section 18(2) of the Legal Aid (Scotland) Act 1986; and decerns.

Note:

[1] Pursuant to my interlocutor and Note of 28 February 2017, the defender lodged a motion to modify his liability for expenses to nil under section 18 of the Legal Aid (Scotland) Act 1986. The pursuer lodged opposition to that motion, and I heard argument from parties' agents at a hearing on 20 April 2017.

[2] Ms Samson, for the defender, submitted that the matter was straightforward. The defender had a legal aid certificate with a nil contribution. She referred to a printout of the breakdown of the means application in respect of the defender's legal aid application, now production 1/1 for the defender. This showed that he had a total income of £9,828 per annum in the year to 2 October 2016, with allowable outgoings of £6,377 for the same period. His disposable income was thus £3,451 only. Additional vouching for his continuing low income was to be found in the wage slips and bank statement lodged in the second inventory of productions, items 3 to 11, covering the period from December 2016 to the end of February 2017.

[3] The defender's only capital asset was his share of the former matrimonial home. That is the house where the pursuer continues to reside. The Scottish Legal Aid Board had disregarded the defender's interest in the property for the purposes of his legal aid application. It had originally formed part of the subject matter of the action. Parties had entered into a Minute of Agreement on 21 September 2016, now production 3/1 for the pursuer, agreeing that the property should be sold and the free proceeds divided equally.

The asking price was £120,000, of which an estimated £80,000 was equity. If and when the house was sold, therefore, the defender hoped to receive in the region of £40,000. However the property still remained on the market, and as yet there had been little interest in it.

[4] Ms Samson referred me to the terms of section 18 of the 1986 Act. This provides as follows:

> "18. (2) The liability of a legally assisted person under an award of expenses in any proceedings shall not exceed the amount (if any) which in the opinion of the court or tribunal making the award is a reasonable one for him to pay, having regard to all the circumstances including the means of all the parties and their conduct in connection with the dispute.
>
> (3) None of the following, namely a legally assisted person's house, wearing apparel, household furniture and the tools and implements of his trade or profession shall—
>
> (a) be taken into account in assessing his means for the purposes of subsection (2) above; or
> (b) be subject to diligence or any corresponding process in any part of the United Kingdom in connection with any award of expenses in proceedings to which this section applies,
>
> insofar as regulations made under this section may prescribe."

Ms Samson submitted that, on a plain reading, the property in question was still the defender's house. He continued to jointly own it with the pursuer. It therefore had to be disregarded for the purpose of assessing his means for present purposes.

[5] Accordingly although I had by my previous interlocutor and Note found that in principle the defender would be liable to the pursuer for one third of the expenses of the action, Ms Samson submitted that given his very limited means, and his conduct in connection with the dispute, this liability should be reduced to nil.

[6] Mr Macrae, for the pursuer, made four points, which at my request he had set out in his letter of opposition to the motion to modify.

[7] First, he submitted that the defender had failed to comply with the terms of regulation 3 of the 1986 Act of Sederunt (Civil Legal Aid Rules) 1987 SI 1987/492. In particular regulation 3(2) required him to lodge the legal aid certificate issued to him. That had not been done. He was accordingly not entitled to seek modification under section 18.

[8] Secondly, he submitted that I had awarded expenses by my interlocutor of 28 February 2017, and it was now incompetent for me to modify this award. He referred to two decisions of Lord Prosser, sitting in the Outer House, namely *Gilbert's Trustee* v *Gilbert* 1988 SLT 680, and *Stewart* v *Stewart* 1989 SLT 80.

[9] Thirdly, Mr Macrae submitted that having regard to all the circumstances it would not be reasonable to modify the award of expenses against the defender. He did not dispute the defender's low income, nor did he suggest that his conduct of the litigation justified refusing the motion. He relied solely on the defender's interest in the parties' house. In this regard Mr Macrae submitted that 'house' in section 18(3) of the 1986 Act should be construed as confined to a house in which the assisted person currently resides. Accordingly the court should not be bound to disregard such a person's interest in heritable property in which he was not now living. Were it otherwise, submitted Mr Macrae, an assisted person who, for example, owned buy to let properties would be entitled to have these disregarded when considering a motion for modification of expenses. In the present case the defender did not presently live in the house, and his capital interest in this property should be taken into account. Given the amount of his share of the equity, his liability for expenses should not be modified.

[10] Fourthly, Mr Macrae drew my attention to the terms of the Minute of Agreement referred to above. In paragraph 1.iii thereof the parties agreed that

> "…in the event that the Court makes a finding of expenses against [the defender] in respect of the action by [the pursuer] against him and proceeding under court reference F461/15 then there shall be deducted and paid to [the pursuer's agents] from [the defender's share of the net free proceeds of sale] the amount of the expenses due by [the defender] as either agreed or taxed…"

Mr Macrae submitted that on 28 February 2017 I had made a "finding of expenses", that therefore the defender had agreed to pay these in the manner set out in the agreement. He was therefore precluded from seeking modification.

[11] In my view all of Mr Macrae's arguments fall to be rejected. In the first place, he is of course correct to say that regulation 3(2) of the 1987 Act of Sederunt requires the party not initiating the cause to lodge any legal aid certificate issued to him "on receipt". That was not done in the present case. Indeed Ms Samson was unaware until I pointed it out to her at the start of the hearing on 20 April 2017 that it had still not been lodged. She then did lodge the certificate, which bears an issue date of 29 February 2016, and an endorsement to it, issued 18 May 2016. She also accepted, of course, that the defender was in breach of regulation 3(2), at least insofar as the certificate had not been lodged "on receipt". The question is whether this matters for the purpose of a motion under section 18 of the Act.

[12] I consider that Mr Macrae was right to submit that the purpose of regulation 3, and the various requirements it imposes, is to ensure that the party to the action who is not the assisted person knows, at any given point in the proceedings, whether the other party is at that point an assisted person or not, and if so, whether he is assisted in relation to all the craves in the writ or (as in the present case) only some of them. Given the possibility for modification under section 18 of the Act, this knowledge may be of great

importance to the first party in deciding how to conduct the litigation. A failure to comply with regulation 3 is therefore strongly to be deprecated.

[13] However Mr Macrae accepted that no sanction for failure to comply with regulation 3 is specified in the Act of Sederunt. Moreover section 18 of the Act has application in relation to the liability in expenses of "a legally assisted person", that is, a person in receipt of civil legal aid in the proceedings in question: see section 16. As far as I can see, and Mr Macrae was unable to point to anything to the contrary, a party does not cease to be a "legally assisted person" simply because they have failed to comply with the requirement to timeously lodge their legal aid certificate in accordance with regulation 3. Therefore such a failure cannot in itself mean that they are not entitled to seek modification.

[14] That does not mean that a breach of regulation 3 can have no relevance in this context however. It seems to me that such a breach might well be one of "all the circumstances" to which the court can have regard for the purposes of section 18(2). I do not think that this means that the court should, in effect, automatically penalise the breach of regulation 3 by refusing modification. But in a case where the other party can point to some prejudice, for example, some uncertainty in their conduct of the litigation arising from the lack of timeous notice which compliance with regulation 3 would have given, then I would have thought that the terms of section 18(2) would permit this to be taken into account. In such circumstances there might be justification to refuse modification, in whole or in part.

[15] In the present case, however, and as Mr Macrae fairly accepted, the defender's breach of regulation 3 did not prejudice the pursuer in her conduct of the litigation. He accepted that he had had intimation of the grant of legal aid direct from the Scottish Legal

Aid Board, and indeed that in preparation of certain court documents thereafter he had designed the defender as an "assisted person". Although the defender did not get legal aid to defend all the craves of the action, Mr Macrae was sufficiently aware of those parts for which he did not have assistance. Furthermore, this was not a case where the defender's legal aid certificate was ever suspended or withdrawn, for example due to fluctuations of income or misconduct. In the circumstances the pursuer and her agents were well aware that the defender had been a "legally assisted person" throughout the whole period since the end of February 2016.

[16] In the circumstances, having regard to the breach of regulation 3, but in the absence of any identifiable prejudice to the pursuer arising therefrom, I am not willing to refuse or restrict modification on this ground.

[17] As regards Mr Macrae's second point, I consider that this misunderstands what I did by my interlocutor and Note of 28 February 2017. It is true that I set out an interlocutor finding the defender liable to the pursuer in the expenses of process, restricted to 33%. However I made clear in my Note (see paragraph 29) that this was subject to any motion being made to modify in terms of section 18. The context was, of course, that Ms Samson had made a written motion for modification, but that Mr Macrae had submitted that this should not be dealt with without due procedure (paragraph 28). At his insistence I therefore continued the question of modification and invited a formal motion in this regard, if so advised. It is abundantly clear that the interlocutor finding the defender liable to the pursuer in expenses would become final if, and only if, no motion for modification was made within seven days. Such a motion was made and accordingly the interlocutor did not become final. In these circumstances I consider Mr Macrae's point to be without foundation.

[18] Further and in any event, the authorities which he cited do not properly support the point which he sought to make. In the first place they seem to me to turn very closely on the particular provisions of the relevant rule of the Court of Session, for which there is no equivalent in the Sheriff Court Rules. In the second place, in both *Gilbert* and *Stewart*, the Lord Ordinary had not only pronounced an interlocutor finding the assisted person liable for expenses, he had also decerned, as required by the rule. The point about decerniture, of course, is that it is used:

> "…as a word of style for two purposes, namely to mark the fact that the interlocutor is final on the subject with which it deals, and as showing that the interlocutor in which it occurs is meant to be and is extractable" (Macphail, *Sheriff Court Practice*, (3rd Edition), paragraph 17.15)

[19] I did not decern for expenses against the defender on 28 February 2017. It was clear that the interlocutor which I produced was neither final on the subject with which it dealt, nor meant to be extractable, in that it expressly left open, indeed invited, a motion for modification to be made.

[20] In these circumstances, I do not accept that modification as now sought would be incompetent by virtue of anything contained in the interlocutor or Note of 28 February 2017.

[21] As regards Mr Macrae's third point I accept, in the first place, that the time for considering whether to modify an award of expenses under section 18(2) is the time when the motion to modify is made. The court must have before it sufficient information to determine whether or not it would be reasonable to modify: see *Ferguson* v *Povah* 1993 SCLR 634 per Sheriff Stoddart at 639; *Masson* v *Masson* 2001 Fam LR 138 per the Sheriff Principal at paragraph 25.12. Neither party's agent attempted to estimate what the defender's liability would be if modification was refused, but it would clearly run to

several thousand pounds. The defender has a legal aid certificate with a nil contribution, and his financial circumstances do not appear to have materially changed since the certificate was awarded. Absent the question of his interest in the parties' house, Mr Macrae did not suggest that it would be reasonable to expect him to pay any of the expenses.

[22] I was referred to no authority on the point but it seems to me that the defender's interest in the parties' house falls to be disregarded by virtue of section 18(3). It is true that this provision refers to a legally assisted person's "house", and not their "home" or their "only or principal house". But the context within which the word "house" appears, that is, along with "wearing apparel, household furniture and the tools and implements of his trade or profession", does suggest to me a level of personal connection and usage which may well be inconsistent with Mr Macrae's example of ownership of a buy to let property. On the other hand, while the house must be his, there is no express requirement that the legally assisted person be actually residing in it at the time the motion for modification is made.

[23] In the present case there is no question but that the house is jointly owned by the parties, and to that extent it is the defender's house. That he lives in rented accommodation elsewhere does not change this. It was his home in the recent past, and has only ceased to be so because of the separation of the parties. It was part of the subject matter of the action, even though this aspect was readily settled by Minute of Agreement. The defender's relationship to the house is plainly not akin to a buy to let situation, where heritable property is purchased and owned primarily if not exclusively as an investment. It seems to me, therefore, in the circumstances, that proper application of the terms of

section 18(3) means that I must not take into account the defender's interest in the equity of the property at the House.

[24] That being so there is no substance to Mr Macrae's opposition to modification on this ground either.

[25] As for Mr Macrae's fourth point, he accepted in argument that this was in reality dependent on his second point. The purpose of the clause in the Minute of Agreement is not to make provision about liability for expenses, but simply to provide a mechanism by which any expenses ultimately awarded would be paid, that is, by deduction from the defender's share of the free sale proceeds of the house. As I did not, for the reasons already explained, make a final decision awarding expenses against the defender on 28 February 2017, there is nothing in the Minute of Agreement precluding the defender seeking modification. Put another way, if his motion in this regard were to be granted, he would have no liability for expenses and the relevant clause in the Minute of Agreement would have no effect.

[26] For all these reasons, therefore, I shall grant the defender's motion and modify his liability for expenses, which would otherwise have been 33% of the taxed or agreed expenses or process, to nil.

[27] There remains the question of the expenses of the motion itself. I had some concerns about this. At paragraph 30 of my Note of 28 February 2017 I specifically raised the point that, in effect, opposition to a motion to modify might be academic. That was because a judicial account restricted to 33% of taxed expenses might well be less than the amount recoverable under a legal aid account. Mr Macrae, in the course of his submissions, accepted that this was so, and that he would intend to submit a legal aid account. I therefore questioned whether his opposition to the motion was proper, given

(a) that even if successful, it could be of no benefit to the pursuer, and (b) that it was being maintained at public expense, given that he was still instructed by the pursuer as a legally assisted person. In the light of these considerations, and no doubt encouraged by the mood music coming from the Bench, Ms Samson tentatively submitted that a finding of expenses personally against Mr Macrae might be appropriate.

[28] Mr Macrae, as I understood him, accepted that his opposition to the motion was likely to be academic from the pursuer's point of view. Her legal aid contribution, he said, was nearly £3000 and whether or not modification was granted there was no prospect of his legal aid account being less than that figure. Accordingly she could not expect any refund of her contribution. However Mr Macrae resisted the suggestion that he should be personally liable for the expenses of the motion. He pointed out that if modification was refused then the Scottish Legal Aid Board would have entitlement to seek a judicial account and to recover what they could from the defender under it. To this extent he was acting in the public interest in opposing the motion. Moreover the defender had not intimated the motion on the Scottish Legal Aid Board itself, so they were not present to oppose it.

[29] I am satisfied that this is not a case where I should make an award of expenses against Mr Macrae personally. Given my decision of 28 February 2017, and in particular my comments at paragraph 30 of the Note, a more pragmatic approach would have suggested that public money should not have been spent in opposing and arguing this motion. Alternatively, had Mr Macrae felt that the public interest required opposition to be made, it would have been open to him, not only as an officer of court, but as a solicitor himself instructed under a legal aid certificate for the other party, to intimate the motion on the Board, or at least to invite the Court to do so. However ultimately I do not

consider that Mr Macrae's actions justify an award of expenses against him personally, having regard to the circumstances in which this is generally done (see *MacPhail*, op cit., at paragraph 19.23). My impression of Mr Macrae, from this case and others, is that he is an experienced and conscientious solicitor, resolute in the defence of his clients' interests. The most that I can say, I think, is that it is this latter quality which may have led to a degree of over enthusiasm on Mr Macrae's part in seeking to minimise his client's contribution to legal aid, in a case where, after all, she was substantially successful.

[30] In all the circumstances, both parties being legally aided, I will find no expenses due to or by either party in relation to the defender's motion for modification of liability for expenses.