EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 1

XA57/16

Lady Paton

Lord Malcolm

Lord Glennie

OPINION OF THE COURT

delivered by LORD GLENNIE

in the appeal

by

SM

Defender and Appellant

against

CM

Pursuer and Respondent

Defender and Appellant: McAlpine; Aitken Nairn WS

Pursuer and Respondent: Wallace; Blackadders

5 January 2017

Introduction

[1] This is an appeal by the defender and appellant against a finding of contempt made against her on 24 October 2013 by the sheriff sitting in Perth, and a sentence of 3 months imprisonment imposed on her in respect thereof on 20 May 2015, over a year and a half later. Having heard argument on both sides, we have concluded that we should quash that finding of contempt. It follows that the sentence of imprisonment falls away; but even if we had not quashed the finding of contempt we would, in any event, have quashed the sentence of imprisonment.

[2] Every case of contempt of court turns essentially on its own facts. However, this case raises issues of practice and procedure of more general application. It also gives rise once again to real concern about the time taken in the Sheriff Court to determine issues of contact and other matters concerning young children. We deal with these matters as they arise in the course of this judgment and in a postscript at the end.

[3] We should note that this appeal began as a petition to the *nobile officium* in which the defender and appellant was the petitioner. The sheriff provided a Note in that process giving a summary of what had happened in the contempt proceedings (which had already been covered in her judgment) and going on to explain the factors which had informed her decision on sentencing. Following the decision in *Shepherd* v *Letley* [2015] CSIH 87, that petition was dismissed of consent and, in effect, superseded by this appeal. As a result of this procedure, this Court has had the advantage not only of the detailed account of the proceedings set out in the sheriff's judgment under appeal but also of her further observations contained in the Note.

Background

[4] The defender and appellant is the mother of a child, C, who was born in January 2009. The pursuer and respondent is the father. It is convenient to refer to them respectively as "the defender" and "the pursuer", the roles they played in the proceedings in the Sheriff Court. They separated prior to the birth of the child. Since his birth, the child has been living with the defender.

[5] In January 2010, after some non-residential contact with the child, the pursuer commenced proceedings in the Sheriff Court seeking orders under the Children (Scotland) Act 1995 for parental rights and responsibilities and for more extensive contact with C than previously allowed. We shall call this "the contact action".

[6] We are not here concerned with the merits of the contact action; but that action forms an essential part of the background to this appeal, both in establishing the interim contact orders of which the defender was alleged to be in contempt and in contributing to the procedural problems which have led to this appeal. It is necessary to summarise steps taken in the contact action in a little detail.

Procedure, Interim Contact Orders and Allegations of Contempt

[7] The contact action was sisted immediately after it was raised in order to allow attempts at mediation. Mediation having failed, the sist was recalled in June 2010. Thereafter a number of interlocutors were pronounced providing for interim contact between the pursuer and the child on particular dates and between particular times.

[8] An interlocutor of 16 July 2010 stipulated for contact between the pursuer and the child for two hours every Sunday morning at the home of the defender. On 20 October 2010 the pursuer complained by motion in the contact action that the defender was in contempt of court by reason of her failure, in breach of that interlocutor, to permit or facilitate contact on two occasions in August and a further two occasions in October. Arrangements for contact were later varied by an interlocutor of 3 December 2010 which provided for contact to take place for two hours every Saturday. On 23 February 2011 the pursuer made new complaints of contempt, again by motion in the contact action, to the effect that the defender had failed to permit or facilitate contact on 28 December 2010 and 5 February 2011. On 4 March 2011 the sheriff ordered that the allegations of contempt be dealt with by Minute and Answers, with a hearing fixed for 19 May 2011. We shall refer to the proceedings commenced by Minute as "the contempt proceedings".

[9] The Minute was lodged on 18 March 2011. The hearing fixed for 19 May was discharged by agreement on that day, but orders were made allowing the defender

further time to lodge Answers to the Minute, followed by a period for adjustment and the lodging of a closed record. A hearing on the Minute and Answers was of new fixed for 11 August 2011.

[10] On 15 July 2011, at the hearing of a motion by the pursuer in the contact action, the contempt hearing fixed for 11 August was discharged on the application of the defender because of the impending absence on holiday of her agent. The sheriff dealing with the matter decided that there should be an evidential Child Welfare Hearing in relation to the contact action and, simultaneously, a hearing in the contempt proceedings, both to take place on 29 July and 1 and 2 September 2011. No objection was taken to that course.

[11] In August 2011 the defender's agent withdrew from acting. Her new agent attended the hearing on 1 September 2011 and, on grounds of her own late instruction and the defender's illness, persuaded the sheriff to discharge both hearings. They were re-fixed for 1 December 2011.

[12] Meanwhile, in the contact action, an interlocutor was pronounced on 27 May 2011 fixing contact between the pursuer and the child for four hours every Saturday between 10.30 am and 2.30 pm. In due course the pursuer complained that in breach of this interlocutor the defender had failed or refused to facilitate contact on 8 October 2011. This complaint was first raised in the contact action but was at some point amended in to the Minute for contempt (at crave G and Statement 8) and the Answers previously lodged by the defender were amended to answer it.

[13] On 1 December 2011 the sheriff *ex proprio motu* discharged both the evidential hearing in the contact action and the hearing in the contempt proceedings. He sisted the contempt proceedings. In the contact action, having discharged the evidential hearing, he issued an interlocutor fixing contact between the pursuer and the child for seven hours every Saturday between 10 am and 5 pm. The contact action called at an Options Hearing on 10 February 2012. A diet of proof in the contact action was fixed for 20 April 2012 but that diet was discharged by agreement because at that time contact appeared to be operating relatively well. The contact action was sisted for mediation in July 2012. That sist was recalled in August or September 2012 in

light of complaints by the pursuer that, in breach of the interlocutor, the defender had failed or refused to facilitate contact on 11 August 2012. That complaint, and further complaints that the defender had failed to facilitate contact on 7 April, 1, 8, 15, 22 and 29 September and 6 October 2012, were at some point amended in to the Minute for contempt (craves H, I and J and Statement 9) but were never formally answered by the defender.

[14] On 12 October 2012 the sist was recalled in the contempt proceedings and a hearing fixed for 10 January 2013. At the same time a diet of proof in the contact action was fixed for that same date.

Proof in the Contact Action and the Contempt Proceedings

[15] The proof in the contact action and the hearing in the contempt proceedings – we shall refer to this combined hearing as the proof, the hearing or the case without intending any distinction between those terms – commenced on the afternoon of 10 January 2013. This was, as we understand it, the first time the case had appeared before that particular sheriff. She was at the time a visiting sheriff at that Court. We mention these matters in fairness to her, since the procedure of having the contact action and the contempt proceedings heard together (albeit not formally conjoined), had already been decided upon without objection by either party by the time she first saw the case. Further, being a visiting sheriff, she was only available for limited periods; and once the case had commenced before her such further hearings as were required to complete the evidence and submissions had to fit around her availability.

[16] The pursuer commenced examination in chief that afternoon. It became apparent that further time was required. Parties were agreed that four further days would be sufficient. After a procedural hearing in March, it was ordered that the proof would continue on 2, 3, 4 and 5 July 2013, those being the earliest dates on which the sheriff was available. However, even before the proof resumed on 2 July 2013, parties came the view that yet further days would be needed.

[17] Before adjourning the case, the sheriff pronounced an interlocutor making further provisions for contact between the pursuer and the child. The pursuer subsequently complained that in breach of that order the defender had failed or refused to facilitate contact on Saturday 6 April and Sunday 7 April 2013. This complaint was amended in to the Minute for contempt (at Crave K and Statement 10) but, as with the previous amendment, was never formally answered by the defender.

[18] Accordingly, when the case next came before the sheriff in July 2013 the Minute and Answers in the contempt proceedings were in the form of an Open Record, containing allegations of contempt in respect of matters which had arisen after the hearing in those proceedings had begun and which remained unanswered by the defender.

[19] The sheriff was undoubtedly aware of her case management responsibilities: cf *NJDB* v *JEG* 2012 SC (UKSC) 293. Before the case resumed on 2 July 2013 she sought to clarify with agents in chambers the precise matters in dispute and the evidence proposed to be led. She records that "both solicitors were in agreement that the evidence to be led would be evidence in respect of the principal contact action and in respect of the contempt minute". She encouraged agents to consider what matters could be agreed in a Joint Minute of Admissions. S, who appeared on behalf of the defender, suggested that agreement could be reached in a Joint Minute confirming that contact had not taken place on the various dates which were the subject of the Minute for contempt. The sheriff sought to identify the issues as regards contact and reminded parties of the need to confine evidence to relevant matters. When the case called in open court she summarised the effect of that discussion. The proof then proceeded with the pursuer leading his witnesses. That continued until 5 July 2013, the last day of the four days allocated in that session, at which time parties estimated that an additional five days would be required.

[20] The case resumed on 7 August 2013. The pursuer was recalled to give evidence in relation to contact which had taken place in the meantime. He then closed his case. At this point S, for the defender, made a motion to the effect that it

was incompetent to conjoin the contact action with the contempt proceedings and, further, that it was incompetent for the same sheriff to hear proof in respect of both. She supported that motion by reference to a judgment of Sheriff Robertson in *NJDB* v *JEG* (F12/08, unreported, 22 January 2009) and to an opinion of counsel (which was not shown to the Court). Sheriff Robertson's judgment emphasised (at paragraphs 25-33) the distinctions between a contact action and contempt proceedings, in terms of the burden and standard of proof and the non-compellability of the alleged contemnor in contempt proceedings and suggested that they should seldom if ever be heard together. In the present case, however, the sheriff refused S's motion, distinguishing *NJDB* on the basis that in the case before her the contact action and contempt proceedings had never been conjoined, and (understandably) placing considerable weight on the fact that the proof had proceeded for five days already on the agreed basis that the evidence led would be evidence in both the contact action and the contempt proceedings. She considered that had the process being conjoined and had there, in consequence, been a requirement for her to issue one judgment, that might have presented difficulties; but those difficulties could be avoided, she thought, if she were to issue two distinct judgments, making findings in fact relevant to each separate process and applying the appropriate standard of proof to each. So far as concerned the question of compellability, the sheriff appreciated the "potential anomaly", as she described it, of the defender wanting to give evidence in the contact action but not in the contempt proceedings, but took the view that any potential prejudice to the defender could be avoided if she were to indicate whether she elected to give evidence in respect of the contact action only or in respect also of the contempt proceedings.

[21] The pursuer's case concluded on 8 August 2013. The defender elected to give evidence only in respect of the contact action. Accordingly, when she was asked questions in cross-examination about matters relating to the alleged contempt, the sheriff warned her that she need not answer any question that might expose her to a risk of a finding of contempt. At the close of the pursuer's own evidence, S asked for

an adjournment in order to consider whether to call any of the witnesses on her witness list. In the event she elected not to do so.

[22] The Joint Minute anticipated at the discussion in chambers prior to the case calling in Court on 2 July 2013 was ultimately forthcoming in a form agreed between agents on 8 August 2013, prior to or immediately following the completion of the evidence. It was agreed in the Joint Minute that contact due in terms of the interlocutors issued by the Court had not taken place on the 17 occasions complained of by the pursuer. There was no admission of culpability in respect thereof but neither was there any agreement about the reasons for contact having been missed.

[23] After the conclusion of the evidence written submissions were lodged on behalf of both parties. These were supplemented by oral submissions on 19 August 2013.

The Judgments

[24] On 24 October 2013 the sheriff issued two judgments, one in respect of the contact action and the other in respect of the contempt proceedings. We need not say anything about the judgment in the contact action. So far as concerns the contempt proceedings, the sheriff considered carefully the evidence and surrounding circumstances established by that evidence in relation to each of the 17 occasions on which contact which ought to have taken place had been missed. She rejected the pursuer's case in respect of 12 of those occasions to the extent that, although she found the defender to have been generally obstructive, she did not find it proved beyond reasonable doubt that her failure to allow access on those occasions amounted to a contempt of court. However, she found that the defender's failure to facilitate contact on five occasions when contact was missed, namely 8 October 2011, 7 April 2012, 11 August 2012, and 6 and 7 April 2013, was "wilful, inexcusably careless or [constituted] a flagrant disregard for the authority of the Court" and that, as a result, the defender was in contempt of court. She pointed to the absence of any explanation from the defender for the missed contact on some of these occasions.

The sheriff had earlier indicated that she accepted a submission made on behalf of the pursuer that the defender should not enjoy any advantage as a consequence of her decision not to give evidence or to call any witnesses on her behalf. By that she meant that she could not treat submissions by S on behalf of the defender as evidence to explain why contact did not take place or to excuse the failure. As she said: "those submissions are not evidence, have not been agreed or admitted and have not been subject to cross-examination."

Sentence

[25] Having made these findings of contempt, the sheriff ordained the defender to appear on 15 November 2013 to determine the question of punishment. On that day she adjourned the case for a criminal justice social work report to be prepared. That report was available on 20 December 2013, but having heard from the defender's newly appointed solicitor (S was no longer acting for her) she deferred sentence until 17 June 2014 for the defender "to obtemper the Court's interlocutor of 24 October 2013 and to be of good behaviour." The interlocutor of 24 October 2013 made further provision for contact between the pursuer and the child. The sheriff called for a supplementary criminal justice social work report to be available at that time.

[26] When the case called again on 17 June 2014 the sheriff was told that the petitioner had not allowed contact to take place other than on one occasion. There was a Minute to Vary outstanding in the Alloa Sheriff Court in terms of which the parties were seeking to identify and agree on specific dates for contact. Given the "extensive and entrenched difficulties in the operation of contact and the number of instances of contempt" the sheriff considered it "prudent" to defer sentence for a further six months until 17 December 2014.

[27] When the case called again on 17 December 2014 the sheriff was told that no contact had taken place in September of that year. Because there were still proceedings taking place in respect of the Minute to Vary, she deferred sentence again until 1 April 2015; and on that date, because the requested supplementary criminal justice social work report was not then available, "and to allow the

[defender] further opportunity to obtemper the Court's order", she deferred sentence again until 20 May 2015. The supplementary criminal justice social work report was then available. It narrated failures on the part of the defender to co-operate with social workers in terms of a child protection plan. The sheriff commented that the defender had, without any satisfactory explanation, denied the social workers weekly access to the child. She noted that the defender had in various ways breached the court's order of 24 October 2013 (this was to do with notification of a new address for the defender in Scotland). Having had regard to the defender's personal circumstances and the potential impact on the children, she imposed a custodial sentence "with reluctance, as a last resort and after repeated warnings to the [defender] of the consequences of her conduct." The court, she said, had done everything in its power to allow the defender to co-operate and to mitigate the potential punishment for her contempt. She continued in this way:

> "After initial compliance, it seemed to me that the [defender] not only failed to obtemper the contact order but other aspects of the Court order. The [defender's] attitude to Court orders and the Court process is demonstrated by the instruction of signature of a Joint Minute agreeing contact to settle a proof and the immediate lodging thereafter of a Minute and motion to vary contact to nil.
>
> Having regard to the foregoing conduct of the [defender] since sentence was deferred in June 2014, the numerous and what I considered blatant failures to obtemper the Court's earlier orders as established at proof and the repeated failure to allow social work access to the child for child protection purposes, I determined that the [defender] had demonstrated continuing disregard for the Court's authority and that a custodial sentence was appropriate. To reflect the serious nature of the contempt, I considered that the maximum period of three months was merited."

As is apparent from the two paragraphs taken together, the reference to the Joint Minute and Minute at the end of that first paragraph was a reference to the defender's conduct in the contact proceedings in the period after the sheriff had found the defender to be in contempt.

Evidence Lodged in the Appeal

Complaints about S's Handling of the Case

[28] We have already noted that the defender appointed a new solicitor to represent her at the sentencing diet. The reason for this appears from the documents lodged in process in this appeal. The defender was unhappy not only about the outcome of the proceedings but also about the manner in which they had been handled by S. In light of that S took the view that she should withdraw from acting – and indeed that the firm as a whole should withdraw from acting – so that any agent acting for the defender from then on should feel free to criticise her handling of the proof. The defender made a complaint to S's firm. That complaint was upheld, in some respects at least, by the business partner of S's firm. In particular, he upheld a complaint that S had incorrectly executed an affidavit by the defender in October 2012 in such a way as to suggest that the defender had been in Scotland at the time it was sworn when in fact she had not. The precise details do not matter, but the contradiction between what appeared from the affidavit and the defender's own evidence that she had not been Scotland at the time clearly caused the sheriff to form an adverse view of both her credibility and reliability. The matter was touched upon by the sheriff in her judgment in the contact action. Although it was not specifically mentioned in the judgment in the contempt proceedings, it is difficult to imagine that it did not play some part in the sheriff's assessment of the defender when she came to consider the explanations proffered on her behalf for the missed contacts. In his letter to the defender, the business partner of the firm noted that he was unable to make a decision on all the individual issues raised by the defender because S had failed to provide him with a response to the complaint. A subsequent complaint by the defender to the Law Society of Scotland raising similar issues was

upheld. That dealt specifically with the complaint about the preparation of the affidavit and the Tribunal noted that in the contact action the sheriff had treated this inconsistency as relevant to an assessment of her other evidence.

[29] We were told that disciplinary proceedings are not yet concluded. In light of that we think it undesirable to go into too much detail about the complaints made by the defender against S. In the following discussion we shall confine ourselves to matters which we regard as essential to a resolution of this appeal.

The Defender's Affidavit

[30] The defender swore an affidavit on 15 September 2016 for the purposes of this appeal. We do not propose to set out the contents in any detail. What follows is intended simply to give the flavour of the defender's case. In the affidavit the defender explains that she had had problems in getting hold of her solicitors at relevant times before and during the proof. It appeared to her that S was unwell during the first week of the proof and that this affected her conduct of it. She took detailed notes throughout the hearing and provided S with a list of points that she wished to be put in cross-examination but S did not put these points, instead putting other points for which she was pulled up by the sheriff. On 17 July 2013, after the first five days of the hearing, S emailed her expressing some concerns about the procedure which was being followed. That email, which was attached to the affidavit, ended with a question by S as to whether it was the defender's understanding that the sheriff was continuing to hear the contempt matter "as frankly I am unsure …". On 2 August she was sent an email asking for her comments about a request from the pursuer's agents to admit that contact had not taken place on certain dates. By email of 6 August 2013 S sent her an Opinion from an advocate indicating that the process which had been followed in the proceedings in court to date (conducting the hearings in the contact action and the contempt proceedings at the same time) had not been appropriate. In that same email S said that she had been discussing the case with her business partner and that neither the defender nor her mother should need to give evidence at the proof.

[31] Mr McAlpine, who appeared for the defender, submitted that this last point was surprising; if it was to be admitted that contact as ordered by the court had not taken place on certain dates, then a failure to give evidence explaining why it had not taken place would almost certainly lead to a finding of contempt. Further, under reference to the advice that neither she nor her mother would need to give evidence at the proof, the defender said in her affidavit that as far as she was aware her mother had not even been cited or precognosed.

[32] Perhaps the most striking thing to emerge from the defender's affidavit, if it is to be believed, is that until the morning on which she gave evidence in relation to the contact action, she had been unaware that formal contempt proceedings were being heard alongside the contact action. She had thought that the proof was about contact only and had thought that the word "contempt" simply related to the fact that contact sessions had been missed. She had not understood that contempt was a separate issue to be determined by the court. She had last seen the pleadings in the contact action back in September 2011 but had never seen "the contempt papers" (i.e. the papers in relating to the contempt proceedings) until that morning. When she went into the witness box she was asked a few questions by S about contact. When she was questioned by the pursuer's solicitor she was advised by the sheriff that she need not answer any questions concerning the alleged contempt and, on the advice of S, she refused to do so. She says that had S not given her this advice she would have been able to give explanations concerning each of the occasions on which the sheriff ultimately found the allegation of contempt proved. Those explanations are given later in her Affidavit but it is unnecessary to set them out in any detail here. We cannot say what the sheriff would have made of them had they been given in evidence by the defender. Suffice it to say that they were explanations which went directly to the allegations of contempt. Had the sheriff believed them, she would probably not have found the defender to have been in contempt; and even if the sheriff had not believed them, they might have raised sufficient doubt in her mind to prevent her being satisfied that contempt was proved beyond reasonable doubt.

[33] The defender attached to her affidavit an email from S dated 13 November 2013, some two days before the first sentencing diet, at a time when she had ceased to represent her. In that email she says that a finding of contempt would not affect the defender's ability to work in education. It would be "analogous with a solicitor caught speeding". She went on to say that all the sheriff wanted her to do was to turn up and give her address; and she reassured her that she would not be facing a jail sentence.

Written Submissions by S

[34] At the conclusion of the evidence both agents lodged written submissions which were then amplified at an oral hearing. Certain passages from the submissions lodged by S on behalf of the defender are instructive having regard to the criticisms made of S in the defender's affidavit. On the first page, S submits that any failure of contact on the dates agreed in the Joint Minute of Admissions was neither wilful, intentional, inexcusably careless nor a flagrant disregard for the proper administration of justice. She then says this:

> "… It is respectfully submitted that the reasons for missed contact is (*sic*) as per the open record dated 25/06/2013.
>
> It is further submitted that the failure to answer statement of facts number 9 and 10 is solely the fault of the Defenders solicitors abscence (*sic*) from the office due to ill health, the circumstances of which were explained to the Court. It is therefore respectfully submitted that the Court be invited to include an answer for both these statements of fact that 'no admission is made'. …"

There are a number of points arising from this. First, the reference to S's ill health to explain why no answers were given to Statements 9 and 10 supports the defender's own evidence in her affidavit that S's conduct of her defence was affected by her ill health. Second, simply to refer to the reasons given in the pleadings is clearly

inadequate in the absence of evidence supporting those reasons. The same is true of explanations given further on in the submissions, such as the suggestion that contact in April 2013 was missed because the defender "got the weeks wrong". The sheriff was bound to take the view, as she did, that the reasons given in S's submissions could not be treated as evidence. Third, the suggested answer to be given in respect of Statements 9 and 10, that "no admission is made", is both contradictory and inadequate given that the fact that contact ordered by the court had not taken place was by then a matter of admission in the Joint Minute. In effect the suggested answer to Statements 9 and 10 was no answer at all and failed to put forward any explanation. S's written submissions did provide certain explanations as to why contact was missed on various occasions, explanations which the sheriff, correctly, was not prepared to treat as evidence but which are consistent with the defender's affidavit evidence of what she would have said had she been called to give evidence on these matters. Accordingly this supports the defender's case that she did give S relevant information which could have been put before the Court in the contempt proceedings, that the explanations for missed contacts have not just been made up after the event and that the failure to give evidence on such matters was the result of a decision made by or on the advice of S rather than because the defender had no relevant evidence to give.

Mr Morris's Affidavit

[35] The pursuer lodged in process for the purpose of the appeal an affidavit sworn by Mr Morris, the solicitor who had acted for him at the proof before the sheriff. With regard to the defender's suggestion that she had not understood that formal contempt proceedings were being heard alongside the contact action, Mr Morris pointed out that she had been in Court on a number of occasions between February 2010 and the beginning of the proof on 10 January 2013 at which the procedure had been laid down. On the day the proof started, the defender was present in Court during discussions about future procedure. On 2 July 2013, after discussion between the sheriff and agents in the sheriff's chambers about how the

proceedings were to be managed, there was a brief discussion in Court in which the sheriff pointed out that "Separately there are contempt proceedings …". Under reference to a statement by the defender in her affidavit that the Joint Minute was agreed without her knowledge or authority, Mr Morris pointed out, under reference to a copy of the relevant document, that she had in fact herself taken a pen and "scribbled through" two sections of the text of the draft before it was agreed. Mr Morris also identified other inconsistencies, as he saw it, in the defender's affidavit when compared with his recollection of what had occurred in Court.

Submissions

[36] On behalf of the defender, Mr McAlpine advanced three propositions. First, while he stopped short of submitting that it was incompetent to run the contact action concurrently with the contempt proceedings before the same sheriff, he did submit that that course had "afforded an opportunity for substantial injustice to be done" and that substantial injustice had in fact been done in the present case. He referred in this context to the observations of the Lord Justice-Clerk (Carloway) in *AB and CD* v *AT* 2015 SC 545 at paragraphs [3]-[9] concerning the need for clarity and a certain degree of formality in contempt proceedings.

[37] Second, Mr McAlpine submitted that the defender had suffered a miscarriage of justice in relation to the finding of contempt as a result of defective representation before the sheriff. It was true that contempt proceedings were *sui generis* (see *HMA* v *Airs* 1975 JC 64, 69 and *AB and CD* v *AT* (supra) at paragraph [3]), being neither civil nor criminal, but in many respects – such as burden and standard of proof, compellability of witnesses and the potential for deprivation of liberty – they had much in common with criminal proceedings. Accordingly the approach in *Anderson* v *HMA* 1996 JC 29 should be applied by analogy. Under reference to the observations of the Lord Justice-Clerk (Gill) in *Grant* v *HMA* 2006 JC 205 at paragraph [25], he submitted that in this case the defender could show that her defence as shown to her agent was not properly put before the Court and that in consequence there had been a miscarriage of justice. This was a case in which it

could be shown that, albeit through no fault of her own, the sheriff had failed to consider relevant evidence and the court was therefore entitled to interfere with the sheriff's findings of contempt: *Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203 at paragraph [67].

[38] Third, Mr McAlpine submitted that, even if he was wrong about that, the sentence selected by the sheriff was excessive and, separately, took into account matters, such as her subsequent attitude to contact arrangements, which were irrelevant to the question of what punishment was appropriate for the specific instances of contempt found by the sheriff after proof to have been established.

[39] For the pursuer, Mr Wallace invited us to refuse the appeal. He rejected the suggestion that there was anything prejudicial about the contact action being heard concurrently with the contempt proceedings. So far as concerned the defective representation case, he submitted that *Anderson* v *HMA* applied only to criminal proceedings. If the court took the view that the contempt proceedings were quasi criminal, then it would have to look at the matter afresh and consider how and to what extent the *Anderson* principles should apply. But before an appeal could succeed on this ground it would have to be shown that the defender's representation at the proof was defective in the manner described in *Anderson*. Further, as was made clear in *Anderson* at page 45A-C, it was essential that those against whom allegations of defective representation were made should be given a fair opportunity to respond in writing before the court heard the appeal. That had not been done. In light of that, the court could not find in this case that there had been defective representation; and unless it was found that there had been defective representation, the appeal could not succeed on this ground.

[40] It was not accepted that the defender had been the victim of defective representation. There was a dispute about the defender's understanding of what was going on at the hearing. There was no reason to doubt that the defender was fully informed of what was happening. It was by no means clear that decisions made by her agent at the hearing, and in particular the decision not to adduce her evidence or call any witnesses in relation to the allegations of contempt, were made

otherwise than with her full and informed consent. There was nothing to suggest that S was acting outwith her authority at any time.

[41] So far as concerned sentence, Mr Wallace was content to rely on the reasons given by the sheriff as set out in her Note. The sentence of three months imprisonment was not unreasonable in all the circumstances.

Discussion

[42] In their submissions counsel addressed us separately on the question of the procedure adopted at the proof and on the question of defective representation. While this is a helpful way to identify the different principles in play, for our part we do not consider that in this case these two questions can be separated out quite so easily.

[43] It has long been established that contempt of court is an offence *sui generis*: *HMA* v *Airs* 1975 JC 64, 69 and *AB and CD* v *AT* (supra) at paragraph [3]. But it has characteristics which, in many cases, make it quasi-criminal in nature. The contempt must be proved to the criminal standard, beyond reasonable doubt. The alleged contemnor is not a compellable witness. Perhaps most importantly, a finding of contempt may result in a fine or a period of imprisonment. For these reasons it is important, at least in a case such as this, that a procedure is adopted which enables the alleged contemnor to know exactly what is alleged against him, to obtain legal advice and to give clear instructions to those acting for him: *AB and CD* v *AT* at paragraphs [7]-[8].

[44] As is explained in *AB and CD* v *AT*, contempt of court covers a variety of situations. In this case we are concerned with an allegation by the pursuer that the defender in the contact action has wilfully refused to obey orders made by the court in that action. The alleged contempt, viz the refusal to facilitate contact between the pursuer and the child, has occurred outwith the court and, therefore, requires to be proved unless it is admitted. But all that needs to be proved in such a case is that the court made an order for contact, that contact did not take place in accordance with that order and, put shortly, and without intending to redefine the requisite *mens rea*,

that that failure resulted from wilful disobedience. That will all be set out in a Minute for contempt and the defender will have a chance to respond in her Answers. In practice, the fact of the order and the fact that contact did not take place in accordance with the order will usually be capable of agreement. It may be that the cause of the failure will also be a matter of admission; but, if not, all that will be required will be evidence about what went wrong on the various occasions.

[45] By contrast, in the substantive proceedings, viz the contact action, the issues to be resolved by the court will be quite different. The inquiry will focus on what is in the best interests of the child. That will, no doubt, involve hearing evidence from the parents and, possibly, social workers and experts, but it will seldom be of relevance to go into the history of what contacts have been missed and why they were missed. Further, the procedure and rules of evidence in the contact action will be very different from those in the contempt proceedings. In the contact action the burden of proof is unlikely to be relevant. The court will seldom be interested in attributing blame for particular incidents as opposed to making an overall assessment of what contact arrangements are in the best interests of the child. Any decision will be made on the basis of the civil standard of proof, on balance of probabilities. The court will wish to hear from both parents. Issues of compellability do not arise – if one or other parent chooses not to give evidence the court is entitled to draw appropriate inferences.

[46] For those reasons it should never be necessary, and will seldom be appropriate, for the issue of contempt to be dealt with in the substantive action to which the alleged contempt is ancillary. Dealing with the contempt proceedings in the same process as the contact action is likely to prolong the proceedings and delay the resolution of the dispute about contact. It is also liable, as this case demonstrates, to cause confusion and uncertainty because of the differences in the two processes being heard together.

[47] In the present case the sheriff was quite right to make an order on 18 March 2011 that the allegation of contempt be dealt with formally by Minute and Answers apart from the substantive action. He was also correct to fix a date for the hearing of

the Minute and Answers within about 10 weeks of his order. That hearing had to be discharged because of difficulties in obtaining legal aid in sufficient time for parties to be adequately prepared. That was unfortunate. It is important that allegations of contempt, by failing to comply with an order of the court, if persisted in, are determined promptly. As we have said, the issues are seldom complicated. Any disputes of fact can be identified from the Minute and Answers; and a hearing on the Minute and Answers ought to be capable of being resolved without delay and without the need for extensive evidence: *AB and CD* v *AT* at paragraph [8].

[48] In the present case, once the hearing fixed for 19 May 2011 had been discharged, a new hearing date was fixed for 11 August. That in turn was discharged because the defender's then agent (not the agent who subsequently conducted the proof on her behalf) was due to be on holiday. It was at this time that matters began to go wrong. The application to discharge the contempt hearing was made at the hearing of a motion made on behalf of the pursuer in the contact action to increase the provision for contact. Having heard and granted the motion to discharge the contempt hearing, the sheriff re-fixed it to come on at the same time as the hearing in the contact action. That may well have seemed the sensible course, but we consider that it was wrong in principle. As we have already pointed out, the issues to be resolved in the contempt proceedings are quite distinct from those arising in the contact action. There was no need for the two proceedings to be heard together, nor any likely advantage in that course being adopted.

[49] There are two particular features of what in fact transpired during the combined hearing of the contact action and the contempt proceedings which call for particular comment. The first is this. The contact action commenced in early 2010 and came to a hearing in January 2013. During the course of that pre-hearing period interim contact orders were made. For whatever reason there were occasions on which contact ordered by the court did not take place. This led the pursuer to make complaints that the defender was in contempt of court. These complaints were added by amendment to the existing Minute and became part of the contempt proceedings. Accordingly, the scope of the contempt proceedings grew as the pre-

hearing procedure went on. The Minute began life with four specific allegations. By the time the hearing commenced in January 2013 the Minute had been amended to encompass 15 specific allegations of contempt. Seven of those allegations were never answered. We are not sure why this was – it may have been because of S's illness – but whatever the reasons we do not consider that the matter should have been allowed to proceed to a hearing with the pleadings in that state. Matters were made worse when during the hearing the Minute was amended again to include allegations of contempt on 6 and 7 April 2013, incidents occurring in the period between the first and second tranches of the hearing. Those allegations were left unanswered, yet this does not appear to have been picked up until the time came for final submissions after the close of the evidence.

[50] The failure to answer the new allegations of contempt may well have resulted from S's illness, as she herself said in her written submissions, but that simply shifts the question back one stage. How was it that the hearing was allowed to proceed on matters as important as this without answers being lodged on behalf the defender to specific instances in respect of which it was alleged that she had deliberately flouted the order of the Court? The answer can only be one or other (or both) of two possibilities: either the sheriff did not take a sufficiently firm grasp of proceedings; or S failed in her duties to her client. Even if ill-health was the initial reason for failing to lodge answers, that does not explain why the specific allegations introduced by amendment on two occasions were allowed to remain unanswered throughout the whole course of the hearing.

[51] It is true that that failure to answer the new allegations does not appear, of itself, to have prejudiced the defender directly, though it may have been a factor in S's thinking that no evidence was required from the defender on these issues. However it is indicative of S failing to keep on top of what was going on. Quite apart from her temporary ill-health, it is possible that her pre-occupation with the contact action allowed her to take her eye off the ball so far as concerned the contempt proceedings, and to overlook the need to do something about the addition of new allegations to the contempt Minute. Although her failure to deal adequately

with this aspect of the case can properly be criticised, we consider that she should never have been put in this position. A consequence of running the contempt proceedings in parallel with the contact action, and the delay in bringing the contempt proceedings to a prompt hearing, was that it gave the contempt proceedings the opportunity to grow arms and legs, with new incidents of disputed contact being added as time went by, and put the defender and her agent under unfair pressure. While we cannot say that S would necessarily have coped better in different circumstances, we can say that had the contempt proceedings been dealt with promptly as a discrete process separately from the contact action, as they should have been, this difficult situation would almost certainly have been avoided.

[52] The second feature of the hearing which calls for comment is of greater moment. We have formed the clear impression from the evidence about what happened in the case – and this emerges as much from the sheriff's Note and judgment as from the defender's evidence – that there was at times considerable uncertainty on the defender's side as to what was going on at the hearing. We do not blame the sheriff for this, nor can fault be laid at the door of the pursuer's agent. As far as can be seen from the sheriff's judgment, and from her Note, the first five days of the hearing were taken up with evidence called on behalf of the pursuer. That evidence addressed both the question of contact and the question of contempt. The witnesses were cross-examined by S in relation to both issues. Yet it is apparent that even during this process S did not at times fully appreciate what was going on. Her e-mail to the defender on 17 July 2013 makes it clear that she was "frankly … unsure" whether the sheriff was continuing to hear the contempt matter. Why she should have been unsure is, perhaps, difficult to understand. The procedure had been agreed between parties' agents at an early stage. S had been party to discussions with the sheriff before court resumed on 2 July 2013. The sheriff records in her Note that she raised the issue with agents for the parties because she was concerned about the "procedural anomaly", as she called it, of proceeding to a proof on both matters at the same time. The sheriff records in her judgment that "both solicitors were in agreement that the evidence to be led would be evidence in respect

of the principal contact action and in respect of the contempt minute." Yet not long after the conclusion of that part of the hearing S sent her e-mail expressing uncertainty about whether the sheriff was continuing to hear the contempt matter. To attempt to unravel the reasons for this would be to indulge in impermissible speculation; it is sufficient to note that this uncertainty was real.

[53] It seems to have been this uncertainty which caused S to question the propriety of this course with counsel. In her e-mail of 17 July 2013 she told the defender that she had been looking at procedure vis-a-vis contempt of court and it was so rare that all she could establish was that there was no set procedure. We note in passing that she was clearly wrong about this; the set procedure was the Minute and Answers procedure which was before the court. She said that she had asked the Legal Aid Board for sanction for an opinion from counsel on the competency of the procedure thus far. She then gave a summary of certain principles relating to contempt and observed that "we have some grounds for discomfort here as to how the Court has allowed matters to proceed". She wanted an advocate's opinion "on the line of evidence we should or should not take". It appears that she received an opinion from counsel to the effect that the procedure was incompetent.

[54] When the case resumed on 7 August 2013, and before calling the defender to give evidence, S made a motion which the sheriff describes in the following terms:

> "The motion was curious in its terms and not immediately clear. Ultimately, I understood the motion to be that I should undertake not to make findings in fact in respect of the contempt minute and that it was incompetent to conjoin the principal action and the contempt minute procedure. Further, it was incompetent for the same Sheriff to hear proof in respect of both."

The practical effect of what S was seeking was that the sheriff should continue with the contact action but go no further with the contempt proceedings. Her argument was that it was incompetent to conjoin the two hearings and that it was incompetent for the same sheriff to hear proof in respect of both. The sheriff refused that motion. She pointed out, correctly, that the proceedings were not in fact conjoined – they

were simply being heard together. This, in her view, made the critical difference. Any potential difficulty of having to issue a single judgment in the conjoined proceedings, making findings of fact in the conjoined proceedings when different issues had to be decided according to different standards of proof and when, in respect of some issues, the defender was not a compellable witness, could be avoided if she were to issue separate judgments, making findings in fact relevant to each separate proceeding according to the appropriate standard of proof. So far as concerned the issue of compellability, the sheriff states that she:

> "… could readily appreciate the potential anomaly of the Defender electing to give evidence in the principal action in respect of contact but equally not to give evidence in the contempt minute."

However, ultimately, and without having had the benefit of submissions on this point from the pursuer's agent:

> "[she] took the view that any potential prejudice to the Defender could be avoided by the Defender indicating whether she elected to give evidence in respect of the principal action solely or in respect also of the contempt minute."

While acknowledging that the position was unsatisfactory, she was satisfied that it was not prejudicial to the defender; and, further, it allowed the proof in respect of the contempt minute to proceed, given that the motion was made so late and only after five days of evidence had already been heard.

[55] In his submissions to us on this appeal, Mr McAlpine did not seek to maintain the argument that the procedure adopted by the sheriff was incompetent. We consider that he was correct to take this approach. Nonetheless, he argued that it was unsatisfactory and, in his words, "afforded an opportunity for substantial injustice to be done". We consider that there is force in this argument. We can quite understand the concern of the sheriff that acceding to S's motion might result in the waste of five days of evidence which had already been heard, although if she had

acceded to the motion and continued with the hearing only in respect of the contact action there would, we suspect, have been little wastage. But we do not consider that the potential prejudice to the defender was overcome by the device of asking her to elect whether she wanted to give evidence in the contact action only or also in respect of the contempt proceedings. Indeed, we fail to follow her reasoning set out in the two passages from her judgment quoted above. In the first of those passages she identifies the potential anomaly of adopting this course, whereas in the second passage she appears to think that adopting precisely the same course avoids any potential prejudice to the defender. With respect to the sheriff, that does not appear to us to make sense. There is in our view an undoubted difficulty in allowing the two very different types of proceeding to be heard together. We have identified the main problems earlier in this Opinion: the issues are different, there are different standards of proof, there are different rules as to compellability (or, perhaps more accurately, as to the power to draw inferences adverse to a party if he or she does not give evidence), and there are different outcomes, both extremely serious. In a purely technical sense the solution adopted by the sheriff appears to protect the defender's position. But in reality anyone in the position of the defender will be anxious about giving evidence on matters which though relevant to one set of proceedings are irrelevant to the other. There might well, we suspect, be a concern that it will be almost impossible for the sheriff to make some findings according to one standard of proof and some according to the other, and very difficult for the sheriff not to allow her impressions of the witnesses and evidence on some matters to infect her thinking on others. One illustration of this last point is the problem about the execution of the affidavit which formed part of the subject matter of the complaints considered by the Law Society of Scotland. It clearly influenced the sheriff's assessment of the defender's credibility in the contact action. In her judgment in the contact action, at the end of the paragraph in which she notes that the defender's evidence about not having been in Scotland was contradicted by the affidavit bearing to have been sworn by her at Falkirk, she ends with the words:

> "The Defender, it seems to me, treated the proof as a contest at which it was unfortunate if her actions or intentions were discovered."

Although it is not specifically mentioned by the sheriff in her judgment in the contempt proceedings, it is difficult to conceive of it not being somewhere at the back of her mind (if not further forward) when considering the evidence and lack of evidence in the contempt proceedings.

[56] The issue of compellability appears to have assumed a particular importance in the mind of S when considering the propriety of the two sets of proceedings running together. Although we have had no evidence from her as to her thinking, it appears to us that she may have latched onto this notion that the defender could not be compelled to be a witness in the contempt proceedings and converted it into a firm view that the defender should not give evidence in those proceedings. "Need not" became "must not". This may have been what caused her to advise the court that the defender would not be giving evidence in the contempt proceedings. It is clear from one of the emails attached by the defender to her affidavit that the decision not to call the defender to give evidence was made by S, possibly with the assistance of someone else in her firm: "neither you nor your mother should need to give evidence". As we have already made clear, this decision is difficult, if not impossible, to understand, given that S had either agreed or was in the process of agreeing a Joint Minute accepting that 17 contact sessions ordered by the court had not taken place, and given that the pursuer himself had given evidence about them (we have not seen a transcript of his evidence, but it is a fair inference that he must have spoken to the circumstances of these missed contacts from his point of view). S may have thought that because the procedure was incompetent it would be better for the defender not to participate by giving evidence in the contempt proceedings, or she may have thought that since the defender was not a compellable witness the sheriff would not be able to make findings against her if she did not give evidence. But this, again, is impermissible speculation. It may be that she was confused by the proceedings, or simply made a wrong call. Whatever the reason, and we emphasise

that we do not seek to speculate about that reason, the fact is that a decision was made that the defender should not give evidence in answer to the allegations of contempt, and that that decision was plainly wrong. It does not matter, in our view, whether that decision can be attributed directly to the fact that the two sets of proceedings were being heard concurrently. The fact is that that procedure afforded an opportunity for substantial injustice to be done; and, in our view, without pre-judging what decision the sheriff would have made had she heard evidence from the defender about the missed contacts for which she found the defender to be in contempt, there is a real risk that substantial injustice was done. Put another way, it created a situation in which there was clearly some uncertainty as to what was going on and how best to proceed, and whatever decisions were taken were taken in these unsatisfactory circumstances and were likely to be less than satisfactory.

[57] In these circumstances we do not think it necessary to consider to what extent the defective representation cases, such as *Anderson* v *HMA* 1996 JC 29, apply here. We see no reason to doubt that the principle will apply at least by analogy to contempt of court cases. But we would prefer to reserve our position on the application of that principle to the present case, for two reasons: first, because we have found that the procedure adopted in the Sheriff Court was, though not incompetent, clearly inappropriate and prone to cause confusion and injustice; and, second, because we have not had the benefit of S's written comments in answer to the allegations made against her as regards her handling of the defender's case. Other complaints are made against her in this respect, but we have sought to confine our comments to areas where what happened is apparent from the judgment and contemporaneous documents. Had it been necessary to reach a decision on all the criticisms made against her, we would have felt obliged to continue the appeal for her comments. However, because the focus of our reasoning is on the procedure that was followed, we do not think that such a course is necessary in this case, either in fairness to S or to do justice to the defender.

[58] On this part of the case, therefore, we are satisfied that the appeal should be allowed. As we have already made clear, we have not come to any conclusion on

the question whether the sheriff would, nonetheless, have reached the same decision had she heard evidence from the defender and, possibly, other witnesses called by the defender. In those circumstances we have considered whether we should remit the case back to the sheriff to hear further evidence and make such findings on that evidence as she thought fit. We have decided not to do so because, as appears below, we have also come to the conclusion that, even if the finding of contempt were to stand, the sentence of imprisonment imposed by the sheriff should be set aside.

[59] We can deal with the question of sentence briefly, and we do so on the basis of the sheriff's findings that the defender was in contempt of court on the five occasions which the sheriff found proved beyond reasonable doubt. We consider that there are valid criticisms to be made of the sheriff's approach in two separate, though overlapping, respects.

[60] The first concerns the repeated adjournments or deferments of the sentencing diet. On some occasions these were to allow up-to-date criminal justice social work reports to be prepared and made available. On other occasions the sheriff deferred sentencing because of what was happening in the contact action. Thus on 17 June 2014 the sheriff deferred sentence because a Minute to Vary procedure was outstanding in the Sheriff Court; and on 1 April 2015 sentence was deferred both for the preparation of a supplementary report "and to allow the [defender] further opportunity to obtemper the Court's order [in the contact action]". As a result of these repeated adjournments or deferments, the defender was not in fact sentenced until 20 May 2015, over a year and a half after the findings of contempt were made. Such delay is inimical to the interests of justice. If a sentence of imprisonment is to be imposed, it should be imposed without undue delay, since the period running up to the imposition of that sentence will inevitably be fraught and stressful. For the defender to have to endure such delay only to find that she was then sentenced to the maximum sentence of imprisonment of three months is, to our minds, wholly inappropriate.

[61] The second matter of concern is the fact that the sheriff appears to have taken into account in fixing her sentence events other than the five instances of contempt of court which she had found established. As appears from the fact that she deferred sentence on more than one occasion to see what happened in the contact action, the sheriff seems to have thought it appropriate to hold the deferred sentence over the defender as a kind of "sword of Damocles", to encourage future compliance with court orders and future cooperation with the pursuer and social workers about contact. In fixing upon her sentence, as she informs us in her Note, the sheriff took into account the defender's continuing unwillingness after the judgment to cooperate with social workers in terms of a child protection plan, her denial of access to the child for social workers, her failure to notify the pursuer of a new address, her failure to obtemper not just orders as to contact but also other aspects of court orders and, more generally, the fact that ever since sentence was first deferred in June 2014 she had demonstrated by her conduct a continuing disregard for the court's authority. None of this is relevant to the question of sentencing. The sentence passed by the court should be a sentence in respect of the instances of contempt found to have been established and should not take into account subsequent conduct which did not form part of the allegations in the Minute for contempt and had not been proved to the requisite high standard. If complaint was to be made of that conduct it should have been by a separate Minute.

[62] Taking a step back, and quite apart from these two specific points, we consider that a sentence of three months imprisonment for the five incidents of contempt found to have been established was, in any event, excessive. It is not uncommon for disputes between former partners involving contact with children to be both acrimonious and emotional. A failure on the part of one parent to comply with court orders for contact, even where deliberate, may be an instinctive shying away from the immediate prospect of contact rather than some calculated or pre-planned refusal to comply with the order of the court. Ultimately, the court must enforce its orders, but in many cases the contempt proceedings themselves will provide a salutary reminder to the defaulting party of the need to comply. A

custodial sentence, particularly on a mother with whom the children live, should only be imposed with reluctance and as a last resort. The sheriff recognised this but, in our view, moved too far too fast in imposing it. It may be that this was because she allowed herself to take into account the defender's failure to cooperate in the period between judgment and sentencing. She refers to "repeated warnings" having been given to the defender of the consequences of her conduct. She refers to the Court having done "everything in its power" to allow the defender to cooperate and mitigate the potential punishment for contempt. It appears from this that in coming to the conclusion that there was no alternative to a custodial sentence the sheriff has taken account of subsequent conduct. This was wrong. Without such conduct being taken into account, we are satisfied that it was excessive to impose a custodial sentence of any length on the defender. Had we upheld the findings of contempt we would have quashed that sentence.

[63] For all these reasons we shall allow the appeal and quash the finding of contempt made by the sheriff on 24 October 2013. It follows from that that the sentence passed by the sheriff on 20 May 2015 falls away, but for the avoidance of doubt we shall quash that sentence too. That is a course that we would have taken even if we had not allowed the appeal against the finding of contempt.

Postscript

[64] We cannot leave this case without commenting specifically upon three matters of concern in these proceedings.

[65] The first relates to the length of time taken up by the proceedings in the Sheriff Court. This is not a matter which arises directly in this appeal. But it is important that we should express our concern as to the time taken for these proceedings to be resolved. For a contact action which commenced in January 2010 only to come to a conclusion in October 2013 is unacceptable. The child was just one-year-old when the action began. By the time judgment was delivered in the contact action he was only three months short of his fifth birthday. Though difficult to resolve, the issues in dispute between the parties were not complex. With proper

case management, they could have been resolved expeditiously and without delay. The same point can be made about the contempt proceedings. By the time they had been brought to a conclusion a year and a half later, the child was well past his sixth birthday. This Court has repeatedly emphasised the need for expedition in dealing with cases involving children. The Supreme Court has said the same thing: see, in the context of a contact dispute, *NJDB* v *JEG* 2012 SC (UKSC) 293, per Lord Reed at paragraphs 20-23 and 33-34 and, in the context of adoption proceedings, *ANS* v *ML* 2013 SC (UKSC) 20, per Lord Reed at paragraphs 50-56 and per Lord Hope at paragraphs 63-65. So has the European Court of Human Rights: see, most recently, *Malec* v *Poland* 2016 ECHR 588 at paragraphs 66 and 67. The problems arising from delay are obvious. The longer a dispute about contact goes on, the more difficult it is likely to become; and the more the life of the child will be overshadowed by the continued and protracted nature of the proceedings. The passage of time can have irremediable consequences for relations between the child and the parents, particularly the non-cohabiting parent seeking contact or greater contact. Delay in resolving the proceedings may result in a *de facto* determination of the issue before the court. Such problems are real enough where the only matter before the court is the question of contact, but are aggravated when combined with an equally long-running dispute about contempt of court, with the risk of one parent being found to be in contempt and sentenced to a period of imprisonment.

[66] The time taken to resolve disputes about contact should be measured not in years but in weeks or, at most, months. We recognise that there may be subsequent applications to vary contact arrangements, but the initial decision should be capable of being made, following a short well-organised evidential hearing, within this time-frame. If disputes about child abduction, often involving evidence of foreign proceedings as well as direct evidence from the parents, can be resolved, as they have to be, within a period of six weeks (c.f. the Child Abduction and Custody Act 1985, Schedule 1, Art 11) a similar regime could be made to apply to contact disputes. We do not suggest that in contact actions there is quite the same requirement for urgency as in cases of child abduction. But there is no reason why

contact disputes also should not be dealt with within a short timetable. The issues are seldom complicated, albeit that the decision will often be an anxious and difficult one. As has been said on numerous occasions, there is a tendency for evidence to be led on all manner of issues thought to be of relevance, when all that is required is evidence going to the question of what is in the best interests of the child.

[67] We cannot say precisely where the problem lies. It may lie in the workload of the Sheriff Court and we do not underestimate the difficulties that that may cause and the pressure it places on the sheriffs in any particular court. It may be difficult in many if not most courts to allocate the case to a particular sheriff who will then take responsibility for seeing it through from start to finish. We recognise that the challenges of programming court business make such allocation (judicial docketing) very difficult. But it would undoubtedly make a difference. Case management is vitally important but, unless it comes at the right time and the case is case-managed from beginning to end by the same judge so as to ensure consistency, it is unlikely to provide a complete solution. Quite apart from the question of judicial docketing, we see no reason in principle why, in most cases, whether at the first Child Welfare Hearing under Rule 33.22A of the Ordinary Cause Rules, if one is held, or (if there is no Child Welfare Hearing) on the earliest occasion on which the matter comes before the court, the sheriff should not lay down a strict timetable for all steps leading up to a fixed hearing date of a fixed duration (to come on within a matter of weeks or, at most, a few months) and give such further directions as regards witnesses, affidavits, reports, admissions and the like as are needed to ensure not only that the case comes to a hearing at the identified date but also that it will conclude within the time fixed for that hearing without the need for adjournments or the allocation of additional hearing days. At the same time it should be made clear that the court will expect parties to adhere to this timetable except only on further order made in exceptional circumstances; that interim contact orders are to be obeyed; and that instances of non-compliance will be dealt with promptly without impinging on or delaying the substantive proceedings. It seems to us that, in a case where a Child Welfare Hearing takes place, the Sheriff Court already has such powers under Rule

33.22A(4) of the Ordinary Cause Rules as presently in force. Similar case management powers, albeit exercisable at a later stage of proceedings, are conferred by the provisions of Chapter 33AA of the Ordinary Cause Rules. We understand that the case management tools presently available in family actions are under review by the Scottish Civil Justice Council. We welcome such a review.

[68] We said earlier that case management is important. The instant case illustrates the problems that may occur if a firm grip is not taken from the outset. The action was sisted for nearly six months for (unsuccessful) mediation immediately after it was raised in January 2010. The procedural and/or Child Welfare Hearings were continued on a number of occasions. The lack of substantive progress resulted in interim contact orders being made, breach of which simply fuelled the contempt proceedings running in parallel. A hearing in the contempt proceedings was fixed and discharged. The contact action was sisted on at least one occasion when it looked as though the parties might be able to work something out amicably. A hearing in the contact action was discharged because of the holiday commitments of one of the agents. In due course, it was decided that the contact action and the contempt proceedings should be heard together, a decision which may also have contributed to the lack of progress. We appreciate that all such matters are case management decisions for the sheriff to deal with on their individual merits; but we cannot help wondering whether the court was too ready to accede to applications which, in the event, collectively caused so much delay. Ultimately the hearing was fixed for one day in January 2013. It was allocated to a visiting sheriff. This created its own problems. As a visiting sheriff, her availability was limited, so that after the first half day in January the hearing had to be adjourned to July and was only concluded in August 2013, with judgment being given in October.

[69] A related point of concern is the rule by which, when an appeal is taken to the Inner House, the whole process is removed from the Sheriff Court, with the result that (so we were told) no further progress is possible in the action in the Sheriff Court until disposal of the appeal. It may be possible for the parties to apply

for the process to be remitted to the Sheriff Court for some application to be made there, and then sent back to the Inner House after that matter has been dealt with, but this is a cumbersome procedure which places unnecessary obstacles in the way of parties seeking, for example, to vary contact orders previously made or to make special provision for particular occasions. The difficulty is not unique to contact actions or, indeed, family proceedings generally, but its impact is felt most acutely in such proceedings where parties frequently need the assistance of the Court on an ongoing basis and, sometimes, at relatively short notice. We would suggest that the Scottish Civil Justice Council might wish to give consideration to revising the relevant Rules of Court to allow steps to be taken in the Sheriff Court even though one particular matter in the process is under appeal to the Inner House.

[70] The third matter of concern, unrelated to this, is to do with the form in which the sentence of three months imprisonment was imposed. There was no interlocutor signed by the sheriff. Instead, the sentence was simply recorded in a court minute. The terms of the minute were akin to those used in sentencing in criminal proceedings. Thus, in one court minute, there was reference to an adjournment in terms of section 201 of the Criminal Procedure (Scotland) Act 1995. In the sentencing process, as noted in the court minute, the sheriff ordered the preparation of a Criminal Justice Social Work Report, and she followed this up on a later occasion by ordering a further updated report. The court minutes all bear a procurator fiscal reference. They refer to the defender as the "Accused". This is entirely inappropriate for a case where a person is being sentenced to imprisonment for civil contempt. This is not a problem simply about paperwork. Mr McAlpine pointed out that this had practical consequences. As a result of the way in which the order was recorded, when she was taken to prison the defender was placed in the Hall for convicted prisoners rather than in the remand Hall where those sentenced for civil contempt should be placed. She stayed there for 15 days until granted interim liberation by this court on 4 June 2015. To prevent this problem recurring, steps should be taken to ensure that all sentences resulting from the findings of civil contempt are dealt with by an interlocutor in the proceedings begun by the Minute.