SHERIFF APPEAL COURT

[2019] SAC (Civ) 13
GLW-CA88-18

Appeal Sheriff WH Holligan

OPINION OF THE COURT

delivered by APPEAL SHERIFF WILLIAM HOLLIGAN

in the appeal by

SITEMAN PAINTING AND DECORATING SERVICES LIMITED, company incorporated under the Companies Act, with registered number is 08949300 and having its registered office at Siteman House, Unit 1, 22 Chapel Lane, Pinner, London, HA5 1AZ

Pursuers and Respondents

against

SIMPLY CONSTRUCT (UK) LLP, a limited liability partnership incorporated under the Limited Liability Partnerships Act 2000, with registered number S0302044 and having its registered office at Clydesdale House, Springhill Parkway, Glasgow Business Park, Baillieston, Glasgow, G69 6GA

Defenders and Appellants

Act: Howie QC and Massaro; Building Law Practice Limited
Alt: Middleton; Lyons Davidson, Edinburgh

2 April 2019

Introduction

[1] In this action the pursuers and respondents sought to enforce against the defenders and appellants the decision of an adjudicator issued pursuant to the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"). They did so by raising a commercial action at Glasgow Sheriff Court. Having heard parties in debate (and read short) by interlocutor dated 4 December 2018 ("the December interlocutor") the sheriff

repelled the appellants' defences and granted decree *de plano* against the appellants. The sheriff also found the appellants liable to the respondents in the expenses of the action as taxed and made the usual remit to the auditor of court to tax and report. Subsequent to the issuing of the December interlocutor, the respondents enrolled a motion seeking sanction for the instruction of junior counsel in relation to the cause and also for an uplift in fees. Initially the motion was opposed. An agreement was reached between parties and by interlocutor dated 16 January 2019 ("the January interlocutor") the sheriff sanctioned the cause as being suitable for the instruction of junior counsel; found the appellants liable to the respondents in the expenses of the respondents' motion; made the usual order for remit of the account to the auditor to tax and report, *quoad ultra* refused the respondents' motion for want of insistence.

[2] The appellants lodged a note of appeal on 30 January 2019. The note of appeal narrates that the appeal is taken against both the December and January interlocutors. As there was some doubt as to the competency of the appeal the appellants lodged a motion moving the court to allow the note of appeal to be received. The appellants' motion called before Sheriff Principal Pyle on 4 February 2019 who assigned a hearing on competency on 20 February 2019. As I understand it, the question as to the competency of the appeal was raised by the court. The matter called before me as procedural sheriff.

[3] Put very shortly, the main issue before me concerns what constitutes a "final judgment".

[4] As directed by the court, both parties lodged notes of argument which are lodged in process. Given the timing, the notes of argument were lodged without counsel having had the opportunity to peruse each other's note. As some of the arguments anticipated in the notes of argument did not materialise, not everything raised in the note of argument was

relied upon. The notes of argument are detailed. I do not intend to rehearse everything.

Reference was made to the following authorities:

1. Court of Session Act 1868 ("the 1868 Act");
2. Sheriff Courts (Scotland) Act 1907 ("the 1907 Act");
3. Courts Reform (Scotland) Act 2014 ("the 2014 Act");
4. Macphail, Sheriff Court Practice 3rd Edition;
5. *Baird* v *Barton* (1892) 9 R 970;
6. *Crellin's Trustee* v *Muirhead's Judicial Factor* 1893 21 R 21;
7. *Burns* v *Waddell* & Son (1897) 24 R 325;
8. *Innes* v *McDonald* (1899) 1 F 380;
9. *The Earl of Kintore* v *Pirie* (1904) 12 SLT 385;
10. *Inglis* v *The National Bank of Scotland* 1911 SC 6;
11. *Stirling-Maxwell Trustees* v *Kirkintilloch Police Commissioners* (1883) 11 R 1;
12. Wilson, The Practice of the Sheriff Courts of Scotland in Civil Causes (4th Edition) 1891 pages 315-317;
13. *Lloyd* v *Thompson* 2001 SLT (Sh Ct) 127;
14. *Laing* v *Scottish Arts Council* 2001 SC 493;
15. *The Construction Centre Group Limited* v *Highland Council* 2003 SC 464;
16. *Marks & Spencer Limited* v *British Gas Corporation* 1984 SC 86;
17. *UCB Bank Plc* v *Dundas & Wilson CS and Others* 1990 SC 377;
18. *Barras* v *Aberdeen Steam Trawling & Fishing Company* 1933 SC (HL) 21.

[5] I will refer to the relevant statutory provisions and authorities in more detail below.

Submission for the appellants

[6] Section 110 of the 2014 Act provides *inter alia* that an appeal may be taken to the Sheriff Appeal Court without the need for permission, against a decision of the sheriff constituting a "final judgment in civil proceedings". The definition of "final judgment" is to be found in section 136(1). Apart from final judgments and other categories of interlocutor specified in section 110(1)(b) (not relevant to this case) other interlocutors can only be appealed with permission of the sheriff (section 110(2)). In terms of rule 6.3 an appeal must be made within 28 days after the date on which the decision appealed against was given. In terms of section 116 of the 2014 Act, the effect of an appeal is to open to review all prior decisions in the proceedings. The definition of final judgment in the 2014 Act closely follows

the provisions of the 1907 Act (see sections 3 and 27 thereof). In this respect the 2014 Act made no change to the law from the law as it was under the 1907 Act immediately prior to its repeal. Cases and commentary relevant to the 1907 Act therefore continue to be relevant in interpreting the 2014 Act. The definition of the 1907 Act is not materially different from the definition in other prior statutes which includes section 53 of the 1868 Act. Given that the same language as before has been used Parliament is taken not to have intended a change (*Barras* v *Aberdeen Steam Trawling & Fishing Company*). Although Mr Howie accepted that there are some differences in wording in the 2014 Act in his submission they are not material for present purposes.

[7] Reading sections 110(1) and 136(1) of the 2014 Act together means that an appeal can be taken without permission against a decision of the sheriff if that decision is one which, itself or taken together with earlier ones, disposes of the subject matter of proceedings and allocates liability for expenses. No decision can be a "final judgment" until liability for the whole of the expenses of the process has been allocated (*Baird* v *Barton*; *Burns* v *Waddell & Co*) but it does not follow from that that once such allocation has occurred no subsequent interlocutor can be a final judgment. There is no restriction in section 110 or section 136 limiting the number of final judgments in a cause to one. Rather it is the reverse. Once one decision qualifies as a "final judgment" any later one "taken together with" that one must necessarily also be a "final judgment" – and appealable without permission – unless some other rule stops it from being so. Both sections 110(1)(a) and 136 employ the indefinite article in relation to decisions, not the definite one – as would be appropriate if an action could have but one final judgment. That is consistent with there being more than a single "final judgment". If there could only be one such judgment or interlocutor it would as a matter of ordinary English be the last one. That in practice would tend to be the one

decerning, perhaps long after the substantive questions at issue in a case being adjudicated upon, for payment of a given sum in name of expenses. That would lead to delay including wasted expenditure arising from a waste of the taxation process. Sections 110 and 136 therefore deem earlier interlocutors "final judgments" and advance the point at which one might competently appeal without leave and so obviate unfortunate potential consequences. However, in Mr Howie's submission, it is important to notice that the sections neither say, nor imply, anything about the point after which one may not appeal. To hold that an earlier interlocutor can be regarded as a final judgment does not imply that the ultimate interlocutor of substance is not also a final judgment. The conclusion to be drawn therefore is that a case can have more than one "final judgment" hence the use of the indefinite article in the definition of section 136. The only safe way to determine if a given interlocutor embodies a "final judgment" is to compare it with the statutory definition. If it answers the description given in the definition it is a "final judgment" and can be appealed without leave irrespective of whether or not some earlier interlocutor could also have been so appealed. In such an event the cause has two final judgments. In support of these propositions Mr Howie referred to *Crellin's Trustee* v *Muirhead's Judicial Factor* and *Inglis* v *National Bank of Scotland*; *Earl of Kintore* v *Pirie* and *Stirling-Maxwell Trustees* v *Kirkintilloch Police Commissioners*. Mr Howie also helpfully provided extracts from the session papers in *Crellin's Trustee* and *Inglis*. For present purposes all I need note is that in *Crellin's Trustee* the session papers would tend to suggest that there was argument before the Lord Ordinary on a question involving expenses. It was not, in the wording then used, executorial. Similarly, in the case of *Inglis*, the report of the case suggested that there were no objections taken in relation to a matter concerning expenses. However, the session papers would tend to suggest that both parties were represented and that there was an argument. The rule in

relation to executorial interlocutors not opening up previous interlocutors is a rule of the common law. The case of *Inglis* is of particular relevance.

[8] In relation to the respondents' note of argument, the appellants did not require leave of the sheriff to appeal because the interlocutor complained of was a final interlocutor. Mr Howie referred to paragraphs 18.34-18.37 of Macphail which deals specifically with the topic. However, he criticised the sentence contained in paragraph 18.37 (purportedly supported by footnote 62) which, read short, provides that executorial interlocutors fixing the scale of taxation for or decerning for expenses already found due are not final judgments in the sense of the statutory definition and may be appealed, not as final judgments, but only with leave. As I understand it, it is that passage relating to leave which was criticised. Mr Howie also referred to Wilson which also (page 316) suggested that a supplementary interlocutor taxing, modifying or decerning for expenses does not come within the definition of a final judgment. This passage ante-dates *Inglis* and *Innes*. No point was taken in those cases about there being no leave. *Stirling-Maxwell* failed because it was an executorial interlocutor. Mr Howie also referred to the case of *Lloyd* v *Thompso*n. Mr Howie analysed the decision of Sheriff Principal Nicolson QC in some detail and submitted that there were a number of dicta which were not correct. In short, the decision in *Lloyd* did not advance the case in relation to leave to appeal.

Submissions for the respondents

[9] For the respondents, Mr Middleton submitted that the appeal is incompetent. The key question is whether the January 2019 interlocutor is a final judgment within the meaning of section 110 of the 2014 Act. If it does fall within that definition then the appellants are entitled to appeal it under section 110(1) without first having to obtain the

permission of the sheriff. If the January 2019 interlocutor does not fall within that statutory definition the appellants cannot appeal without permission and as no such permission has been granted the appeal would therefore be incompetent. The issue is one of statutory interpretation. Mr Middleton did not accept Mr Howie's submission as to the use of the indefinite article in section 136. The indefinite article qualifies "decision". Secondly, the definition in section 136 refers to "the subject matter of proceedings" which the appellants do not address. The interlocutor requires to dispose of the subject matter of proceedings in some way. The January 2019 interlocutor does not and it is therefore not a final judgment. What constitutes the subject matter has been clear since *Baird* v *Barton* (the 1868 Act replaced the earlier Court of Session Act 1850). *Burns* follows *Barton*. The question of liability for the expenses of process is part of the subject matter of proceedings. The quantification of any such liability is not. That is clear from *Baird* v *Barton*. The statutory definition anticipates that liability for the expenses of process ("expenses found due") but not procedure intended to quantify that liability (modification or taxation) will have been dealt with by the time the final judgment is issued. In relation to the authorities (*Inglis, Innes, Earl of Kintore* and *Crellin*) they are in effect all similar. There were two interlocutors. The first dealt with the merits and expenses; the second interlocutor decerned for payment of a sum. They also dealt with an issue which was in dispute although Mr Middleton submitted that the decision in *Inglis* may be unclear. The first interlocutor was a final judgment in accordance with section 53 of the 1868 Act. The second interlocutor was an appealable interlocutor (without leave). In Mr Middleton's submission nowhere is there a decision that the second interlocutor was appealable because it was a final judgment. That is something inferred by the appellants. Just because it is appealable without leave does not make it a final interlocutor because not all appealable interlocutors are final interlocutors. In terms of

section 53 of the 1868 Act a final interlocutor marked the time when the whole cause was decided in the Outer House. Section 54 provided that any interlocutor before a final judgment was an interlocutory judgment. All of the authorities are explained upon the basis that they contained interlocutors issued after the final judgment and therefore did not require leave. Mr Middleton took no issue in relation to the rule as to executorial judgments. In short, the January 2019 interlocutor did not dispose of the proceedings. In relation to the cases in *Marks and Spencer Plc* and *UCB Bank* these involved cases in which there had been an order for expenses followed by a later motion in relation to expenses. The Inner House held that modification is part of an award of expenses. Where sanction has been issued in relation to the instruction of counsel for an additional fee that does not alter the basis of the award of expenses. That is different from the basis upon which expenses are to be awarded such as party and party scale (see *Laing*). *Laing* made an important point about bringing certainty to matters. It should not be the case that a party could delay matters by dragging out what is a final interlocutor by reference to expenses. Like Mr Howie, Mr Middleton criticised paragraph 18.37 of Macphail though in a different respect. ("An interlocutor modifying expenses, which follows a prior interlocutor disposing of the merits of the cause and finding expenses due, may be appealed without leave, and the appeal has the effect of submitting the whole previous interlocutors to review"). The only authority in support of that is the case of *Inglis*. It may have been true under the 1868 Act but it is not true under the 2014 Act. Although he accepted that the wording in the 2014 Act is not really different from the earlier legislation it is not accepted that the use of the word final judgments (plural) meant that there would be more than one final judgment per proceeding.

[10] The December interlocutor was clearly a final judgment. It disposed of the parties' preliminary pleas; repelled defences; granted decree *de plano* and found the defenders liable to the pursuers in expenses of the process. The January 2019 interlocutor dealt with procedure intended to quantify the appellants' liability for expenses namely whether counsel's fees should be included as an outlay or a percentage increase allowed for the work of the solicitor. It did not address the subject matter of the proceedings. It was therefore not a final judgment. At its highest *Inglis* is authority for the proposition that it is competent to appeal an interlocutor dealing only with quantification of a liability for expenses. It has nothing to say about whether such an appeal would require permission (*Lloyd* v *Thompson*). It is not the respondents' position that it is incompetent to appeal the January interlocutor; it is incompetent to appeal the January 2019 interlocutor without permission. There are clear policy reasons for rejecting the appellants' proposition. Firstly, if the appellants are correct neither party would be able to ascertain the point in time beyond which the interlocutor finally disposing on the merits of the cause could not be appealed without permission. An interlocutor finally disposing of the merits of the cause must inevitably deal with the question of liability for expenses but an interlocutor finally disposing the merits need not deal with the quantification of any liability for expenses. There may be one or more interlocutors dealing with quantification e.g. sanction for counsel or objections to an auditor's report. Secondly, if an unsuccessful party could appeal any interlocutor giving the quantification of expenses without leave the 28 day period provided for by rule 6.3 of the Sheriff Appeal Court Rules would be undermined. An unsuccessful party would simply refuse to agree the quantum of an expenses award made against it and take objection to the auditor's report purely for the purpose of obtaining an interlocutor which would

recommence the 28 day period in which he could submit the interlocutor disposing of the merits for review without permission.

Late lodging

[11] For the appellants, in the event that the court was not persuaded that the appeal was competent the appellants had a motion for late lodging. The issue was clearly one of some complexity (as was noted by Sheriff Principal Nicolson QC in *Lloyd*). There was clearly prejudice to the appellants if, in effect, an error had been made. The appellants' adviser considered that the appellants could and should wait until the sheriff issued his interlocutor dealing with expenses so that the whole case could then be remitted without the need to remit that matter back to the sheriff to resolve the outstanding issues relating to expenses. The respondents were always aware that the appellants intended to appeal. The appellants have identified arguable grounds of appeal which ought to be considered by the Appeal Court. It would not be in the interests of justice to deny the appellants that opportunity.

[12] For the respondents, it was not open to the appellants' agents to blame the agents for the respondents for failing to identify in correspondence that the appellants' solicitors were labouring under a misapprehension as to what was a final judgment. When the defenders enrolled their motion for relief in terms of rule 2.1 of the Sheriff Appeal Court Rules they did so without intimating it to the respondents as it was submitted they ought to have done. Thirdly, the subject matter of the cause is the enforcement of an adjudicator's decision. The policy behind the adjudication procedure provided that the 1996 Act is to enable the businesses engaged in the construction industry to obtain speedy decisions which are binding and enforceable but nonetheless provisional. Reference was made to the *Construction Centre Group Limited* v *Highland Regional Council* 2003 SC 464 in which the Inner

House made clear that the courts are expected to lend assistance to the prompt enforcement of adjudicator's decisions. A motion for late lodging should accordingly be refused.

Decision

[13] In order to determine this matter it is necessary to set out the relevant statutory provisions. Starting with the 2014 Act:

> "**Section 110 Appeal from a sheriff to the Sheriff Appeal Court**
> (1) An appeal may be taken to the Sheriff Appeal Court, without the need for permission, against –
> (a) a decision of a sheriff constituting final judgment in civil proceedings, or
> (b) any decision of a sheriff in civil proceedings –
> (i) granting, refusing or recalling an interdict, whether interim or final,
> (ii) granting interim decree for payment of money other than a decree for expenses,
> (iii) making an order *ad factum praestandum*,
> (iv) sisting an action,
> (v) allowing, refusing or limiting the mode of proof or,
> (vi) refusing a reponing note.
> (2) An appeal may be taken to the Sheriff Appeal Court against any other decision of a sheriff in civil proceedings if the sheriff, on the sheriff's own initiative or on the application of any party to the proceedings, grants permission for the appeal".

> "**Section 136 Interpretation**
> (1) In this Act, unless the context requires otherwise –
> …
> 'civil proceedings' includes –
> (a) proceedings under the Children's Hearings (Scotland) Act 2011, and
> (b) proceedings for contempt of court where the contempt –
> (i) arises in, or in connection with, civil proceedings, or
> (ii) relates to an order made in civil proceedings,
> 'decision', in relation to a sheriff, judge or court, includes interlocutor, order or judgment,
> 'final judgment', means a decision which, by itself, or taken along with previous decisions, disposes of the subject matter of proceedings, even though judgment may not have been pronounced on every question raised or expenses found due may not have been modified, taxed or decerned for…".

[14] Turning to the 1907 Act (as amended):

"**Section 27 Appeal to Sheriff**
Subject to the provisions of this Act, an appeal to the sheriff principal shall be competent against all final judgments of the sheriff and also against interlocutors –
A. Granting or refusing interdict, interim or final;
B. Granting interim decree for payment of money other than the decree for expenses, or making an order *ad factum praestandum;*
C. Sisting an action;
D. Allowing or refusing or limiting the mode of proof;
E. Refusing a reponing note; or
F. Against which the sheriff either *ex proprio motu* or on the motion of any party grants leave to appeal…".

"**Section 3 Interpretation**
(h) 'Final judgment' means an interlocutor which, by itself, or taken along with previous interlocutors, disposes of the subject-matter of the cause, notwithstanding that judgment may not have been pronounced on every question raised, and that expenses found due may not have been modified, taxed, or decerned for".

[15] I was provided with a copy of the 1868 Act. It is not necessary to set out at length all the relevant provisions which are to be found in sections 52-54. Read short, section 54 provides that it shall not be competent to present a reclaiming note against an interlocutor of the Lord Ordinary without his leave until the whole cause has been decided in the Outer House. Section 53 sets out the definition of a final judgment which is an interlocutor which either by itself, or taken along with a previous interlocutor or interlocutors, disposes of the whole subject matter of the cause. The section goes on to provide that "It shall not prevent a cause from being held as so decided that expenses, if found due, have not been taxed, modified or decerned for". The remainder of the section provides that this provision is to apply to determine the competency of appeals from the Sheriff Court. Section 52 provides that the effect of a reclaiming motion is to open to review the prior interlocutors of the Lord Ordinary.

[16] As the authorities referred to by Mr Howie are essential to his argument they require to be reviewed. The opinions are all short. They all involve reclaiming motions brought

before the Inner House of the Court of Session. They also involve two interlocutors pronounced by the Lord Ordinary: put broadly, a first interlocutor dealing with the merits; the second, in some way dealing with expenses or an issue relating to expenses.

[17] Dealing with the authorities in chronological order, the first of these is *Baird* v *Barton*. In that case, on 21 March 1882 the Lord Ordinary pronounced an interlocutor in favour of the defender but reserving questions of expenses. On 2 June the Lord Ordinary pronounced a further interlocutor finding the defender entitled to expenses and remitting the matter to the auditor to tax and report. The reclaiming note against the interlocutor of 2 June was lodged on 20 June. The defender objected to the competency of the reclaiming note arguing that, as the interlocutor of 2 June did not dispose of the merits of the cause, the reclaiming note should have been presented within 10 days (the then time limit). The First Division held that the reclaiming motion was competent. As this case is referred to in a number of subsequent cases it is worth quoting from the opinion of the Lord President who gave the opinion of the court (at page 971):

> "Now, observe that the words here are 'an interlocutor or interlocutors disposing of the whole subject-matter of the cause,'… and although it may be a question whether expenses can be said to form part of the merits of the cause, [*the wording of the 1850 Act*] it may very well be held that they are a part, and often come to be a very important part, of the subject-matter of the cause… Now, while that is a positive enactment that the absence of a decree for expenses shall not be held to prevent the whole subject-matter of the cause from being disposed of, it also, by very clear implication, provides that until the question of expenses has been disposed of, - that is, until one or other of the parties has been found entitled to expenses, or expenses have been found due to neither party, - there has been no final judgment, and the whole subject-matter of the cause, in the language of the Act of 1868, has not been disposed of. It appears to me, accordingly, that the case was not finally disposed of until the interlocutor of 2d June, and, consequently, that the reclaimer is in time within 21 days."

As I read the Lord President he considered expenses to be part of the subject matter of the cause subject to the proviso that it was liability for expenses rather than their quantification

which was required. The case of *Stirling-Maxwell's Trustees* v *Kirkintilloch Police Commissioners* involved an interlocutor dated 23 May 1883 whereby the Lord Ordinary made a final order on the merits of the matter and finding the pursuers entitled to expenses. On 19 July the Lord Ordinary pronounced an interlocutor approving of the auditor's report and making a decerniture against the defenders for payment of a specific sum of money as the same had been taxed. According to the report the defenders lodged no objections to the auditor's report but reclaimed. The pursuers objected to the competency of the reclaiming note on the ground that the interlocutor of 23 May was to be regarded as a final interlocutor given that there had been no objections to the auditor's report. In the course of a very short opinion, giving the opinion on behalf of the First Division, the Lord President refused the reclaiming note as incompetent. He did so upon the basis that the interlocutor of 19 July involved nothing more than approval of the auditor's report and relevant decerniture. He went on to say (at page 2):

> "Now, if the defender had lodged objections to the Auditor's report, and had taken the opinion of the Lord Ordinary on these objections, the case would have been in a totally different position; but there were no such objections, and it is not suggested that there could be any such objections".

The consequence is that the interlocutor of 23 May was a final interlocutor. What took place on 19 July was "merely executorial" of what had already been finally determined.

Mr Howie lodged part of the session papers which narrate that counsel for both parties appeared before the Lord Ordinary on 19 July which suggested to him that objection had been taken. That said, there is no note in the session papers of any note of objections to the account of expenses.

[18] *Crellin's Trustee* v *Muirhead's Judicial Factor* involved a claim for legitim. The interlocutor (dated 22 June) decerned against the defender for a certain sum by way of

legitim and found the pursuer entitled to expenses but "reserving till after taxation the question whether any, and if so what, modification should be allowed in respect of the ascertainment of the amount of the legitim fund". The usual remit to the auditor was also pronounced. No reclaiming motion was lodged. On 14 July the Lord Ordinary granted an interlocutor approving of the report and, "having heard counsel on the question of modification", modified the amount of expenses payable. The defender then presented a reclaiming note against this interlocutor within 21 days. The pursuer argued that the interlocutor of 14 July was merely executorial. The Second Division, after consultation with the judges of the First Division, held that the note was competent. The opinion of the court was issued by the Lord Justice Clerk and is very short:

> "We are of opinion that, without trenching upon the judgment in the case of *Stirling-Maxwell*, the Judge in the Outer House having applied his mind to a question which had not been previously considered, viz, the modification of expenses, the reclaiming note is competent, and must go to the roll".

It is clear from the brief report that the defender argued that *Stirling-Maxwell* had identified an exception (namely a dispute in relation to expenses) and that exception applied. The Lord Ordinary had exercised his discretion and judgment on the matter of expenses and had issued an interlocutor accordingly. *Burns* v *Waddell & Son* can be taken shortly. That involved an interlocutor of the Lord Ordinary which did not deal with the question of expenses. It was held, following *Baird*, that the absence of a disposal of the question of expenses rendered the reclaiming motion incompetent because the judgment was an interlocutory judgment not a final judgment. *Innes* v *McDonald* involved an argument before the Lord Ordinary following a report by the auditor on the taxation of the successful party's account. The interlocutor on the merits was issued on 28 October 1898; the interlocutor of the Lord Ordinary in relation to expenses was issued on 24 December.

Although there had been no written objection taken to the account, it was not disputed that there had been argument. Again, following *Stirling-Maxwell's Trustees*, it was decided that this case fell within the reservation expressed in the opinion of the Lord President and that there had been a litigated question upon the matter of expenses. It followed that the reclaiming motion was competent. In *The Earl of Kintore* v *Pirie* the Lord Ordinary pronounced an interlocutor finding the pursuers entitled to expenses "subject to some modification". The defenders lodged a reclaiming note without obtaining leave of the Lord Ordinary. The pursuers objected to the competency of the reclaiming motion on the basis that it was not competent to reclaim until the amount of the modification had been determined. That argument was rejected. The Inner House held that the interlocutor satisfied the definition of "final judgment" in section 53 of the 1868 Act.

[19] The remaining authority amongst the older cases is the one of *Inglis* v *The National Bank of Scotland*. This decision (issued by Lord President Dunedin) is important as it reviews many of the earlier authorities leading the Lord President to draw certain conclusions. As with all these cases, the facts were very simple. On 22 April 1910 the Lord Ordinary pronounced decree of absolvitor with expenses in favour of the defenders as taxed. No reclaiming note was presented against this interlocutor. The account of expenses was lodged and reported upon by the auditor. No objections were taken to the report with the result that the Lord Ordinary, on 19 July pronounced an interlocutor approving the report and decerning against the pursuer for payment of the specific sum. On 18 August the pursuer reclaimed against the latter interlocutor. The defenders objected to the competency of the reclaiming motion. In short, the defender said that the interlocutor of 22 April was the final interlocutor and that there "could not be two final interlocutors in the same cause". The second interlocutor was merely executorial and could not be reclaimed against. The

pursuer argued that modification of expenses was part of the "subject matter of the cause" (the Lord Ordinary having reserved questions of modification in his interlocutor) and that it was competent to reclaim against the second interlocutor within 21 days thereof. The reclaiming note would thus submit for review all previous interlocutors. The plea to the competency was repelled. The Lord President set out three rules in relation to reclaiming. It is worthwhile quoting from the opinion:

> "These rules can be stated very shortly. The first is that, although, in one sense, there cannot be more than one final interlocutor in a case, yet, in another sense, there may be, because there may be an interlocutor which is not final according to the strict meaning of that term, but yet is final in the sense of the statutory definition for the purpose of allowing it to be reclaimed against within twenty-one days without leave. This was the position in the *Kintore* case, and this was all that was decided there. The interlocutor in that case disposed of the merits of the cause, but left over the matter of expenses for the purpose of modification. Now, if anyone were asked whether, without reference to any statute, that was a final interlocutor, the answer would be 'No,' for something was still to be done – the expenses had to be dealt with. But then, according to section 53 of the 1868 Act, it was final… Now, the interlocutor in the *Kintore* case satisfied this definition, and accordingly the reclaiming note was held to be competent. That is the explanation of the case.
>
> The next rule is that, according to section 52… every reclaiming note has the effect of submitting to review the whole of the prior interlocutors in the case.
>
> The third and last rule is one which does not depend on the precise provisions of any statute; and it is this, that where at the end of a case there is an interlocutor which is merely executorial and does not represent the determination of any contention between the parties, that interlocutor cannot be reclaimed against. This rule is based on a series of decisions of which *Stirling-Maxwell's Trustees'*… is one…
>
> Now, all this may not be strictly logical, and in certain cases there may be two courses open to a party in regard to reclaiming. I have no doubt that, as was quite properly decided in the *Kintore* case, the defenders in that case were entitled to reclaim although the matter of the modification of expenses had not been determined; but I have also no doubt that if they had not reclaimed then but had allowed the case to go on, they could, under *Crellin's* case, have reclaimed against the interlocutor dealing with the modification of expenses, and this would have brought up for review the whole previous interlocutors".

[20] It is the last passage in Lord President's opinion to which Mr Howie made particular reference. The Lord President clearly anticipated that there were two opportunities for the

reclaimers to have marked the reclaiming motion, the latter being modification of an award of expenses.

[21] The last case to consider in any detail is the opinion of Sheriff Principal Nicolson QC in *Lloyd* v *Thompson*. The opinion of the Sheriff Principal is lengthy. Put shortly, the issue in that case followed the hearing before the sheriff on a note of objections and answers to a report by the auditor. The interlocutor of the sheriff was dated 26 January 2001 in which the sheriff repelled the pursuers' objections and approved the auditor's report. There was no dispute that the interlocutor disposing of the merits of the action (dismissing the pursuers' action) was dated 3 August 1999. The pursuer appealed against the sheriff's interlocutor of 26 January 2001 without leave and the question arose as to the competency of the appeal. Unusually, neither party contended that the appeal was incompetent although each for different motives. Nonetheless, the Sheriff Principal felt obliged to consider the matter of competency and held that the appeal was indeed incompetent. In his interlocutor of 26 January the sheriff reserved the question of expenses relating to the note of objection. The Sheriff Principal held that for that reason alone the interlocutor under review could not be held to be a "final judgment" within the meaning of section 27 of the 1907 Act because there has to be some finding regarding expenses (page 129 E-F). However, the Sheriff Principal acknowledged that there was an issue as to whether there could be two final judgments in the same action (page 129 H-I). The Sheriff Principal then embarked upon an analysis of many of the authorities to which Mr Howie referred. The Sheriff Principal clearly had some difficulty with the opinion of the Lord President in *Inglis*. The Sheriff Principal considered that the cases of *Crellin* and *Stirling-Maxwell's Trustees* were consistent with each other but he had difficulty in reconciling *Inglis* with *Stirling-Maxwell's Trustees* (page 130K). He contented himself with the conclusion that *Crellin* and *Inglis* were both distinguishable from

the case before him because they did not deal with an interlocutor disposing of a note of objections. Perhaps most importantly, the Sheriff Principal came to the view that neither *Crellin* nor *Inglis* involved the construction of section 27 of the 1907 Act but depended on sections 52-54 of the 1868 Act which the Sheriff Principal described as containing provisions which are "significantly different". He contented himself by deciding the matter by reference to the 1907 Act and "not by reference to what was said in respect of the different statute applying to a different court" (page 131A-B). He did not specify in what way the statutes were materially different. I think it was fair to say that the Sheriff Principal was not attracted to the proposition that there might be more than one final interlocutor in a cause. The practical implications of that meant that proceedings might well become protracted, extended by an undeserving litigant lodging frivolous objections to an auditor's report long after the principal subject matter of a case had been disposed of (page 133-E).

[22] The statutory definition of a "final judgment" has two practical effects. Firstly, it tells an appellant when he can appeal as of right. Secondly, pursuant to the rules of court (in the present case rule of court 6.3) it mandates the time (28 days) within which he must, if so advised, exercise that right. The authorities concern some cases where objection was taken by the respondent that the appeal was premature; others that the appeal was too late. This structure prevents disruption to the orderly progress of an action by the pursuit of appeals against interlocutory decisions. A further consequence of an appeal is that it opens up prior interlocutors to review.

[23] I agree with counsel that the relevant parts of the 2014 Act to which I was referred restate in more modern prose the structure of the 1907 Act which, in turn, follows some of the structure of the 1868 Act. I do not see that the current legislation can be said to be materially different from its earlier manifestations, particularly in relation to the essential

architecture relating to appeals. It follows that the decisions to which I was referred remain authoritative. In their respective publications both Wilson and Macphail treat the 19th century cases as relevant. (I note also the *dicta* of the Lord President in *Stirling-Maxwell's Trustees* (at page 2) in which he specifically refers to sheriff court practice).

[24] As a matter of statutory interpretation, it seems to me that the December 2018 judgment was a "final judgment" within the meaning of section 136(1). It was a decision disposing of the subject matter of proceedings and it allocated liability for expenses. The proviso to the definition makes clear that modification, taxation or decerniture is not necessary to satisfy the definition of "final judgment". It follows that it was open to the appellants to mark an appeal within the relevant time limit against that interlocutor.

[25] As I have said, the statute cannot be taken in isolation from the authorities to which I was referred. In the case of *Baird,* the Lord President contrasted the wording used in the 1868 Act with that of its predecessor (the Court of Session Act 1850). The 1868 Act used the terminology "whole subject matter of the cause" whereas the 1850 Act referred to the "merits of the cause". The Lord President clearly found the choice of words significant. He considered that expenses are a part of the subject matter of the cause. However, he also accepted, following the proviso to section 53 which has been continued throughout its legislative history, that subject matter meant liability for expenses, not the amount thereof. Although it does not appear in any of the statutory provisions, the authorities recognise that administrative orders in relation to expenses ("executorial" decisions) do not fall within the definition and are thus not appealable as of right. The problem, clearly recognised in *Lloyd*, is that in certain cases involving disputes over expenses, the authorities seem to permit an appellant to choose more than one interlocutor as constituting a final interlocutor. The source of this rule derives from the *dicta* of the Lord President in *Stirling-Maxwell's Trustees.*

It was later applied in *Crellin* and, it seems to me, in *Inglis*. Strictly speaking, the issue never arose directly in *Stirling-Maxwell's Trustees* because there was no note of objections to the auditor's report. The Lord President was merely commenting that the position would have been different had there been such objection. On one view, *Crellin's Trustees* is a difficult case. The opinion of the Lord Justice Clerk runs to no more than six lines but it appears to have been of such importance to require consultation with the members of the First Division. It might be said that the question of modification of expenses was tied up with the merits of the matter (the quantification of the legitim fund). The case clearly had a long history (see 1892 20 R 51). However, it seems to me that there is simply no way to distinguish *Inglis*. In that case the reclaimer waited until the second, later interlocutor of the Lord Ordinary before marking the reclaiming motion. That was a case in which there were no objections taken to the account of expenses and all the Lord Ordinary did was to approve of the report. The Lord President was satisfied that the motion was competent. The opinion of the Lord President was clearly of concern to Sheriff Principal Nicolson, QC. Given the issue before him he was able to distinguish *Inglis.* What I find difficult in *Inglis* is the fact that the interlocutor of the Lord Ordinary reclaimed against was, consistent with earlier authorities, executorial: there were no objections taken to the account of expenses and all the Lord Ordinary did was to grant decree in terms of the auditor's report. I think it is difficult to see how that can be a"final judgment" and, notwithstanding what the Lord President said, sits somewhat awkwardly with *Kintore.* The one unifying feature in the cases of *Crellin, Kintore* and *Inglis* is that in each of the first interlocutors, liability for expenses was made expressly under reservation of questions of modification. Given the statutory definition it might be thought that such a reservation is irrelevant however, it is the only unifying feature of all three decisions. Accordingly, it seems to me that where liability for expenses is determined

but modification expressly reserved in the same interlocutor, it may be said that the ensuing interlocutor (unless purely executorial) satisfies the statutory definition of a "final interlocutor" notwithstanding the fact that the earlier interlocutor may also do likewise. However, if, as in the present case, the interlocutor has dealt with liability for expenses without reservation the situation is different. Furthermore, this is not a case in which there was any dispute over a matter relating to expenses. When one examines the January 2019 interlocutor closely, the sheriff was not called upon to make a decision. There was no appearance before him (representation being described as "email"); the parties had resolved their differences as to the motion and it was simply granted in the terms sought by the parties themselves. There is also nothing in the grounds of appeal in relation to that interlocutor.

[26] It follows from what I have said, that I am not satisfied that the January 2019 interlocutor constituted a final judgment and that consequently the appeal was marked out of time.

[27] The next question therefore is whether I ought to allow the appeal although late. The appeal is only very slightly late and given the complexities which emerge in this matter, I have to say that I am not without some sympathy for the appellants' advisors. They could however have marked an appeal against the December 2018 interlocutor because it would be impossible to say that did not constitute a final interlocutor as so defined. However, there is I think a more salient point. This is an action raised in terms of the 1996 Act. The purpose of the legislation is to ensure a speedy decision from an adjudicator (*The Construction Centre Group Limited* v *Highland Council*). Although I shall allow the appeal to be received, although late, I shall accordingly direct this matter be disposed of in early course. I shall

reserve all questions of expenses before me. Should parties reach agreement on that point the clerk can be notified and an interlocutor pronounced accordingly.

[28] By way of postscript, In *Lloyd,* Sheriff Principal Nicolson QC, endorsed comments by Lord McCluskey in *Sheltered Housing Management Ltd* v *Aitken* 1998 SC 150 that the question of appeals and time limits had become "a bit of a minefield" (p157). It seems to me that matters have not changed and that review of this issue by the Scottish Civil Justice Council would be beneficial.