

SCOTLAND / JUDGMENT

Lindsay v. Rattray [2007]

ScotSC 3 (17 January 2007)

[2007] ScotSC 3

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- [2007] ScotSC 3 [New search] [Help] SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY F23/03 JUDGMENT OF SHERIFF PRINCIPAL B A LOCKHART in the cause WILLIAM LINDSAY Pursuer and Respondent Assisted Person against NICOLA ROMAINE RATTRAY OR LINDSAY Defender and Appellant Assisted Person Act: J Brown, Advocate, instructed by Messrs Nicol Harvey & Pierce Alt: J Speir, Advocate, instructed by Messrs McAndrew & Co STRANRAER : 17 January 2007 The Sheriff Principal, having resumed consideration of the cause, upholds the appeal and recalls the Sheriff's interlocutors of (i) 11 November 2005 except to the extent that the Sheriff granted decree in terms of the defender and appellant's third crave, and (ii) 30 November 2005 to the extent of finding the defender and appellant liable to the pursuer and respondent in the expenses of the cause from 12 February 2004 until the conclusion of the action as taxed; sustains plea in law 3 for the defender and appellant to the extent of granting decree against the pursuer and respondent for payment to the defender and appellant of a capital sum of £19,930.63, of which £10,036.53 is payable on the date hereof and £7,894.10 is payable on 17 January 2009; finds no expenses due to or by either party in respect of the expenses of the cause from 12 February 2004 to 30 November 2005 with the exception of
- (i) the amendment procedure which followed Minutes of Amendment lodged on behalf of the defender and appellant on 11 February 2004 and 8 November 2004, in respect of which finds the defender and appellant liable to the pursuer and respondent, (ii) the expenses of the first appeal which have already been determined; finds the pursuer and respondent liable to the defender and appellant in the expenses of the appeal; certifies the appeal as suitable for the employment of counsel; allows accounts of expenses, where appropriate, to be given in and remits same when lodged to the Auditor of Court to tax and to report; reserves all questions of interest and appoints parties to be heard thereon, if necessary, on a date to be hereafter assigned. NOTE: Background to the appeal 1. On 11 February the Sheriff granted decree of divorce in favour of the respondent and in terms of Rule 12(1)(b) of the Family Law

(Scotland) Act 1985 allowed a period of twelve months for the granting of an order for a capital sum. Thereafter there was a variety of procedure and in due course evidence was heard on 12 November 2004 , 10 December 2004 , 17 January 2005 and 18 January 2005 . On that latter date the evidence was concluded and a hearing on the evidence, when the shorthand notes would be available, was assigned for 9 February 2005 . 2. On 7 February the Sheriff heard a motion 7/5 of process which was in the following terms: "Nicol for the defender respectfully moves the court to extend the period of twelve months allowed in the Sheriff's interlocutor of 11 February 2004 for the granting of an order for a capital sum, to be extended by a period of one month or such other period as the court may consider appropriate to allow the Hearing on Evidence presently fixed for 9 February 2005 to be completed and to allow the Sheriff time thereafter to issue a written judgment." The Sheriff held that that motion to be incompetent and, ex proprio motu, granted leave to appeal. He wrote a note giving his reasons for taking that course. 3. Section 12(1) of the Family Law (Scotland) Act 1985 provides: "An order under section 8(2) of this Act for payment of a capital sum or transfer of property may be made - (a) on granting decree of divorce or (b) within such period as the court on granting of decree of divorce may specify." The Sheriff in his note expressed the opinion that these terms were clear and unambiguous. He stated: "As regards orders for payment of a capital sum or transfer of property that is reflected in the terms of section 12 ... an order in terms of section 12(1)(b) can only be pronounced at one point of time - on granting decree of divorce. ... At that point of time the court must specify a period of time. It is only "within such period" that an order "for payment of a capital sum or transfer of property may be made" ... and thus unless an order is made within that period it cannot be made at all." The Sheriff then continued: "That being my view it follows that once specified on granting decree of divorce that period cannot be re-specified on a later occasion." The Sheriff's position was effectively that, once a period was specified in terms of section 12(1)(b) of the 1985 Act, extension to a later date was not competent. He appeared to accept that the inevitable consequence in the circumstances of this case was that if there was no extension of the period the right to a capital sum would be lost. 4. That decision was appealed to Sheriff Principal McInnes who, having heard parties, on 5 August issued the following interlocutor: "The Sheriff Principal, having resumed consideration of the appeal, recalls the interlocutor of the Sheriff of 7 February 2005 insofar as he refused the defender's motion (no 7/5 of process) as incompetent; remits the cause to the Sheriff to hear parties on the evidence led on a date to be afterwards fixed and thereafter to issue his judgment in respect of the matters in dispute ..." The Sheriff Principal accepted the reasoning of the Sheriff that it was not competent to effect an extension of the time limit in section 12(1)(b) by means of an incidental order under section 12(2)(k) of the Act. The Sheriff Principal said at para 18 page 9: "The question essentially is whether this court can and should avoid the injustice which would occur if the Sheriff's decision is allowed to stand. It is difficult to believe that this court does not have the ability to provide a remedy where the absence of such a remedy would cause such manifest injustice. ... There is a very strong case in equity favouring a decision by this court which will allow the Sheriff to conclude the case before him by reaching a decision on the evidence already led." The Sheriff Principal referred to the

case of *Newman Shopfitters Ltd v M J Gleeson Group plc* 2003 SLT (Sh Ct) 83 where Sheriff Principal Macphail held that the Sheriff Court had an inherent jurisdiction, derived from the very nature of the court itself rather than from any statute or rule of court. In *Hall v Associated Newspapers Ltd* 1979 JC1 that jurisdiction was described as: "the indispensable power which is inherent in every court to do whatever is necessary to discharge the whole of its responsibilities." Sheriff Principal Macphail quoted with approval an article by Sir Jack Jacob on Practice and Procedure in Halsbury's Laws of England volume 37 (revised 2001) para 12 to the effect that the inherent jurisdiction of the court: "has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them." He noted that the Sheriff Court (Scotland) Act 1907 section 5 provided: "Nothing herein contained shall derogate from any jurisdiction powers or authority presently processed or in use to be exercised by the sheriffs of Scotland ." 5. Sheriff Principal McInnes at para 24 in his judgment in this case stated: "I am satisfied that the statement of the law by Sheriff Principal Macphail in paragraphs 23-26 is a correct statement of the law of Scotland in relation to the inherent jurisdiction of the Sheriff and other courts. I am further satisfied that this is an appropriate case in which to invoke that inherent jurisdiction to enable the Sheriff to do justice between the parties and to reach a conclusion on the evidence which he has already heard. It seems to me that that is the only basis upon which justice can be done between the parties since I am satisfied that the Sheriff was correct to hold that section 12(1)(b) required him to specify a period and that that period could not be extended using the provisions of the Family Law (Scotland) Act 1985. I have set out above the reasons why I consider it to be equitable to recall interlocutor of the Sheriff insofar as he refused the defender's motion (7/5 of process) as incompetent. I have remitted the case to the Sheriff so that the parties may be heard on the evidence led so that he may thereafter issue a judgment." 6. The case was then returned to the Sheriff in accordance with the Sheriff Principal's interlocutor to hear parties on the evidence and thereafter to issue a judgment in respect of the matters in dispute. 7. The Sheriff thereafter heard parties on the evidence. He issued an interlocutor and note on 11 November 2005 . The Sheriff found in law: "1. It being incompetent to grant decree ordaining the pursuer to make payment of a capital sum to the defender having regard to the provisions of the Family Law (Scotland) Act 1985 section 8(2), grants decree of absolvitor anent the defender's first crave. At page 15 of his note the Sheriff stated: "I have now heard parties on the evidence ... It is in the issue of the judgment to the extent of granting a decree, that I perceive two insurmountable obstacles which would render such a step incompetent." The Sheriff then proceeded: "Section 8(1) of the 1985 Act provides that in an action for divorce a party may apply to the court for various orders including an order for payment of a capital sum by the other party to the marriage. Section 8(2) then provides as follows: Subject to sections 12-15 of this Act where an application has been made under subsection (1) above, the court shall make such order if any as is - (a) justified by the principles set out in section 9 of this Act and (b) reasonable having regard to the resources of the parties." Having heard the parties I am

satisfied that the granting of an order for payment by the pursuer to the defender of a capital sum of £12,036.88 would be justified by the principles set out in section 9 of the Act. And would be reasonable having regard to the resources of the parties. But it is the next step involving granting decree that cannot now be taken. The first reason is this. I refused the defender's motion (7/5) on the sole basis that it was incompetent. The Sheriff Principal then recalled that interlocutor of the Sheriff "Insofar as he refused the defender's motion 7/5 as incompetent". The reason given being that it was equitable to do so by virtue of the inherent jurisdiction of the court. But having held the motion to be competent it has never been adjudicated upon on its merits. Far less granted. Neither by the Sheriff Principal nor by myself. And the discretion of the court has never been exercised upon its grant or refusal. There are unquestionably powerful arguments which might be deployed upon the matter. For example the prejudice to one or other of the parties in making or not making an order for payment of a capital sum over one or a half years after the parties were divorced. When their circumstances and resources may have changed dramatically in the interval. Thus without the motion having been determined the position remains as it was. That in the absence of the grant of the motion the period specified in terms of section 12(1)(b) of the interlocutor of 11 February 2006 remains as stated in the interlocutor. The second reason relates to the terms of section 8(2). Which provides in its opening words that an order shall only be made "subject to sections 12 to 15 of this Act." Whilst the Sheriff Principal has held that the inherent jurisdiction allowed the motion 7/5 of process to be held to be competent, rather than incompetent, he made no such ruling in regard to the grant of decree in terms of section 8(2). Standing the express terms of section 12(1)(b) and the terms of the interlocutor of 11 February 2004 I find it inescapable that a decree for payment of a capital sum cannot now be pronounced." 8. Against that interlocutor the appellant now appeals. I deal with the appeal under the following heads: A. The Sheriff's finding that it was incompetent to grant decree ordaining the pursuer to make a payment of a capital sum to the defender having regard to the provisions of the Family Law (Scotland) Act 1985 section 8(2) B. Submissions on behalf of parties made in respect of calculation of capital sum to the Sheriff at the proof. C. The Sheriff's calculation of the capital sum of £12,036.88 which he would have awarded to the appellant if he had considered it was competent so to do. D. Whether the Sheriff should have adjusted his computation to give effect to the fact that, although the parties operated the ice-cream business as a partnership and were thus jointly liable for the debts of the ice-cream business of £15,788.19, these debts had been contracted by the appellant and the fact that she would require to pay them in the first instance should have been reflected in the computation and the appellant's assets reduced by that sum. At the very least, the appellant's assets should have been reduced by £7,894.09, being one half of these debts. E. Whether the Sheriff erred in giving the respondent credit for the Standard Life loan of £5,535.84 (see finding in fact 7) but making no corresponding finding about the related asset owned by the respondent, which was a Standard Life endowment policy against which the loan was secured. F. Interest. G. Expenses. I deal with these in turn. A. The Sheriff's finding that it was incompetent to grant decree ordaining the pursuer to make a payment of a capital sum to the defender having regard to the provisions of the Family Law (Scotland) Act 1985 section

8(2) Submissions for the defender and appellant 9. Counsel for the appellant noted that Sheriff Principal McInnes had held in his interlocutor of 5 August 2005 that the twelve month period which had been specified in terms of section 12(1)(b) of the 1985 Act on 11 February 2004 might subsequently be extended in the exercise of the inherent jurisdiction of the Sheriff Court at common law where it is necessary to do justice between the parties. It was further submitted that the interlocutor and note went further and directed an extension of the period for a sufficient time to enable the hearing on evidence to be held and the judgment to be issued. The Sheriff had stated that the defender's motion 7/5 of process had never been adjudicated upon on its merits. He claimed that the discretion of neither himself nor the Sheriff Principal had been exercised as to the grant or refusal of the motion. It was submitted that, on a proper reading of the Sheriff Principal's note, the motion had been adjudicated upon by him on its merits. The Sheriff Principal in fact held an extension of the twelve month period was competent in view of the court's inherent jurisdiction and then proceeded to grant an extension. He directed an extension for the time necessary for the Sheriff to hear parties on the evidence led and thereafter to issue his judgment in respect of the matters in dispute. That decision was binding upon the Sheriff. The appellant accepted that an extension of the twelve month period was a condition precedent to the competency of any award of a capital sum. It was submitted that, if the Sheriff Principal was only making a decision on the question of competence, his interlocutor would have remitted the matter to the Sheriff to determine whether or not the motion 7/5 of process should be granted. That was not what the Sheriff Principal had done in this case. He had expressly remitted the cause to the Sheriff to hold a hearing on the evidence and to issue a judgement in respect of the matters in dispute. He had effectively determined the motion. 10. As far as his second reason for refusing the motion, the Sheriff had referred to the terms of section 8(2) which provides: "Subject to sections 12-15 of this Act, where an application has been made under subsection (1) above, the court shall make such order, if any as is - (a) justified by the principles set out in section 9 of this Act and (b) reasonable having regard to the resources of the parties." Any award in terms of section 8(2) was "subject to sections 12-15 of this Act". Section 12, as had already been noted, provided that an order may be made within such period as the court on granting decree may specify. The Sheriff suggested that the Sheriff Principal had made no ruling in regard to the grant of decree in terms of section 8(2). In view of the terms of section 12(1)(b) of the 1985 Act and interlocutor of 11 February 2005 the Sheriff concluded that a decree for a payment of a capital sum could not be pronounced. It was submitted for the appellant that where the legislation provides for a period to be fixed, but is silent on the question of whether once fixed it may be extended, there is no statutory bar to extension. It was submitted that the Sheriff had found that the inherent jurisdiction allowed an extension. In these circumstances if the inherent jurisdiction allowed extension and an extension was granted, there was no bar in terms of section 12(1)(b) to the Sheriff granting decree in terms of section 8(2) of the Act. The respondent had only asked for an order for a capital sum to be made after extension had been granted. 11. It was submitted that what had been determined by the Sheriff Principal, and what was binding on the Sheriff, was that the inherent jurisdiction permitted extension of the period fixed in terms of

section 12(1)(b) and, the extension having been allowed, it was competent to grant decree. The restriction in place as a result of the fixing of the twelve month period in terms of section 12(1)(b) of the 1985 Act had been lifted by the Sheriff Principal's decision. 12. It was submitted it was clear from the Sheriff Principal's note attached to his interlocutor of 5 August 2005 that the interlocutor was in effect granting an extension of the twelve month period fixed by the Sheriff on 11 February 2004 for such period as was necessary for the Sheriff to hear parties on the evidence led and thereafter to issue his judgment in respect of the matters in dispute. Moreover, it was submitted that where the opinion of an appellate court made clear what was intended and set out the basis of the appellant court's decision, where there is a short form of interlocutor which perhaps omitted detail, it was appropriate to look at the terms of the appeal court's opinion to determine how the interlocutor should be interpreted. I was referred to *Pollok School Company v Glasgow Town Clerk* 1947 SC 605 where Lord President Cooper said at page 619: "Controversy developed as to the meaning of that decision, owing mainly to the unfortunate fact that the court's interlocutor does not square with the opinions delivered ... the opinions, which were unanimous in the result, narrowly limited the proof to two specific issues, and determined the most important legal issue raised in the case. I consider that for present purposes we must follow the ratio decidendi disclosed by the opinions and ignore the interlocutor." 13. It was submitted that it was clear from Sheriff Principal McInnes' note that he intended to grant an extension for as long as it took for the Sheriff to hear parties on the evidence led and thereafter to issue his judgment. If this was not clear from his interlocutor (and it was submitted that it was) the matter was put beyond doubt by the terms of the Sheriff Principal's note which said: "I have set out above the reasons why I consider it to be equitable to recall the interlocutor of the Sheriff insofar as he refused the defender's motion (no 7/5 of process) as incompetent. I have remitted the case to the Sheriff so that the parties may be heard on the evidence led and so that he may thereafter issue a judgment." The appellant's position was that it was clear that the Sheriff Principal had granted an extension. 14. It was submitted there were three factors which pointed to the conclusion that there had been an extension. i. The terms of the note: "I am further satisfied that this is an appropriate case in which to invoke the inherent jurisdiction to enable the Sheriff to do justice between the parties and to reach a conclusion on the evidence which he has already heard." ii. In the Sheriff's first note of 25 February 2005 he expressly recognised the inevitable consequence of refusing an extension would be that the capital payment would be lost. It was a matter of concession before Sheriff Principal McInnes that, unless the appeal were allowed, the action would be at an end insofar as the capital sum was concerned. When the Sheriff Principal came to decide what should happen after he had dealt with the issue of competency, there were two alternatives open to him namely (a) rule on the merits of the motion himself or (b) remit to the Sheriff to rule on the merits of the motion. The question of remitting to the Sheriff to rule on the merits of the motion was discussed by the parties before the Sheriff Principal. There was no suggestion in his note that he proposed doing so or indeed had done so. iii. The disposal of the appeal expenses. The expenses of the appeal had been granted in favour of the appellant subject to a modification 15. It was submitted on behalf of the appellant that, not only was the Sheriff

Principal's decision to the effect that an extension was competent in view of the inherent jurisdiction of the Sheriff Court, but also that he then proceeded to grant the motion for an extension on the basis set out in his interlocutor, namely by remitting the case to the Sheriff to hear parties on the evidence led and to issue a judgment in respect of the matters in dispute. Submissions for the pursuer and respondent 16. Counsel for the respondent stated that the point of competency was one which the Sheriff himself had raised at the hearing on evidence. It was not one which had been urged on him on behalf of the respondent. However, the point having been taken by the Sheriff it was submitted that the Sheriff's analysis of the effect of the Sheriff Principal's interlocutor dated 5 August 2005 and the reasons given by him for the decision he reached were correct. It was submitted that the motion for the appellant 7/5 of process which was refused by the Sheriff on 7 February 2005 was only partially granted on appeal. In particular the Sheriff Principal did not grant the first part of the motion which sought: "To extend the period of twelve months allowed in the Sheriff's interlocutor of 11 February 2004 for the granting of an order for a capital sum to be extended by a period of one month or such other period as the court might consider appropriate." The Sheriff Principal did not uphold the appellant's grounds of appeal in relation to the competency of such an extension in terms of the Family Law (Scotland) Act 1985. Indeed he refused to follow the cases of Mackin v Mackin SLT (Sh Ct) 22 and Fernando v Fernando Sheriff Principal Risk Aberdeen Sheriff Court 25 March 1996 . It was incorrect and inappropriate to read otherwise into the Sheriff Principal's interlocutor of 5 August 2005 . 17. It was submitted the appeal was successful solely on the issue of whether the court had an inherent jurisdiction in terms set out by Sheriff Principal Macphail in Newman Shopfitters Limited v MG Gleeson plc 2003 SLT (Sh Ct) 83. Counsel suggested that that case was only authority for the general proposition that the court had discretion in certain very limited circumstances: "To do whatever is necessary to discharge the whole of its responsibilities. That discretion could not be exercised in a way which was inconsistent with statute law or the statutory rules of the courts." The Sheriff, after hearing parties on the evidence, concluded that the first part of the motion 7/5 of process had not been determined. He decided to refuse the motion on the two grounds (i) by exercising his discretion against granting the motion due to the length of time that had passed and the possible prejudicial effect on the parties' resources. In this regard the correct period to have regard to was the period since the relevant date (28 August 2002) rather than the date of divorce 11 February . Although the Sheriff refers to the latter date it was clearly the former date he had in mind having regard to his determination that payment of a sum of £12,036 (arrived at by considering the value of the property at the relevant date) would be reasonable having regard to the resources of the parties and (ii) that, in any event the present case was not one in which he could exercise an inherent jurisdiction due to the clear terms of the statute. It was submitted that in the second proposition (which logically should be considered before the first) the Sheriff was correct. There was no ambiguity in the relevant provisions of the Family Law Scotland) Act 1985. Indeed to exercise the discretion suggested would be contrary to the terms of the Act. 18. Counsel for the respondent pointed out that the Sheriff had indicated that, had he been asked to exercise his discretion in favour of

granting the motion, he would have declined to do so because of the length of time that had passed since the decree of divorce (nearly 18 months) and the possible prejudicial effect on the parties' resources. It was submitted that the question of resources was an integral part of the Sheriff's determination. The Sheriff secondly took the view that an order for financial provision had to be made in terms of the statute. If the statute (section 12(1)(b)) provided a specific period in which such an order could be made - as was the case here - it was not open to the Sheriff to extend that period. It was the Sheriff's view there was no lacuna in the statute which required to be filled by the exercise of any inherent jurisdiction he may have. While it was accepted that this might be seen as being harsh on Mrs Lindsay, nevertheless that determination was in accordance with the law. 19. I was asked in the whole circumstances to uphold the Sheriff's decision and refuse the appeal. Decision 20. I prefer the arguments which have been put forward on behalf of the appellant. Section 12(1)(b) provides that an order under section 8(2) of the Act "for payment of a capital sum or transfer of property may be made - ... (b) within such period as the court on granting decree of divorce may specify." In this case on 11 February 2004 the Sheriff granted decree of divorce in favour of the respondent and allowed a period of twelve months for the granting of a capital sum. There is no provision in the Family Law (Scotland) Act 1985 to allow that period to be extended in terms of the statute. The Sheriff accordingly considered the motion to extend the period of twelve months which came before him on 7 February 2005 to be incompetent. It is clear, in my view, that there is a lacuna in the statute which could result in injustice. For example, a Sheriff might be taken ill shortly before the twelve month period elapsed and he would be unable either to conclude the hearing of the proof or to issue a judgement. Then there is the situation which arose in this case. The court programme in a busy single Sheriff Court did not allow sufficient court time, after the necessary investigation had been undertaken, for the evidence to be heard, the parties to be heard on the evidence and the judgment to be issued, all within the twelve month period. 21. I take the view that Sheriff Principal McInnes was correct to reach the view that there is an inherent jurisdiction in such circumstances in the Sheriff Court to take such steps as are necessary to allow justice to be done between the parties. That inherent jurisdiction was described in *Hall v Associated Newspapers Ltd* 1979 JC 1 as: "the indispensable power which is inherent in every court to do whatever is necessary to discharge the whole of its responsibilities" In *Newman Shopfitters Limited v MG Greeson Group plc* 2003 SLT (Sh Ct) 83 Sheriff Principal Macphail quoted with approval an article by Sir Jack Jacob on Practice and Procedure in Halsbury's Law of England vol 37 (revised 2001) para 12 to the effect that the inherent jurisdiction of the court: "has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them." 22. I agree with Sheriff Principal McInnes that this is an appropriate case in which to invoke that inherent jurisdiction to enable the Sheriff to do justice between the parties and to reach a conclusion on the evidence which has already been heard. 23. Sheriff Principal McInnes, in his interlocutor, having recalled the interlocutor of the Sheriff of 7 February 2005 insofar as

he refused the appellant's motion no 7/5 of process as incompetent, then proceeded to remit the cause to the Sheriff to hear parties on the evidence led on a date to be afterwards fixed and thereafter to issue his judgment in respect of the matters in dispute. In his note at para 24 he stated: "I have set out above the reasons why I consider it is equitable to recall the interlocutor of the Sheriff insofar as he refused the defender's motion (7/5 of process) as incompetent. I have remitted the case to the Sheriff so that the parties may be heard on the evidence led so that he may thereafter issue a judgment." To my mind it is clear from a reading of both the interlocutor and the note that what the Sheriff Principal was doing was (1) holding the motion to be competent and (2) granting an extension as requested and that for the time necessary for the Sheriff to hear parties on the evidence led and thereafter to issue his judgment in respect of the matters in dispute. He did not choose to fix an exact period during which that should be done. However, standing the fact that all the evidence had been led and all that remained to be done was to fix a hearing on the evidence and to issue a judgment on the matters in dispute, I take the view it was not necessary for him to specify an exact time period. The way in which he chose to deal with the request for an extension of time was a proper and practical one. 24. I consider the Sheriff was not correct to take the view that the Sheriff Principal had not determined the motion. I was informed by counsel for both parties that the question of remitting the motion to the Sheriff to be dealt with by him was considered at the appeal hearing, but it is clear from his note that the Sheriff Principal declined to take that course. I consider that the only reasonable interpretation of his interlocutor and note is that he decided to deal with the motion himself. He held the motion competent, and then proceeded to grant it for the period necessary for the Sheriff, who had heard the evidence, to hear parties on the evidence and thereafter to issue his judgment. 25. The other point which requires consideration is the Sheriff's decision that the terms of section 8(2) of the 1985 Act which provide that an order for a capital sum could only be made "subject to sections 12 to 15 of this Act" prevented him from making an award of a capital sum. The Sheriff considered that the terms of section 12(1)(b) precluded him from making a capital sum as he could not make it "within such period as the court on granting decree of divorce may specify". He took the view that the period of twelve months specified by the court on 11 February 2004 had not been extended. He could not as a result pronounce decree. 26. I do not agree with that view. A Sheriff may grant decree for a capital sum in terms of section 8(2). This is subject to any restriction placed upon him or her by section 12(1)(b) of the Act. However the restriction originally in place in terms of section 12(1)(b) of granting decree for a capital sum only within twelve months of 11 February 2004 was no longer in place when the case was returned to the Sheriff. The Sheriff Principal by his decision had exercised the inherent jurisdiction of the Sheriff Court to remove that restriction. A capital sum could accordingly be awarded by the Sheriff when he had heard parties on the evidence and issued a judgment on the matters in dispute. There was no restriction then in place in terms of section 12(1)(b) of the 1985 Act to prevent him from doing so. I consider that the Sheriff was bound by the Sheriff Principal's interlocutor and, having heard parties on the evidence, was bound to grant decree for a capital sum if he considered that was appropriate on the evidence. B. Submissions on behalf

of parties made in respect of calculation of capital sum to the Sheriff at the proof 27. The calculation submitted at the proof on behalf of the pursuer and respondent, contained in 5/45 of process was that the husband had matrimonial assets at the relevant date of £158,600.00 and the wife £15,440.71. The total matrimonial assets were accordingly £174,040.71. There were debts at the instance of the husband of £114,806.29 and at the instance of the wife £7,216.60. The total matrimonial debts were £122,022.88. Deducting the total matrimonial debts from the total matrimonial assets left net matrimonial property of £52,017.83. On an equal sharing each spouse was entitled to £26,008.91. The wife had already in her possession £15,440.71 being the value of her pension. She was accordingly entitled to a capital sum of £10,568.20. 28. A calculation was submitted on behalf of the defender and appellant in 6/27 of process. She deducted from the husband's assets the debts said to be payable by the husband of £93,617.74 leaving net assets in the hands of the husband at £124,182.26. She deducted from the wife's assets the debts payable by the wife of £15,671.49 leaving net assets at the instance of the wife of minus £230.78. She calculated that the total net assets were £124,413.04. Her one half share was £62,206.52. She had in her possession £15,440.71, so the capital sum payable should be £46,765.81. 29. Against that background I proceed to record the capital sum which the Sheriff said he would have awarded had he considered it to be competent for him so to do. I would comment at this stage that, while both calculations indicated that the appellant only had in her possession her pension valued at £15,440.71, the Sheriff found in fact that one half share of the moveables, being the assets of the ice cream parlour, were in store and he assessed that they should be considered in the possession of the appellant. I precede on that basis. C. The Sheriff's calculation of the capital sum of £12,036.88 which he would have awarded to the appellant if he had considered it was competent so to do 30. The Sheriff sets out in his findings in fact his calculations in reaching his conclusion that, having regard to the principles set out in section 9 of the 1985 Act and having regard to the resources of the parties, the ordering of payment of a capital sum of £12,036.88 by the respondent to the appellant would have been justified by these principles and reasonable having regard to the resources of the parties. 31. The Sheriff's calculation of the capital sum which he stated he would have awarded if in a position to do so can be set out in four stages: 1. Total net value of the matrimonial property. (a) Assets (i) Pursuer's assets £158,300 (findings 12 (cars) and 17 (farm)) (ii) Defender's assets £15,440.71 (finding 13) (iii) Joint assets £2,000 (finding 14) (iv) Total assets £175,740.71 (finding 18) (b) Liabilities (i) Pursuer's liabilities £102,998.05 (finding 8) (ii) Defender's liabilities £NIL (finding 10) (iii) Joint liabilities £15,788.19 (finding 9) (iv) Total liabilities £118,786.24 (finding 11) Total net value of matrimonial property thus derived by subtracting total liabilities of £118,786.24 from total assets of £175,740.71 hence nett value of £56,954.47 (finding 19) 2. 50% of £56,954.47 is £28,477.24 3. Appellant already has net matrimonial property worth £16,440.71 (pension of £15,440.17 plus half share of moveables at £1,000). 4. Capital sum the difference between what she already has (£16,440.71) and the target figure (£28,477.24) hence £12,036.88 It appears that the calculation in fact brings out the sum of £12,036.53. Although the discrepancy is de minimis, to make the arithmetic work in the remainder of this note, I proceed on the basis that the correct calculation for the figure the Sheriff would have

awarded is £12,036.53. 32. A consideration of production 5/45 for the respondent and production 6/27 for the appellant, which I have summarised in paras 27 and 28 hereof, demonstrates the competing calculations with which the Sheriff was faced at proof. Although the figures are slightly different, he has preferred the approach to the calculation of the capital sum adopted on behalf of the respondent. 33. In this connection the significant part of the Sheriff's judgment is at page 10 where he said after referring to the two conflicting computations: "... But significantly the submission was that in terms of section 9(1)(a) and 10(1) of the 1985 Act a fair sharing of the net value of the matrimonial property should be an equal sharing. And that there were no special circumstances in terms of section 10(6) or otherwise to justify an unequal sharing. The pursuer had the resources to make such a payment by realising his non-matrimonial property. And if necessary paying the balance of the capital by instalments. The significance of the concession made by the defender was that the net value of the matrimonial property should be shared equally between the parties was that this was then accepted on behalf of the pursuer. Thus a major source of potential controversy in calculating the payment was resolved." The Sheriff continued: "For the pursuer it was submitted that the defender's calculation in 6/27 of process was simply wrong. And demonstrated a misunderstanding of the central provisions of the 1985 Act. The exact provisions of sections 10(4) and 10(2) had to be followed in order to calculate the net value of the matrimonial property at the relevant date. The pursuer's production 5/45 was such a calculation. Which produced a net value for the matrimonial property of £52,017.83. And on an equal sharing basis produced a figure of £10,468.20 which the pursuer would require to pay to the defender as a capital payment to achieve parity. On such a basis it was further accepted by the pursuer in his evidence that he did indeed have the resources to make such a payment. He could obtain further borrowing of £12,000 without having to realise any existing assets. If a capital payment at that level was ordered it could be paid. " The Sheriff gave reasons in his note for his preferring the respondent's valuation of the farm and lands of Carsegowan. He then continued at page 13: "... With that background the outcome of the defender's claim for a capital payment is set out in the findings in fact and the calculations are self explanatory. The pursuer's submission as to how this must be calculated are correct. The exact terms of section 10 of the 1985 Act must be followed to calculate the net value of the matrimonial property. That must then be shared equally between the parties. Which upon the arithmetic produces the outcome that the pursuer requires to make a capital payment to the defender of £12,036.88." 34. Section 10(2) of the Family Law (Scotland) Act 1985 provides: "The net value of the matrimonial property shall be the value of the property at the relevant date after deduction of any debts incurred by the parties or either of them- (a) before the marriage so far as they relate to the matrimonial property and (b) during the marriage which are outstanding at that date." Section 10(4) of the Act said: "Subject to sub-section (5) below, in this section and in section 11 of the Act "matrimonial property" means all the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party)- (a) before the marriage for use by them as a family home or as furniture or furnishings for such home; or (b) during the marriage but

before the relevant date." It is significant that the Sheriff took the view (a) that the debts said in both computations to be the wife's debts were in fact joint debts as they were partnership debts for which both parties were jointly and severally liable and (b) that he did not require to have regard to the party to whom any creditor would look for payment of any of the matrimonial debts. He calculated the total matrimonial assets and deducted therefrom the total debts incurred by the parties or either of them. He divided the resultant figure in two. This gave the share of the net matrimonial property to which each spouse was entitled. He deducted from that figure the assets already in possession of the appellant and the balancing figure gave the capital sum to be awarded. He considered that this was the proper approach having regard to the provisions of sections 10(2) and 10(4) of the Act. 35. Against that calculation the appellant now appeals. D. Whether the Sheriff should have adjusted his computation to give effect to the fact that, although the parties operated the ice-cream business as a partnership and were thus jointly liable for the debts of the ice cream business of £15,788.19, these debts had been contracted by the appellant and the fact that she would require to pay them in the first instance should have been reflected in the computation and the appellant's assets reduced by that sum. At the very least, the appellant's assets should have been reduced by £7,894.10, being one half of these debts 36. It was said that the Sheriff erred in fixing £12,036.88 (corrected to read £12,036.53) as the capital sum which would have been appropriate in the event of him holding that such an award was competent. He proceeded (correctly, it was submitted) upon the basis that the statutory presumption in favour of equal sharing should be given effect to. He also proceeded (again correctly, it was submitted) upon the basis that the matter should be looked at in two stages: first by identifying the net value of the property; and secondly by identifying how much of this was already held by the appellant and thereafter fixing a capital payment so as to give her precisely 50%. It was submitted, however, that he fell into error in leaving out of account at the second stage of that exercise the liabilities relating to the former business of the ice-cream parlour. He did so upon the basis that since the parties were, as partners in the venture, at least on a strict analysis, jointly and severally liable for those debts, no order was necessary. The unchallenged evidence about these debts was that whatever might be the strict legal position the appellant was either primarily liable to the creditor (as with the lease where she was the sole tenant and the Rural Diversification Grant where she was the sole applicant) or had in any event assumed liability for them to the creditors and either had paid or was paying them off. There was no evidence that the respondent would in fact have any liability and he did no so contend. The only argument advanced by him was that the arrears of rent should be discounted because the appellant could avoid paying this upon the basis of an alleged breach by the landlord of the terms of the lease. The calculation gave the respondent credit for his notional half share of the liabilities which in practice he would not have to meet and the appellant would meet in full. 37. In these circumstances the Sheriff ought to have fixed the award to take account of the practical reality of the parties' circumstances. The award fixed by him would leave the appellant to raise further proceedings to assert a right of relief against the respondent for the debts she had paid on his behalf in order to realise her entitlement to a half share of the assets. There was a

distinction between, on the one hand liability of the parties individually in the first instance to third party creditors, and on the other hand, where such debts were incurred in furtherance of the partnership business with the result that the parties have rights of relief inter se. The undisputed evidence was that the appellant was the sole obligant in terms of the lease, and was the party solely responsible in respect of the obligation to repay the Rural Diversification Grant. No doubt, when called upon to pay, she might in turn have asserted a pro rata right of relief against the respondent as her partner, but that was not the point. The Sheriff impliedly rejected the respondent's argument that these debts should be discounted because the lease liability could be avoided on the base of apparent breach by the landlord. However, these debts were in the Sheriff's calculation and it was appropriate that at this stage the fact that who would in fact pay the debts should be taken into account. 38. The situation as a matter of practical reality was that the appellant had all of the liabilities and the respondent had all of the assets. The import of the Sheriff's decision on this point was that further litigation would be required between the parties to resolve their respective shares of these liabilities. That was not an approach which should have been adopted. It disclosed an error in law. As indicated by the First Division in *Little v Little* 1990 SLT 785, the court is to achieve a result which is "a fair and practicable result in accordance with commonsense". The approach of leaving parties to vindicate their respective rights in jointly owned assets according to the law of property was disapproved in the Inner House in *Jacques v Jacques* 1995 SC 327 at pages 331-332 and not challenged in the subsequent appeal to the House of Lords. 39. The application of correct reasoning to the facts found by the Sheriff should start with the net value of the matrimonial property as found by him at £56,954.47. Fifty per cent of this figure was £28,477.24. That was the figure required to achieve fair sharing. The only assets held by the appellant were her pension of £15,446.71 and ice cream equipment of £1,000. She was in reality liable for all of the debts of the ice-cream business, which amounted to £15,788.19. She was thus left with net matrimonial property of minus £347.48. On the figures found by the Sheriff, it was suggested the capital sum required to achieve fair sharing was £28,824.72 (being the target figure of £28,477.24 to which should be added the sum of £347.48 to make up for the minus value of assets in her possession). 40. If I was not with the appellant on that argument it was suggested that at the very least 50% of the joint debt for the ice cream parlour should be credited to the appellant. This would give a capital sum of £19,930.63 to the appellant. Using the Sheriff's figures set out in para 31 hereof as a basis for the calculation, the adjusted calculation should be (1) net value of matrimonial property £56,954.47 (2) 50% thereof £28,477.24 (3) appellant already has net property of £8,546.61 (pension £15,440.71, one half moveables £1,000 less one half ice cream parlour debts £7,894.10) (4) capital sum is the difference between the target figure of £28,477.24 and property already held of £8,546.61, hence £19,930.63. 41. It was acknowledged that in terms of section 8(2) of the Family Law (Scotland) Act 1985 any award required to be (a) justified by the principles set out in section 9 of this Act and (b) reasonable having regard to the resources of the parties. It was suggested that, if the Sheriff in his original judgment had considered £12,036.88 (£12,036.53) to be justified by the principles set out in section 9 of this Act, there could be no quarrel with an award of either £28,824.74 or £19,930.63 being

similarly described as it represented the correct computation of the Sheriff findings. However, before the court could proceed to make an award for that greater figure, it required to be satisfied that such an award would be reasonable having regard to the resources of the parties. 42. It was pointed out that the finding in fact 22 was in the following terms: "As well as the matrimonial property, the pursuer also owned an area of woodland extending to some 139 acres, at the relevant date. And still does. This was acquired by him before the marriage. And thus not matrimonial property. Its valuation may lie somewhere between £35,000 and £10,000. But it might be very hard to find a ready market, standing the present state of the market for woodland. However the pursuer anticipates that upon his resources he would be able to borrow some £12,000 and thus find the payment of an order for a capital sum at this level." It was submitted that the Sheriff had not reached any wrong conclusion on resources. He had just not given any indication of his view on resources on the hypothesis of an award greater than £12,000. He had made an award in the region of £12,000. The respondent had indicated in his evidence that upon his current resources he would be able to borrow some £12,000 and thus fund the payment of a capital sum at that level. This was in fact amplified in evidence by the respondent. He stated at evidence that he would be able to borrow back up to £80,000 on the farm. His original loan had been reduced from £80,000 to £68,000, giving a figure of £12,000 that he would be able to borrow over the farmhouse. It was submitted that what in fact the Sheriff had found was that if the award was £12,000, the respondent would be able to pay that sum. He had not found that the respondent could pay no more than £12,000. 43. The effect of the Sheriff's judgment was that he had stated that he was satisfied that resources existed to pay a capital sum of £12,000. There was no warrant to read his decision as saying that £12,000 was all that the respondent could pay and no more. It was clear from finding in fact 22 that there were two separate sources of resources (a) borrowing capacity of £12,000 over the farmhouse and (b) 139 acres of commercial woodland. The respondent gave evidence at 275/23 that he paid £75,000 for the woodland in 1985. It is not mortgaged. He described at page 332 the woodland as a long term investment for his children. He suggested it would be worth £350,000 to £400,000 by the time they were forty. At page 332 7 he was asked on 17 January 2005 : "But you gave evidence before that G M Thomson had given you a valuation of the ICI factory at £10,000? - A. Yes but what I'm saying is that it is now £35,000. They are growing." At "Q. You are saying it is not valueless now? - A. It was valueless when G M Thomson - when the trees were planted. Two years later we tried to sell it and G M Thomson put a value of £10,000 on it. Seven years later it is worth £35,000." At 362/23 "Q. Nonetheless it is an investment that you could realise ... you may not wish to? - A. Well, it would be really foolish to sell it for £35,000 at this point and it is an investment that will mature when we are both in our seventies and it will be our children's inheritance, not ours. Q. So is it your position that you are not unable to sell it but you are just unwilling to sell it? - A. I think it would be really foolish to sell it." The pursuer's valuer Jane Neill was cross examined at 436/8 "Q. So, what I am just trying to clarify is that you don't necessarily disagree that that area of ground has a value in the region of £35,000 or possibly more?

- A. No I would not disagree. Q. That part of ground presumably like any other piece of ground could be sold if a willing buyer was found?
- A. It would be most difficult. Q. That part of ground presumably like any other piece of ground could be sold if a willing buyer was found? - A. It would be most difficult. Q. But you would not know until you tried. A. If you have land that is planted it would be very difficult to sell. It is not very marketable as a situation." It was submitted on behalf of the appellant that the Sheriff had found in fact that the respondent did indeed have resources beyond £12,000 which he could obtain beyond the £12,000 which he could obtain by obtaining a further loan secured over the farm. The further resources consisted of the 139 acres of commercial woodland. It was accepted it might not be straightforward to sell the woodland and that it might be a sound long term investment. However, the fact remains that it was available as an asset. The Sheriff had not given a precise value for this asset which he valued at between £10,000 and £35,000. It was submitted there was no trace in the Sheriff's note of the Sheriff holding that this asset was not available to fund any award. It was suggested that the lowest figure mentioned of valuation of the woodland was £10,000 which would be enough to fund the £19,930.63 brought out in the alternative calculation in para 40 of this note on the basis that half of the joint debts be credited to the appellant. This source could also be used to fund the higher award proposed of £28,824.72. It was submitted there was scope for deterring payment for a reasonable time for realisation of this asset or there was a possibility of instalments over a substantial period of time. It was submitted however that there was enough in the Sheriff's findings for me to hold that from these two sources, namely mortgage on the farmhouse and sale of the woodland, they were resources available to fund an award at either of the amended figures and that such a course would be reasonable, having regard to the resources of the parties. The Sheriff's judgment did not say, and could not be reasonably read as saying that £12,000 was the limit that the respondent could pay. Submissions for pursuer and respondent 44. It was submitted by counsel for the respondent that the Sheriff had clearly been minded to make an award of £12,000 or thereabouts and was minded to do that, not just simply by adding everything up and splitting it in two, but because of a finding he made that £12,000 in substance represented the only resources reasonably available to the respondent. It was for the party seeking an award to satisfy the court that the award was reasonable and justified having regard to the resources of the parties. It was the position of the respondent that an order for payment in excess of £12,000 would not be reasonable having regard to his resources. 45. Finding in fact 22, which I have already set out, was the only finding in fact which dealt with resources. The Sheriff found that the respondent owned 139 acres of commercial woodland which was not matrimonial property. It was valued between £35,000 and £10,000, but it might be very hard to find a ready market, standing the present state of the market for woodland. Quite apart from the question of the woodland, the respondent anticipated that upon his resources he would be able to borrow some £12,000 and thus find the payment of an order for a capital sum at that level. The Sheriff had concluded in finding in fact 24 that such a payment was reasonable having regard to the resources of the parties. There were two major issues,

resources and valuation of the matrimonial property. The Sheriff recorded at page 13 that the appellant was asking at proof for £60,650 on the basis of her valuation of the farm. Her valuation was not accepted and the Sheriff accepted the respondent's valuation. The Sheriff had commented that this sum was in excess of the entire net value of the matrimonial property. In his note at page 16 the Sheriff concluded that a capital sum of £12,036.88 would be justified by the principles set out in section 9 of the Act and would be reasonable having regard to the resources of the parties. 46. It was submitted on behalf of the respondent that the Sheriff correctly appreciated that it was the end result in terms of the order made which, regarded as a whole, must satisfy the statutory requirements. I was referred to various authorities as follows: (1) *Wallis v Wallis* 1993 SLT 1348 where Lord Jauncey said at page 1352F-H: "... In terms of s 8(2) on an application for an order under s 8(1) the Court "shall make such order, if any, as is (a) justified by the principles set out in section 9 of this Act; and (b) reasonable having regard to the resources of the parties". These requirements are cumulative with the result that unless both are satisfied the court has no power to make an order. ... Assume a situation in which neither party has any personal capital and the only matrimonial property consists of a house and contents. Assume further that between the relevant date and the date of the hearing the value of the house has diminished by more than one half, for example, as a result of unforeseen subsidence or incompatible adjacent development. In that situation the court could make no order under section 8 because it would be unreasonable having regard to the resources of the spouse in possession for him or her to pay to the other a sum in excess of any available capital ..." This demonstrated that resources cannot be assumed to exist. They are real and important parts of the approach to financial provision. (2) *McVinnie v McVinnie* (No 2) 1997 SLT (Sh Ct) 12 where Sheriff Principal Nicolson stated at page 14H when referring to section 8(2) of the 1985 Act: "What it does is to set out two criteria, each of which must be satisfied before an award can be made ..." It was suggested that for an appeal, it has to be shown that the Sheriff misdirected himself in some way. It was suggested that as far as the appeal hearing was concerned, nothing had been heard about resources. Whatever figure was discussed, it was suggested the appellant had failed to show that any increased award would be reasonable having regard to the resources of the parties. (3) *Sweeney v Sweeney* (No 2) 2005 SLT 1141. I was referred to the opinion of the court at para 14C on page 1146: "An order made on an application for financial provision must subject to ss 12-15 of the Act, satisfy the dual criteria of being (a) justified by the principles set out in s 9(b) reasonable, having regard to the resources of the parties (s 8(2)). The only principle specified in s 9 which is applicable for the present purposes is that in s 9(1)(a) namely, that the net value of the matrimonial property should be shared fairly between the parties to the marriage, that principle itself being regulated by the provisions of s 10. "Resources" means present and foreseeable resources (s 27(1)) ... While there may be a logical order in which the application of these provisions should be addressed, it is important to bear in mind that it is the end result, in the terms of the order made, which, regarded as a whole, must satisfy the statutory requirements." 47. It was submitted that, even though the court accepted that the Sheriff was incorrect in his calculation of the award, it was inappropriate to substitute a different figure without

considering whether the Sheriff was also incorrect in relation to his finding on resources, particularly the resources available to the respondent. It was submitted there was no basis for the appeal court to reach such that conclusion. The Sheriff, it was submitted, was correct in his assessment of the available resources. They are set out in his findings in fact and in his note as had previously been noticed. 48. It was conceded that there were sections in the recorded evidence regarding resources, but it was the principal submission on behalf of the respondent and that consideration of these pieces of evidence were unnecessary. If these sections of evidence were considered, it would be seen that the Sheriff's findings in fact regarding resources should not be disturbed. Counsel for the respondent objected to any attempt at this stage to review the evidence on resources without fair notice of where the Sheriff misdirected himself or omitted to make findings that he should have done in relation to resources. 49. If necessary, the section of evidence on which the respondent would seek to rely were (i) 87 to 91 where the respondent, cross examined, appeared to accept that he would not have the income to pay an additional mortgage of some £60,000. (ii) 94 where the question was raised of selling the farm, which does not appear to have been considered by the Sheriff. (iii) 248 to 254 where the respondent describes the mortgage was down to £68,000 and he could borrow back up to £80,000. This was the evidence on which the Sheriff concentrated in reaching the conclusion that the respondent had the resources to meet a capital payment of £12,000. (iv) 361 and 369 there was discussion of the possibility of selling the woodland to which reference has already been made. 50. The respondent's position in evidence had been that £12,000 was the most that he could afford and that he would have had to borrow to obtain that sum. That mortgage would be taken out over the farm. It was submitted that it was clear that the Sheriff was of the view, that if payment of a capital sum should be made, he was satisfied that it should be in the region of £12,000. There had been no real discussion that the respondent had to look after the three children Robert aged seventeen, Elena aged fifteen and Harry aged eleven and the fact that the respondent's only income was from his use of the land, namely rental from grazing and manufacture of ice cream. If the farmhouse was sold that source of income for the family would go. It was submitted that this could be deduced from the notes of evidence. 51. I was referred to *Jacques v Jacques* 1995 SC 20 at 22 where Lord Jauncey said: "I find support for this view in *Little v Little* where the Lord [President (Hope)] after referring to the large amount of detail introduced by the Act of 1985 continued at 787B "But despite all the detail much is still left to the discretion of the court. This is clear from an examination of sec 8(2), which provides that the court shall make such order, if any, as is justified by the principles set out in sec 9 and reasonable having regard to the resources of the parties. The concept of sharing the net value of the matrimonial property fairly, the flexibility which is given by the expression "special circumstances" in sec 10(2) and the repeated reference in sec 11 to all the other circumstances of the case serve to emphasis that, despite the detail, the matter is essential one of discretion, aimed at achieving a fair and practicable result in accordance with commonsense. It remains as important as it always has been that the details should be left in the hands of the court of first instance and not opened up for reconsideration on appeal." That was supported by Lord Clyde at page 25 "It is not disputed that the Act of 1985

innovated on the earlier law in the field of financial provisions on divorce by imposing some restraints on what had been an unfettered discretion in the court. The statement of principles in sec 9 by which under sec 8(2)(a) any order must be justified together with the section which follow upon those sections certainly impose some constraints on the court's discretion but some areas remain in the application of the principles for the court to exercise its own discretion on the facts of the particular case so as to achieve a fair result. But in the task of applying the Act and in the working out of the detail the matter must essentially be one for the judge who first hears the case." 52. The Sheriff had all the factual evidence in this case and the submissions of parties. While a figure higher than £12,036.88 (£12,036.53) might be justified having regard to the principles contained in section 9 of the Act, the fact of the matter was that the Sheriff had exercised his discretion and there was no material before the appeal court to allow the appeal court to conclude that any larger sum would be reasonable having regard to the resources of the parties. The Sheriff had made a discretionary decision on the basis of the information available to him. It was submitted he was entitled to make that decision and it should not be disturbed. Decision 53. I consider the Sheriff's treatment of the ice cream parlour debts in his calculation of the capital sum he would have awarded to be wrong. The Sheriff has found that these debts, although they would require to be paid in the first instance by the appellant, were joint debts. He states at page 12: "As is made clear by the accounts to the year end 30 April, this was a partnership venture, the partners being the pursuer and the defender. It appears to have been an equal partnership. The evidence was that the business ceased trading at the same instant as the parties separated and has never traded since ... Thus at that point of time the assets and debts of the dissolved business were those of the parties jointly and severally. The only asset was the ice cream equipment worth £1,000 which was in store at the date of the proof and the debts are set out in the findings in fact." On the basis of the computation which the Sheriff has used it is not recognised that the appellant will in fact pay these debts, albeit she would be able to recover one half from the respondent. The computation reads to the effect that the respondent is being credited with having to pay these debts. In the computation the joint debts should have been divided equally. What the Sheriff did was in fact allow the respondent credit for the whole of the debts, while in fact he should only be responsible for one half thereof. 54. I was not referred by parties, but have been able myself to consider the unreported decision in the case of *Russell v Russell* by Sheriff Principal Dunlop (Dunfermline Sheriff Court, on 26 September 2005). I think that case is highly relevant in a consideration of the issue which arises in this case. In that case the financial circumstances of the parties were not in dispute. At the relevant date the only material asset was the matrimonial home, which then had a value of £48,000. The property was and continued to be owned by the pursuer and appellant. There was an outstanding loan of £10,480.32 in respect of that property, which the appellant was liable to repay. The parties had joint debts totalling £746.80 and in addition the defender and respondent was liable to repay a bank loan of £12,500. In broad terms therefore the position was one in which, as the Sheriff put it, one party held the sole asset and each party, as an individual, remained personally liable for roughly half of the matrimonial debt. It was a common position of the parties that all these

debts fell to be taken into account in calculating the net value of the matrimonial property which was calculated to be £24,272.88 (the assets less the whole debts). On these figures the Sheriff fixed the amount of the capital sum payable to the respondent at £24,400. 55. Sheriff Principal Dunlop stated: "For the purpose of appeal the precise arithmetical route by which he came to that figure is less important than his general approach, which is reflected in his second finding in fact and in law, in these terms: "2. The parties are entitled to be left with net assets of approximately the same value, measured at the date of separation, and so the capital payment due to the defender should reflect the parties' personal liabilities for particular debts." The Sheriff intended therefore that each party should be left with an approximately equivalent amount after each had settled the debts for which, in a question with their creditor, each was personally liable. He clearly took the view that such result would represent equal sharing of the net value of the matrimonial property ..." In refusing the appeal, Sheriff Principal Dunlop concluded: "In calculating the net value one does not require to be concerned with the question which party owes which items of matrimonial property or which party is liable for which debts. In my view however the position is different when one gets to the stage of deciding what order should be made so as to achieve fair sharing of that net value, since some of that net value may be found in the hands of one party and some in the hands of the other. In such circumstances it seems to me entirely reasonable that the order for financial provision should bear some relationship to the extent to which there is an imbalance between the net value of one party's property when set against that of the other. In the absence of special circumstances in my view it would be consistent with the principle of fair sharing were the court to order the payment of such capital sum as would remove that imbalance, thus leaving each party in an approximately similar position as far as concerned their net assets. Accordingly the incidence of debt is as much a part of the fair sharing of the net value of the matrimonial property as it is in the calculation of that net value. This is an approach which is commonly adopted and in my view fully justified by the terms of the statutory provisions under discussion. It is not in conflict with the entirely different consideration that one spouse is no longer liable for the debts of the other in a question with the creditor in that debt. To take account of the incidence of debt in the fair sharing of the net value of matrimonial property is not the same thing as making one party liable to the creditor of the other for debts incurred by him or her. In any event, I consider that the assumption underlying the provisions of sections 9(1) (a), 10(1) and 10(2) is that debts have been incurred for the benefit of both parties to the marriage and as a general rule there is nothing obviously unfair in bringing them into account when selecting the means by which the net value of the matrimonial property is to be fairly shared." I respectfully agree with these views. In *Russell v Russell*, if the approach adopted by the Sheriff in this case had been adopted the respondent would have received one half of the net value of the matrimonial property of £24,272.88, namely £12,136.44. When she had paid her own debts of £12,500 and one half of the joint debts of £373.40, a total of £12,873.40, she would have paid more in matrimonial debts than she received in assets, while the respondent, after he had paid his share of the debts of £10,853.72, would have been left with net matrimonial property of £37,146.28. This clearly would have been

inequitable and illustrates in my opinion why the Sheriff was wrong not to take into account the factual position regarding liability for outstanding matrimonial debts. 56. In calculating the net value of matrimonial property, it is not necessary to take into account which party owns which items of matrimonial property or which party is liable for which debts. Section 10(2) of the 1985 provides: "The net value of the matrimonial property shall be the value of the property at the relevant date after deduction of any debts incurred by the parties or either of them." However, in my opinion, these matters are relevant when it comes to selecting the means by which the matrimonial property is to be fairly shared. 57. In this case on the Sheriff's figures the respondent had assets of £158,300 and the appellant assets of £15,440.71. The respondent had liabilities of £102,998.05. The appellant had no liabilities personally and there were joint liabilities of £15,788.19. In my view it is entirely right that that state of affairs should be taken into account in selecting the means by which the net value of the matrimonial property should be fairly shared. In the absence of special circumstances, in my view it is consistent with the principle of fair sharing for the court to order the payment of such capital sum as would remove that imbalance, thus leaving each party in an approximately similar position as far as concerned their net assets. 58. I proceed on the figures found by the Sheriff in respect of assets and liabilities. The only distinction in my view is that the computation should give the appellant credit for one half of the joint liabilities. As matters stand in the Sheriff's current computation which I have set out in paragraph 31 hereof, the respondent is being credited with the value of the assets in his possession of £158,300, and has the luxury of there being deducted therefrom the whole of the joint liabilities of £15,788.19, while in reality one half of these debts are the responsibilities of the appellant. 59. In these circumstances, in my view, the calculation which the Sheriff should have made is as follows: 1. Net value of matrimonial property £56,654.47 (as in the Sheriff's computation set out in para 31 hereof). 2. Fifty percent thereof £28,477.24 (as in the Sheriff's computation set out in para 31 hereof). 3. Appellant already has net property of £8,546.61 (pension £15,440.71, one half moveables £1,000 less one half ice cream parlour joint debts £7,894.10). 4. Capital sum is therefore the difference between target figure of £28,477.24 and property already held of £8,546.61, hence £19,930.63. 60. That this figure is correct can be verified by calculating what the respondent would be left with. He has assets of £159,300 (farm, cars and half moveables). He has debts in his own name of £102,998.05. One half of the ice cream parlour debts is £7,894.10. The capital sum is £19,930.63. Deducting these liabilities from the assets leaves him with £28,477.22 - within 2p of the target figure of exactly 50%, the discrepancy being attributable to rounding up of fractions. 61. Counsel for the appellant suggested that in fact all the ice cream parlour debts should be credited to the appellant as in the first instance she would be obliged to pay them. I do not agree. It is a joint and several liability and, for the purpose of calculating the capital sum which should be paid by the respondent to the appellant, in my opinion the proper way of dealing with the matter is to credit each spouse with one half liability for these joint debts. 62. The passages in *Jacques v Jacques* supra to which I have referred and a consideration of the case of *Little v Little* makes it clear that an appeal court should be hesitant to become involved in reviewing an award under section 8(2) of the 1985 Act on the

basis that the making of such an award involves the exercise of the court's discretion. The appeal court can only interfere if the decision by the Sheriff was plainly wrong or unreasonable. I think that, for the reasons I have given, the Sheriff's treatment of the ice cream parlour debts was plainly wrong and I consider that I am now entitled to review his decision. I consider it is open to me to consider all the information available to the Sheriff and substitute my own decision for the one which he made. 63. I take the view that the appropriate capital sum to be awarded should have been £19,930.63 calculated as set out in para 59 hereof. However, before I can hold that the sum of £19,930.63 is the sum that ought to have been awarded by the Sheriff, I require to be satisfied in terms of section 8(2) of the Act not only that such a payment would be justified by the principles set out in section 9 of the 1985 Act, but also that such an award would be reasonable having regard to the resources of the parties. 64. The only finding in fact relating to resources is finding in fact 22 which stated: "As well as the matrimonial property the pursuer also owned an area of woodland extending to some 139 acres, at the relevant date. And still does. This was acquired by him before the marriage. And thus not matrimonial property. Its valuation may lie somewhere between £35,000 and £10,000. But it might be very hard to find a ready market, standing the present state of the market for woodland. However the pursuer anticipates that upon his resources he would be able to borrow some £12,000 and thus find the payment of an order for a capital sum at this level." 65. I have to say that I accept the submission made on behalf of the appellant to the effect that the proper interpretation of the sheriff's findings in fact was that (a) a payment of £12,036.88 (£12,036.53) was justified by the principles set out in section 9 of the Act and that

- (b) he was satisfied that the respondent had the resources to pay that sum. I do not accept the submission on behalf of the respondent that the Sheriff was finding that the respondent could only pay £12,000 and no more. The Sheriff concluded in finding in fact 22 that as well as the matrimonial property the respondent also owned an area of woodland extending to some 139 acres at the relevant date. He concluded its valuation may lie somewhere between £35,000 and £10,000. He commented that it might be very hard to find a ready market, standing the present state of the market. However the fact of the matter is that this asset is available. The Sheriff did not require to consider that issue as the respondent anticipated that upon his current resources he would be able to borrow some £12,000 secured over the farm, being the matrimonial property and thus find the payment for an order for a capital sum at that level. 66. If the Sheriff had made it clear in his judgment that he took the view, on the basis of all the evidence that £12,000 was all that the respondent could afford, I would not have sought to intervene. However, I do not consider that to be the Sheriff's position. He held that the respondent could afford, by further mortgaging the farm, the capital sum which he calculated was due to the appellant. As I have held that the Sheriff wrong in his treatment of the ice cream parlour debts, and that his calculation falls to be revised, the whole question of the capital sum to be awarded is open for consideration by me. I am consider I am entitled, on the basis of the Sheriff's findings in fact, to reach a conclusion as to whether it would be reasonable, having regard to the resources of the parties as outlined

at the proof, for the respondent to pay a further £7,894.10. This was not a matter, in my view, upon which the Sheriff had adjudicated. 67. I have come to the conclusion that, on the basis of the information available at the time of proof, it is reasonable to increase the sum which the Sheriff said he would have awarded to the appellant if in a position to do so, by the sum of £7,894.10. The respondent owns an area of commercial woodland extending to 139 acres. As has already been noted, the Sheriff found that its valuation at the time of the proof lay somewhere between £35,000 and £10,000. While it might be very hard to find a ready market, standing the present state of the market for woodland, it was clear from the evidence that the value of this investment would increase as the trees continued to grow. Indeed there was evidence from the respondent's expert witness that the valuation of the date of the proof would be of the order of £35,000. However, taking the lowest valuation which the Sheriff placed on this asset, £10,000 would be available to fund the additional payment. 68. It appears from the evidence which I have already set out that it may be difficult at this date to find a purchaser for the woodland. If I defer payment of the additional capital sum of £7,894.10 for a period of two years this would give the property the opportunity of further increasing in value and of a purchaser being found. In two years time the respondent would not have the same responsibilities for his children who reside with him. I consider such a finding to be fair in all the circumstances and reasonable having regard to the resources of the parties. I shall accordingly grant decree for payment of a capital sum of £19,930.63. I make an order that £12,036.53 should be paid now, and £7,894.10 on 17 January 2009. 69. If I am wrong in taking the view that only one half of the ice cream parlour debts should be credited to the appellant, and in fact the whole of these debts should have been credited to her, giving a total capital sum of £28,824.74, I have to say that, while such a sum might be justified having regard to the principles set out in section 9 of the Act, I would not have held it to be reasonable having regard to the resources of the parties as found by the Sheriff. E. Whether the Sheriff erred in giving the respondent credit for the Standard Life loan of £5,535.84 (see finding in fact 7) but making no corresponding finding about the related asset owned by the respondent, which was a Standard Life endowment policy against which the loan was secured 70. It was submitted that the respondent in his own evidence (pages 390 to 392) admitted the existence of this policy, admitted that it had been taken out after the date of marriage but before the date of separation, admitted that he had not vouched its value, admitted that it had been in existence for 10 to 12 years before the loan was taken out against it, admitted that the loan was secured against it, and accepted that on any view the value of the property would be sufficient to repay the loan. It was said that in these circumstances the learned Sheriff ought to have found in fact that the respondent had an asset in the form of a Standard Life policy which was worth at least the amount of the Standard Life loan. The effect of such a finding would have been to increase the net value of the matrimonial property by £5,535.84. 71. It was said on behalf of the respondent that the Sheriff was entitled on the evidence and his findings in relation thereto to leave the Standard Life policy out of account for the following reasons (a) there was no firm evidence as to the value of such policy (b) that the evidence of the respondent was that he was in effect holding the policy in trust for the parties' daughter and (c) that the foregoing

position was accepted in evidence by the appellant. The parties' daughter Rosie had been injured in a car crash and had obtained an award of damages. This had been used by the family. The policy was set aside as the money to which Rosie would be entitled. 72. I consider, in these circumstances, in the exercise of his discretion, the Sheriff was entitled to leave that policy out of the calculation. F. Interest 73. I was not addressed on the question of interest which is craved, on the capital sum at 8 per centum per annum from the date of decree or such other date as to the court appeared appropriate until payment. There are clearly a number of different submissions which might be made on this matter. It is a matter of comment that no capital award has been made until the date of this interlocutor, and the Sheriff found that the resources from which the capital sum he would have awarded of £12,038.88 would have come from a loan, which would not be applied for until an award was made. In these circumstances I propose to reserve the question of interest to a hearing at a date to be afterwards fixed. I would express the hope that parties might be able to agree the question of interest and thus avoid the necessity of further expenses being incurred. G. Expenses 74. On November 2005 the Sheriff found no expenses due to or by either party up to and including the date of decree of divorce i.e. 11 February 2004. He thereafter found the appellant liable to the respondent in the expenses of the cause from 12 February 2004 until the conclusion of the action as taxed. He certified Mr Neill and Mr Cockburn as expert witness. After a motion was lodged at the bar to allow modification of these expenses as the appellant was legally aided consideration of the motion was continued until 9 December. 75. Sheriff Principal McInnes dealt with the expenses of the first appeal procedure which culminated in his interlocutor remitting the cause to the Sheriff to hear parties on the evidence led on a date to be afterwards fixed and thereafter to issue his judgment in respect of the matters in dispute. 76. Counsel for the appellant suggested that expenses follow success in respect of this appeal and that, in respect of the procedure before the Sheriff from 12 February these should also be awarded to the appellant if she was successful in obtaining an award. It was submitted, were the appellant to succeed in the appeal, there was no reason for her to bear the respondent's expenses. She should either receive her expenses from the respondent or each side should bear their own expenses. While the respondent had succeeded in the proof regarding valuation of the farm, on appeal the appellant's approach to the proper computation of fair sharing of the net matrimonial property had been vindicated. The figures put forward on behalf of the respondent suggested a payment to the appellant of £10,568.20. If more were awarded, the appellant's decision to proceed to proof had been vindicated. 77. Counsel for the respondent accepted that expenses should follow success on the appeal on the legal point. It was clear from the evidence that at the proof the appellant had lost on the major issue which was which valuation of the farm. The appellant had submitted at proof that the respondent should sell up and move from the farm. The legal point had taken no time at the proof and it was suggested that I should not open up the Sheriff's determination on expenses, even if I was awarding a greater capital sum. It was submitted that I might ask the Sheriff for a note regarding his finding in expenses. 78. I do not find it necessary to obtain a note from the Sheriff to enable me to determine the question of expenses. The approach to expenses in consistorial actions was set out by Lord

Gill (as he then was) in *Adams v Adams* 1997 SLT 150. At 151C-E he said: "Section 22 of the Family Law (Scotland) Act 1995 abolished the rule that a husband was liable for the wife's expenses in a consistorial action. It does not follow that in such an action expenses must now follow success. The provisions of the 1995 Act are complex ... in applying these provisions the court has a wide discretion ... The court's approach to expenses must be more flexible than it would be in a simple petitory action ... In exercising its discretion as to expenses the court may take into account such matters as the reasonableness of the parties claims, the extent to which they have co-operated in disclosing, the agreeing of the value of their respective assets, and offers they have made to settle, the extent to which the proof could have been avoided and, of course, the final outcome." 79. On appeal the appellant has achieved success on what was described as "the legal point" and has also achieved success in having the capital sum increased by £7,894.10. It is clear to me that as far as the appeal is concerned, expenses should follow success. I am prepared to certify the appeal as suitable for the employment of counsel. 80. On November 2005 the Sheriff found no expenses due to or by either party up to 11 February 2004 when divorce was granted and it was not suggested I should disturb that finding. I require to deal with the expenses of the cause from 12 February 004 to 30 November 2005 , as the Sheriff on the latter date awarded the respondent the expenses over that period. In my opinion, standing the decision that I have made in this appeal, the Sheriff's decision on these expenses cannot stand. Both sides have achieved success on certain arguments at the proof. The respondent has succeeded in that there was not an order for the sale of his farm and his valuation of the farm was accepted. However his calculation of the sum due to the appellant, on the basis of the figures he was suggesting, was one of £10,568.20, whereas I have found that the appellant is entitled to £19,930.63. The appellant has been vindicated by her stance in seeking more than calculated by the respondent to be due. The figure I have awarded is in fact more than £9,000 higher than the figure the respondent suggested. Applying the principles set out in *Adams v Adams* supra, I consider in the whole circumstances the proper course is that there should be no award of expenses to or by either party from the period from 12 February to 30 November . I make exceptions in respect of (a) the amendment procedures in respect of the Minutes of Amendment lodged by the appellant on 11 February and 8 November where the expenses go to the respondent and (b) the expenses of the first appeal which have already been determined by Sheriff Principal McInnes. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotSC/2007/3.html>

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