**SHERIFF APPEAL COURT**

**[2020] SAC (Civ) 24**
**ABE-A297-18**

Sheriff Principal M Stephen QC

NOTE

by SHERIFF PRINCIPAL M STEPHEN QC

in application for permission to appeal to the Court of Session in terms of section 113 of the Court Reform (Scotland) Act 2014

by

MRS DEBORAH LOUISE HAY

Applicant

in the cause

THE PARACHUTE REGIMENT CHARITY

Pursuer and Respondent

against

MRS DEBORAH LOUISE HAY

Defender and Applicant

**Applicant: Simpson QC; R & R Urquharts (Drummond Miller LLP as agents)**
**Respondent: Flannigan; Anderson Strathern, Solicitors**

20 December 2019

[1] The applicant, Mrs Deborah Louise Hay, seeks permission to appeal my decision to refuse her motion to allow her note of appeal to proceed though lodged late to the Court of

Session. That motion relied on the court exercising its dispensing power in terms of rule 2.1 of the Sheriff Appeal Court Rules 2015 which I declined to do.

[2] The application for permission proceeds under section 113 of the Courts Reform (Scotland) Act 2014 ("the 2014 Act") which is in the following terms:

> "**113 Appeal from the Sheriff Appeal Court to the Court of Session**
>
> (1) An appeal may be taken to the Court of Session against a decision of the Sheriff Appeal Court constituting final judgment in civil proceedings, but only –
>
> (a) with the permission of the Sheriff Appeal Court, or
> (b) if that Court has refused permission, with the permission of the Court of Session.
>
> (2) The Sheriff Appeal Court or the Court of Session may grant permission under subsection (1) only if the Court considers that –
>
> (a) the appeal would raise an important point of principle or practice, or
> (b) there is some other compelling reason for the Court of Session to hear the appeal.
>
> (3) This section does not affect any other right of appeal against any decision of the Sheriff Appeal Court to the Court of Session under any other enactment.
>
> (4) This section is subject to any provision of any other enactment that restricts or excludes a right of appeal from the Sheriff Appeal Court to the Court of Session."

**Background**

[3] The motion to allow the appeal to proceed though late was lodged along with the note of appeal on 10 July 2019. I heard the opposed motion on 22 July 2019. The applicant made lengthy submissions on the procedural background to the case and referred to authorities. The submissions proceeded on the factual basis that the final decree (dated 16 May 2019) had been extracted on 9 July 2019 the day prior to the note of appeal being

lodged at this Court. I heard submissions on *Alloa Brewery Company* v *Parker* 1991 SCLR 70. I was referred to authorities in which sheriffs principal had distinguished *Alloa Brewery Company* on the basis that the extract had been incompetently or irregularly issued. When I heard the motion on 22 July 2019 it was not suggested that the extract in this case had been either incompetently or irregularly issued by the sheriff clerk in Aberdeen. I was of the opinion that *Alloa Brewery Company* could not be distinguished and therefore I could not exercise the dispensing power in rule 2.1.

[4] I issued an opinion giving my reasons for refusing the motion. That opinion is dated 30 August 2019 and narrates the submissions made by parties. The applicant's submission proceeded on the hypothesis that the interlocutor of 16 May 2019 had actually been issued on or about 6 June 2019 being the date when the applicant's agents advised the court of the defender's position as to the date from which interest should run on the decree.

[5] The applicant complains that those representing the applicant had not received an email from the court attaching the final interlocutor. That interlocutor put into effect prior decisions of the sheriff and granted decree in favour of the pursuer in the sum of £68,577.64 being the balance due to the pursuer as residuary legatee in terms of the late Gregory William Hughes' will; interest was to run on the decree at the rate of eight per cent per annum from the date of the final interlocutor; that interlocutor also found the defender personally liable to the pursuer in the expenses of the cause as taxed and sanctioned the employment of senior counsel. The interlocutor reflected decisions made by the sheriff in open court on 16 May 2019 with the exception of the words "today's date" being the date on which the parties subsequently agreed that interest should run. Apparently, this was the sole matter which delayed the issue of the interlocutor.

[6] The applicant's solicitor did not obtain a copy of the final interlocutor until it was intimated to him on 27 June 2019 by the pursuer's solicitor along with the account of expenses.

[7] At the hearing on 22 July the respondent's agent could not say when he received the interlocutor of 16 May 2019 electronically from Aberdeen Sheriff Court. He had not saved the email but had a time recording entry for perusing the interlocutor on 12 June 2019. It is a reasonable inference that the interlocutor was received on or before 12 June. In his written submission in opposition to the application for permission to appeal to the Court of Session, the respondent's agent states that he advised the court and therefore the applicant on 22 July that his firm confirmed the pursuer's position on the date from which interest should run to the sheriff clerk on 11 June 2019. Although I have no specific note of that I have no reason to doubt it was mentioned on 22 July.

**Application for permission to appeal to the Court of Session**

[8] The application for permission to appeal to the Court of Session narrates:

> "1. On 30 August 2019 the Sheriff Appeal Court refused an application by the Applicant for permission to appeal to it from a decision by the Sheriff at Aberdeen by interlocutor bearing to be dated 16 May 2019".

[9] However, the interlocutor pronounced on 30 August 2019 simply refuses the applicant's motion for relief from failure to comply with the time limits in rule 6.3 of the Sheriff Appeal Court Rules 2015. It is in the following terms:-

> "The Court, having resumed consideration of the cause, makes the following orders:
>
> 1) refuses the defender and proposed appellant's motion, number 3/1 of process, for relief from failure to comply with Rule 6.3 of the Sheriff Appeal Court Rules 2015;

2) finds the defender and proposed appellant liable to the pursuers in the expenses occasioned by and incidental to said motion procedure, including the hearing on 22 July 2019; allows an account thereof to be given in and remits same, when lodged, to the Auditor of the Sheriff Appeal Court to tax and to report."

[10] The applicant proposes two grounds of appeal upon which it will be argued that I erred in concluding that in the circumstances of this case as presented it was not competent for me to exercise the dispensing power in rule 2.1 to allow an appeal to be marked late as the decree had been extracted. The grounds of appeal are: (1) an interlocutor that bears a date other than the date on which it was actually made is invalid. (2) In any event where (i) an interlocutor bears a wrong date, (ii) the interlocutor is not communicated to the party liable to make payment under it, despite an enquiry by that party as regards whether an interlocutor has been issued, and (iii) following discovery of the interlocutor, after expiry of the time limit for appeal (on the basis of the date of the interlocutor), the solicitors for the party make it clear to the court that it is intended to appeal and an appeal is being prepared, the issue of an extract by the court's automatic electronic system does not have the effect of precluding an appeal.

[11] A hearing was assigned on the application for permission to appeal to the Court of Session on 9 October 2019. Parties lodged written submissions in advance of the hearing. At the outset, I raised the question whether it was competent standing the terms of section 113(1), to appeal the interlocutor of 30 August 2019 which is of an interlocutory nature. Section 113(1) provides that an appeal may be taken to the Court of Session "against a decision of the Sheriff Appeal Court constituting final judgment in civil proceedings". I heard parties, in effect, on section 113(2) and continued the competency issue for written submissions which have now been lodged.

**Competency**

[12] The submissions for the applicant raise the question "whether it is competent to appeal to the Court of Session from the Sheriff Principal's refusal of leave to appeal to the Sheriff Appeal Court against an interlocutor of the sheriff".

[13] Section 113 of the 2014 Act makes provision for an appeal to the Court of Session against a decision of the Sheriff Appeal Court constituting "final judgment in civil proceedings". Final judgment is defined in section 136 of the 2014 Act but it is suggested that there is no case law on section 136.

[14] KS [2017] CSIH 68 is one instance of a case where a Sheriff Appeal Court decision on a motion to allow an appeal late was taken with permission to the Court of Session. This would suggest that it is competent to do so. No point of competency was however argued in that case.

[15] The decision on 30 August 2019 to refuse permission to appeal to the Sheriff Appeal Court means that there are no questions remaining to be determined in this case and therefore that decision brings proceedings to an end between the first instance court and an appeal hearing. The decision refusing permission to appeal puts an end to proceedings and therefore must be regarded as "final judgment" in terms of section 113 of the 2014 Act.

[16] Reference was made to the Rules of the Court of Session (RCS 1994 38.4(6)). This provision is to the effect that a decision on leave to reclaim by a judge of the Outer House is final. However, but for that rule the decision is not final and would normally be susceptible to appeal by reclaiming motion.

[17] It was submitted that it is competent to seek permission to appeal to the Court of Session against an interlocutory decision which puts an end to proceedings. That must constitute final judgment.

[18] The respondents' submissions analyse section 113(1) and section 136 of the 2014 Act. The effect of section 113 is to exclude consideration of a case by the Court of Session before final judgment. "Final judgment" is defined by section 136 of the 2014 Act which follows closely the definition of final judgment in section 3 of the Sheriff Courts (Scotland) Act 1907.

[19] The decision of 30 August 2019 against which the appellant now seeks permission to appeal to the Court of Session is not a decision made on appeal. There was no appeal before the Sheriff Appeal Court. It therefore does not dispose of the subject matter of proceedings as it is an interlocutory decision refusing a motion to allow an appeal to be received late. Such an interpretation is entirely consistent with section 113 and its purpose. The legislative intention which can reasonably be inferred from the wording of section 113 is that appeals to the Court of Session against a decision of the Sheriff Appeal Court are restricted to second appeals. The test laid down in section 113 is a second appeals test. Accordingly, there is no appeal decision constituting final judgment against which an appeal can be taken. It is therefore incompetent to seek permission for a second appeal there having been no first appeal and therefore no first appeal decision constituting final judgment against which a further appeal can competently be taken.

**Decision**

[20] The test for permission to appeal from the Sheriff Appeal Court to the Court of Session in civil appeals and to the High Court of Justiciary when exercising its criminal appellate jurisdiction is, by definition, a "second appeals test". This means that the appeal must raise an important point of principle or practice or that there is some other compelling reason for the Court of Session to hear the appeal. The test was introduced originally in England and Wales by the Access to Justice Act 1999. The main authority remains *Uphill* v

*BRB (Residuary)* [2005] 1 WLR 2070. In *Politakis* v *Spencely* 2018 SC 184 the Inner House applied and approved *Uphill.* In *Uphill* Dyson LJ explained the meaning of the test. An "important point of principle or practice" is one which has not yet been established by a superior court. The test is not met where it is contended only that an established principle or practice has not been correctly applied. Some other compelling reason, "involves the residual measure in the sense that it presumes the absence of an important point of principle or practice" (the first leg of the test).

[21] The test itself does not assist with the question of competency however these authorities consider how the first appeal was dealt with. In *Uphill* Dyson LJ speaks about the existence of a compelling reason being unlikely unless the prospects of success are very high and that the judge in the first appeal made a decision which is perverse or otherwise plainly wrong. In *Politakis* the Inner House referring to *Uphill*, followed Dyson LJ's dicta when considering whether a compelling reason existed, namely, it was important to emphasise the "truly exceptional nature of the jurisdiction" in relation to a second appeal. At para [22] Lord Carloway states:

> "The test can be met if it is clear that the court hearing the first appeal reached a decision which is 'plainly wrong' because, for example, 'it is inconsistent with authority'. Alternatively, there may be 'good grounds for believing that the hearing was tainted by some procedural irregularity so as to render the first appeal unfair'".

I agree with this analysis. The test will be satisfied where the decision on the first appeal was clearly wrong, such as where it ignores established precedent, or where there is a procedural irregularity in that appeal which demonstrates that the applicant did not have a fair hearing. (*Eba* v *Advocate General for Scotland*, [2011] UKSC 29; Lord Hope, at para 48). Accordingly, in both *Uphill* and *Politakis* the court is not only considering the second appeals test but much emphasis is placed on consideration of the first appeal decision and process.

The second appeals test is simply that - consideration of the test which has as its purpose restricting the scope for a second appeal (see *Eba supra*). It presupposes that there has been a first appeal.

[22] The test for permission to appeal a decision of the Sheriff Appeal Court exercising its criminal jurisdiction may be found in section 194ZB of the Criminal Procedure (Scotland) Act 1995. The test for a second appeal in summary criminal appeals is the same or similar to that of civil appeals. In the context of criminal appeals a similar issue to that raised in this case was determined in *Mackay* v *Murphy* 2016 SC (SAC) 1. In that case an application for permission to appeal to the High Court of Justiciary was lodged in respect of refusal by SAC of leave to appeal at the sift. That application was refused as incompetent there being no appeal before the court which could be appealed further with permission. There are clear parallels with this application where the applicant seeks permission to appeal against an interlocutory decision which had the effect of preventing any appeal being lodged with this court. In other words, in this case there has never been an appeal competently before the Sheriff Appeal Court.

[23] The question of what constitutes final judgment was considered recently in the case of *Siteman Painting & Decorating Services Ltd* v *Simply Construct UK Ltd* [2019] SAC (Civ) 32[1]. The definition of final judgment is one with which most judges and practitioners will be familiar. It is a decision which either by itself or taken along with previous decisions disposes of the subject matter of proceedings. In the context of the appellate structure, in my opinion, a decision of this court on appeal which disposes of the appeal is susceptible to an application in terms of section 113 of the 2014 Act. However, the interlocutor of 30 August

[1] Reference should be to [2019] SAC (Civ) 13 not [2019] SAC (Civ) 32

2019 did not dispose of the appeal. It was simply an order by which this court declined to grant relief in terms of SAC Civil Appeals rule 2.1 from failure to comply with the rules of court, in particular SAC rule 6.3. In *KS* a single judge of the Inner House considered an application under section 113 for permission to appeal a decision of SAC refusing a late appeal. That application was determined on its merits and whether the section 113(2) test was met. The competency of the application was not raised or argued.

[24] In that regard the applicant's reference to this court's refusal of permission to appeal to the Sheriff Appeal Court is somewhat misguided. The decision given on 30 August determined the motion and is set out above. It simply refused the applicant's motion for relief from failure to comply with rule 6.3. This is not an interlocutor disposing of an appeal or disposing of the merits of the case. It is an interlocutory decision. It may have the effect of bringing to an end the appeal process in the SAC but it is not, in my opinion, either a decision in an appeal or final judgment. In any event, the parallel decision in criminal jurisdiction *Mackay* v *Murphy* (*supra*) deals with a similar situation where the court is deciding whether to grant leave to appeal in the criminal jurisdiction. The refusal of leave or, in this instance, refusing relief from failure to comply with the rules has the effect of there being no appeal before the court. In these circumstances it is, in my opinion, incompetent then to apply for permission in terms of section 113 as that involves applying the second appeals test. Accordingly, the application for permission to appeal to the Court of Session falls to be refused as incompetent.

**Submissions on section 113 of the Courts Reform (Scotland) Act 2014**

***Applicant***

[25] The grounds on which permission to appeal is sought are:

(1) that the interlocutor dated 16 May 2019 is invalid as it bears a date other than the date on which it was actually made. Accordingly, in concluding that the interlocutor was valid and of effect I fell into error. The interlocutor bearing to be dated 16 May 2019 was in fact finalised on 6 June 2019 at the earliest.

(2) The interlocutor not having been communicated to the losing or liable party (the applicant) by the court despite enquiry by email and in face of the stated intention on the part of the applicant's solicitor to appeal, the issue of extract does not have the effect of precluding an appeal.

[26] It was submitted that this is the first appeal to raise the issue of the validity of an interlocutor and as such it is not necessary to demonstrate that either section 113(2)(a) or (b) had been satisfied. In any event, if it was necessary to satisfy the test set out in section 113(2) the circumstances of this case do so. The appeal raises an important point of principle because it raises the issue whether an interlocutor bearing the incorrect date is valid to any extent. The importance of this point is clear as the date of an interlocutor has a number of effects such as triggering the time limit for appealing; identifying the date from which interest runs and also with regard to prescription. Further, there is a compelling reason for granting permission as the executrix as an individual has been found personally liable in expenses in an action brought to resolve an issue regarding interpretation of the will on which she had received conflicting legal advice. This constitutes a compelling reason for the matter being considered by an appellate court.

[27] These were, in effect, the grounds stated in the application for permission to appeal. Following the lodging of notes of argument by the applicant and respondent respectively the applicant advanced a new argument to the effect that the extract had been incompetently issued on 9 July as the interlocutor could only have been signed on 11 June 2019 at the

earliest. This argument ran contrary to the submission and hypothesis upon which the motion for relief proceeded on 22 July when the proposed appellant accepted that the extract had been competently issued. It appears to proceed solely upon the narration given in the respondent's note of argument to the effect that the respondent communicated with Aberdeen Sheriff Court on 11 June on the question of the date from which interest should run. This, of course, had been adverted to by the respondent at the hearing of the motion on 22 July.

[28] The applicant, in explanation, argues that at the hearing on 22 July there was a lack of clarity as to when exactly the sheriff's interlocutor had been made. It is not entirely clear what is meant by being "made". It may be reasonable to assume that this means that the date from which interest should run was added completing the interlocutor and giving effect to the orders pronounced by the sheriff on 16 May.

[29] The nub of the appellant's argument is that the date of the interlocutor is the date it was signed (*Cleland* v *Clark* [1849] 11 D 601). This includes interlocutors pronounced in cases where judgment is given in open court. Accordingly, the interlocutor is not only invalid but should have been dated 11 June at the earliest being the date when both parties had confirmed the date from which interest should run. It follows that the issue of extract on 9 July is incompetent.

[30] On the matter of validity I was referred to chapter 12 of the Sheriff Court Ordinary Cause Rules. The hearing on 16 May 2019 was not a hearing at which evidence had been led (OCR 12.2(4)). Judgment was not reserved. It was submitted that the uncertainty as to date made a significant difference in this case, in particular with regard to the time limit for appealing. It is accepted that the applicant's agents had a copy of the interlocutor (dated 16 May 2019) by 27 June 2019. Steps were taken to contact the sheriff clerk by email and

have grounds of appeal drafted but these were not lodged until 10 July one day following extract. In these circumstances if the interlocutor is invalid then no extract can follow. There would therefore be no extract to bar a late appeal. In any event, whether or not the interlocutor had been extracted the applicant ought to be allowed to appeal. The application for relief to allow the appeal to be lodged was simply due to it being one day after the date of extract and that was in consequence of "a concatenation of circumstances for which she (the applicant) was not responsible."

[31] Counsel for the applicant referred to the cases cited in the course of the motion hearing of 22 July and also referred to authorities dealing with recall of a decree in absence where extract is not seen as a bar to further procedure (*Strain* v *Byers* 2005 SCLR 157; *Little Cumbrae Estate Limited* v *Rolyat1 Limited* 2014 SLT 1118; and RCS rule 38.7).

[32] It is therefore submitted that an important point of practice arises in this case namely, the validity of the interlocutor and the time at which an extract decree may properly be issued. If there is now electronic issue of extracts it is unclear on what basis the computer is programmed to issue extracts and there could be a systemic fault which could affect this and potentially a large number of other cases. Secondly, the compelling reason why an appeal should be allowed to proceed to the Court of Session is the serious effect on the applicant who having assumed the office of executrix required to defend these proceedings and is personally liable for the expenses given the sheriff's decision by interlocutor of 26 March 2019.

**Respondent**

[33] Mr Flannigan for the respondent opposed the application. The applicant has advanced no new information which would satisfy the court that permission ought to be

granted. The respondent at the hearing on 22 July indicated that the solicitors acting for the respondent contacted the sheriff clerk in Aberdeen on 11 June with regard to the date from which interest should run. There was an entry in the firm's time recording system on 12 June for perusing the interlocutor. The interlocutor was certainly issued by that time. The respondents' agents wrote to the court in response to what was described as a "chaser" email from the court on the matter of interest. As previously indicated Anderson Strathern responded on 11 June however all of this information was available at the hearing of the original motion.

[34] Turning to the second appeals test Mr Flannigan referred to *Politakis* which provides guidance as to the correct approach to the test set out in section 113(2). It is a second appeals test and for the reasons given on the question of competency this is not a second appeal nor do the facts and circumstances surrounding this case constitute either an important point of principle or practice nor are there compelling reasons which point to the second appeals test being met in what is a fact specific situation.

[35] With regard to the Sheriff Appeal Court Civil Rule 6.3. Parties had 28 days to lodge an appeal following the decision appealed against. The decision was given *ex tempore* on 16 May. Both parties were aware of the sheriff's decision. As indicated previously the sheriff's decision put into effect earlier decisions and dealt with other matters, such as sanction for senior counsel. Accordingly, focus on a later date of issue is not necessarily proper or correct. The key date is 16 May 2019 and at that stage any party wishing to appeal had all the information available upon which to lodge a note of appeal. There was no need to wait until the interlocutor was issued. The delay in issuing the interlocutor was solely due to agreement and insertion of an operational date on interest which largely depended on the parties' views.

[36] With regard to the validity of the sheriff's interlocutor, OCR 12(2) deals with the question of clerical errors. The sheriff may correct an error. An error in itself does not render the interlocutor invalid and it presupposes that the error will be corrected after the date of signing. In any event, even if the interlocutor was finalised and issued on 11 June that would not suggest that the extract was issued incompetently. The appellant did not take issue with the extract or its competence when the motion for relief was heard on 22 June. The applicant was aware then of the respondent's position, namely, that they contacted the court on 11 June. Nonetheless, the hearing proceeded on the basis that the extract was competently issued. In these circumstances *Alloa Brewery Company* is binding on the question of an appeal following extract. In the end of the day the applicant and prospective appellant did not take the appropriate steps to lodge an appeal either following the hearing on 16 May or following the interlocutor being notified to them on 27 June 2019. This date was well in advance of the extract of the decree.

[37] The date of the interlocutor is the date when the sheriff gave his decision in court. Both parties were represented before the sheriff on 16 May. The applicant's submission that the interlocutor must be dated when it is signed is inconsistent with modern practice. Interlocutors recording orders pronounced in open court are dated on the day the orders are pronounced even though the interlocutor will rarely be drafted, signed and sent to parties on the same day. That is purely a matter of practicality. In these circumstances the application should be refused.

**Decision**

[38] I am not satisfied that either leg of the test set out in section 113(2) of the 2014 Act is met in this case. *Politakis* (approving *Uphill*) sets out authoritatively the meaning of both

parts of the test. It is a second appeals test and is a high test. Part of the rationale for having the second appeals test as confirmed by Lord Hope in *Eba* (*supra*) is to restrict further appeals. Proper application of the test may produce harsh results. It is not an equitable remedy. I consider it to be a matter of some significance that despite there having been considerable debate as to the interlocutor of 16 May; when it was issued and when it was extracted, the party applying for relief, and now for permission, has not taken proper steps to ascertain when the interlocutor was issued or to obtain the interlocutor from the court. The submissions on behalf of the applicant in respect of permission to appeal to the Court of Session proceed on a different hypothesis to that presented in July when I heard the motion. This is unsatisfactory and it is not the basis upon which permission for appeal should be considered. There are certain accepted "known" dates or events. Firstly, on 16 May 2019 both parties were present and well aware of the sheriff's decisions and orders made in respect of the case. These are set out in greater detail in my earlier note. Secondly, by 27 June 2019 the applicant's agents had been provided with a copy of the interlocutor issued by the sheriff putting into effect the orders made on 16 May. Thirdly, on 9 July 2019 the final decree was extracted.

[39] The applicant proposes that the dating of the interlocutor is an important point of practice which deserves consideration by the Court of Session. I do not agree. The dating of the interlocutor is something which disguises the fact that the applicant's agents did not take proper or adequate steps with the sheriff clerk in Aberdeen to obtain the interlocutor in question and secondly did not take effective steps to proceed with an appeal. On 16 May the applicant's agents were well aware of the sheriff's decisions with regard to this case. The decisions which might have been reviewed on appeal predated 16 May 2019.

[40] The authorities referred to as to the dating and effective date of interlocutors such as *Cleland* v *Clark* are of doubtful assistance in modern practice. The respondent is correct to emphasise that modern court practice is significantly different. Very few interlocutors will be signed and issued on the date that the decision is made. This is simply a reflection of the volume of business transacted in court and the pressures on both the judiciary and staff. In practical terms, in a busy court, it is usually impossible to have interlocutors prepared, signed and issued on the same day unless there is a very specific request for urgency. Other changes, such as the use of an electronic system for civil case management (ICMS), have had a significant effect. By statutory instrument (Act of Sederunt (Electronic Authentication) 2016 SSI 2016/306) electronic signature of court documents by the judiciary and court officials is permitted. Interlocutors authenticated and signed in this manner are effective for all purposes including enforcement, arrestment and appeals. Electronic signatures are in a secure format provided for within the ICMS structure and apply to any document which requires to be authenticated (including by signature), certified, signed and dated or endorsed. This practice and procedure covers any requirement for "wet ink signatures". There are, of course, certain exceptions, for example, an extract of decree of divorce will continue to require a "wet signature" by a relevant member of court staff. Certain interlocutors do not require to be signed electronically or otherwise by a sheriff and may be signed by staff. That applies in this court, the Court of Session and the Sheriff Court. The applicant raised the question whether ICMS was reliable in the sense of asking whether the system is programmed to issue extracts at the correct time. In the event that ICMS issued an extract prematurely or incorrectly that would fall within the *Alloa Brewery* exceptions as the extract would have been irregularly or incompetently issued. At the hearing of the motion the applicant conceded that in this case extract was competently issued on 9 July 2019.

Accordingly, in my view, the issue in this case is not truly a question of validity of the interlocutor.

[41] The question whether there is a compelling reason to allow permission depends on the applicant's proposition that the outcome of these proceedings has had a very serious effect on the applicant who assumed the office of executrix and performed it gratuitously. Further the sheriff's decision that she be personally liable in the expenses of process constitutes significant prejudice. In effect, the executrix required to proceed with her defence given that she had received conflicting legal advice. In my opinion the proposition advanced does not fall within the parameters of section 113(2)(b) as set out in *Politakis* and *Uphill*. It is recognised that this is a residual category presupposing that no important point of practice or principle has been raised. This part of the test will usually be satisfied if, in assessing the prospects of success, it appears that the first appeal court reached a decision which is "plainly wrong". The example given in *Politakis* is that the decision is inconsistent with authority or indeed some material procedural irregularity has arisen which might render the first appeal unfair. Of course, in this case, as we know, there has been no first appeal and on the basis that it is competent to consider granting permission in the circumstances of this case then one would have to look at the first instance decision in which the sheriff has considered how to interpret the will. Did he come to a decision which appears to be fundamentally or plainly wrong? On initial consideration the sheriff has reached a rational and reasoned decision. It was not suggested that there had been any procedural irregularity. Accordingly, the residual "compelling reason" test is not met in this case.

[42] As I indicated when hearing parties on this application the purpose of an application under section 113 is to consider and apply the second appeals test. It is not to reconsider

information whether factual or speculative which the parties, in particular the applicant, have brought incrementally to the attention of the court. All of the information required as to the process of issuing the interlocutor could readily have been ascertained had the applicant's agents attended with the sheriff clerk in Aberdeen to find that out. This has not happened and again this court is being asked to consider another hypothesis. This is not the proper approach to an application for permission to appeal assuming it is competent to entertain such an application. I do not consider that my decision on the motion heard on 22 July proceeded on a false factual basis. The decision was made on the basis of the information provided by parties who had sufficient opportunity to ascertain the true or correct position and present it. I reject the proposition that that permission to appeal to the Court of Session should be granted for the purpose of reviewing the factual basis on which the original decision on the late appeal was made.

**Supplementary: renewal of motion for relief from failure to comply with SAC Rule 6.3**

[43] On Wednesday 23 October 2019 whilst this matter was at Avizandum the applicant lodged a second motion in the following terms:

> "On behalf of the appellant, to allow the appellant permission to appeal out of time against the interlocutor bearing to be dated 16 May 2019; relying on the general dispensing power and under Sheriff Appeal Court Rule 2.1; and also in respect that the extract was issued incompetently."

[44] Both parties indicated to the clerk of court that they did not wish to be heard on the motion. It appears to me that the motion is one which attempts not only a second bite at the cherry, but seeks to have the court cancel or review a previous interlocutor which determined whether or not this court would exercise its dispensing power. If that is the case, then, that in itself raises a question of competency. This court has already exercised its

discretionary power under rule 2.1 and declined to grant relief. It may be, if it was accepted that my previous decision was made as a result of a false premise or mistake in point of fact that it is competent to review a previous decision. However, I cannot accept that my decision was made as a result of a mistake or on a false basis. No doubt, the applicant now wishes to argue that she no longer accepts that the extract was issued competently which was her position on 22 July. However, all of the information available now was available on 22 July and it is therefore difficult to see that my interlocutor of 30 August was pronounced by mistake in point of fact. The court is no better informed now than in July when the only dates that were certain and accepted are as stated in para [38]. To these may be added the fact that the Note of Appeal was lodged on 10 July 2019. Beyond these we are in the realms of speculation. On that basis and in the absence of any submissions I do not consider that it is competent for this court to entertain a further motion based on the same facts and circumstances.

**Expenses**

[45] I will award the expenses of the application in terms of section 113 in favour of the respondent.