SHERIFF APPEAL COURT

[2020] SAC (CIV) 3
EDI-F29-17

Sheriff Principal Abercrombie QC
Sheriff Principal Lewis
Appeal Sheriff Holligan

OPINION OF THE COURT

delivered by APPEAL SHERIFF W HOLLIGAN

in appeal by

CWR

Pursuer and Appellant

against

LVBR

Defender and Respondent

Pursuer and Appellant: Spier, advocate; Turcan Connell
Defender and Respondent: Scott QC; Morton Fraser LLP

25 February 2020

Introduction

[1] This is an appeal concerning orders made for financial provision on divorce in terms of the Family Law (Scotland) Act 1985 ("the 1985 Act"). The case was a complex one heard over six days with six inventories of productions (228 productions) for the appellant and five inventories of productions (158 productions) for the respondent. The sheriff issued two judgments: the first dated 21 September 2018 ("the September judgment"); the second dated 18 January 2019 ("the January judgment"). The September judgment extends to 129 pages;

the January judgment 24 pages. Some of the issues before the sheriff are no longer in dispute in this appeal.

[2] The pursuer and appellant is the husband; defender and respondent is the wife. The parties were married in October 2005 having commenced cohabiting in September 2004. The parties have three children under the age of 16. Having reached agreement as to the care of the children (essentially a shared care arrangement) orders were neither sought nor granted in respect thereof. The children are all of school age and attend a private school. Before the parties' separation the parties lived in a substantial property described in the judgment as B Street. After separating the respondent lived in a property known as E Street.

[3] In his pleadings the appellant sought decree of divorce, an order for the transfer of the respondent's interest in B Street to him (title being taken in joint names) and ancillary orders. The respondent sought an order for the sale of B Street to her, the transfer of the appellant's interest in E Street, free of a secured charge, payment of a capital sum of £1,000,000 and periodic allowance of £2,500 per month. In his January judgment the sheriff granted decree of divorce (which is not disputed); orders for the respondent to transfer her interest in B Street to the appellant; transfer by the appellant of his interest in E Street to the respondent, free of all encumbrances; payment of a capital sum by the appellant to the respondent amounting to £158,458 with interest at the rate of 4% from 1 September 2018 until 18 January 2019 and thereafter at the judicial rate of 8% until payment. No award of periodical allowance was made. The sheriff found the appellant liable to the respondent in expenses, modified to 65%; allowed the respondent an increase in fees and sanctioned the employment of senior counsel. Certain witnesses were certified as skilled witnesses.

[4] The September judgment contained findings in fact and findings in fact and law and a detailed note. However, the operative part of the interlocutor did nothing other than

assign a further hearing. In relation to the September judgment, at the close of submissions the sheriff was invited to put the matter out by order to give effect to his judgment. The January interlocutor amended certain figures in the September judgment and then went on to make the orders summarised above, together with the note explaining the sheriff's reasoning for the final form of the judgement.

[5] The financial position of the parties pre-marriage, during the marriage and following separation were examined in depth during the proof. It is clear from the evidence that the appellant is a man of some wealth but the bulk of it was not matrimonial property. In findings in fact 7 and 30-35 the sheriff found, in summary, as follows: the pursuer is the principal beneficiary of a trust described as the "FG trust". The trust is the sole shareholder in S Limited ("S"). S owns the whole issued share capital of T Limited ("T"). The pursuer is entitled to all of the income of the trust. The trustees may in their discretion advance capital to him. The trust was established by the pursuer's father as was T. It appears that since June 2009 the trustees of the trust have not met. They do not maintain a trust bank account and do not prepare financial statements. If the pursuer requires funds from the trust he asks for it which is then paid to S, which pays the trust, which, in turn, pays the pursuer. T has derived income from letting commercial and agricultural properties and from the operation of various other properties. Some of the profits were retained. Between the parties beginning to cohabit and the date of separation T built up its retained profits by £1,901,228. Between marriage and separation the retained profits have appreciated by £1,762,237. Those funds were available to the appellant. No dividends were drawn between 2008 and 2012. The sheriff found that T grew in value between September 2004 and the date of separation from £5,000,000 to £8,000,000. The sheriff also found that the pursuer and his father operated another business called M Limited which had a current value of £284,006. In

finding in fact 43 the sheriff held that the pursuer remains in control of T which has retained profits from which the dividend could be paid, subject to the company having cash. T has a substantial property portfolio and could sell property to generate cash.

[6] The respondent's position on record was that the appellant's interest in the trust was matrimonial property but that position was departed from just before the commencement of the proof.

[7] The funding of the purchase price of the former matrimonial home at B Street was summarised by the sheriff at finding in fact number 11. Given that it is a matter of some importance in this appeal it is appropriate to record the sheriff's finding:

> "The purchase price of…. B Street was £889,200, including stamp duty, which was initially largely funded by a mortgage of £765,000. The defender contributed £86,891.62 to the purchase price, reflecting free proceeds from a previous property owned by her and loan repayments in relation to a previous matrimonial home made by her at £350 per month. The balance, including payments made settling the mortgage account between January 2006 and May 2007 was paid by the pursuer, including £415,701.15, which was funded by dividends from T and M".

[8] The respondent is a chartered accountant who ceased fulltime work in April 2005 on the birth of the parties' first child and thereafter did not resume fulltime work. Before the sheriff an argument was pursued by the respondent as to certain of the financial implications of her not returning to fulltime work. Ultimately, the respondent's argument did not find favour with the sheriff. It was not pursued in the appeal. The sheriff did however find that the respondent required accommodation in which to reside and to care for the parties' children. The respondent had also provided some, albeit limited, professional help in the running of the appellant's business. During the financial crisis of 2008 the respondent agreed to stop paying into two policies in which she had an interest. During her employment the respondent had received share options and shares, also described as loan notes. During the financial crisis of 2008, the businesses in which the

appellant had an interest were in some difficulty. The sheriff held that between June 2008 and December 2010 the respondent cashed in all her shares and loan notes and transferred the proceeds, amounting to £160,500, to the appellant. The appellant in turn lent this money to M. M was subsequently able to repay the loans but the monies were used by the appellant in day to day expenditure in the interests of the family. None of this was repaid to the respondent. The sheriff held that, had the respondent invested the sum of £160,500 at 4%, it would be worth £219,655 as at January 2017. One of the reasons why the respondent agreed to stop making payments in relation to the two policies was that she was given to understand by the appellant that there was no requirement for a pension because "T was their pension for the future".

[9] The sheriff held that, in relation to the resources, the respondent had no significant assets other than her interest in the former matrimonial home. She also had debts of approximately £70,000, excluding legal fees.

The appellant's grounds of appeal

[10] There are four issues raised by the appellant:

1. Was it correct in law *et separatim* reasonable to award the respondent a capital sum in addition to the order for transfer of property in her favour?
2. If a capital sum should be made what amount should it be for?
3. Should there be interest awarded on any such capital sum?
4. What award for expenses should have been made in all the circumstances of the case?

Submissions for appellant

[11] At the outset of his submission Mr Spier accepted that financial provision on divorce is essentially a discretionary decision for the court at first instance (*Little* v *Little* 1990 SLT 785). He also accepted the guidance issued in the cases of *McGraddie* v *McGraddie* 2014 SC (UKSC) 12 and *Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203.

The first ground of appeal

[12] Counsel identified a series of errors made by the sheriff in ordering payment of a capital sum to the respondent in addition to the property transfer orders made. The sheriff considered that he was giving effect to section 9(1)(b) of the 1985 Act. He took specific account of the £219,655 valuation placed on the lost loan note investment and made a further modest additional allowance for advice and support to the appellant's businesses and the respondent's availability to look after the house and children as a consequence of career sacrifice (paragraph [367] of the September judgement). The award was for £300,000, subsequently adjusted in the January judgment to £345,000. The sheriff erred in relation to the proper weight as to the source of funds of the acquisition cost of B Street for £889,200 and the subsequent repayment of the mortgage. These capital contributions came overwhelmingly from the appellant's non-matrimonial property to the extent of 91% of the acquisition cost. The contributions came primarily from two sources: the net free proceeds of sale of two properties that the respondent owned prior to marriage which were non-matrimonial property totalling £385,564.89 ("two W Street properties"); and dividends in companies held prior to marriage in respect of funds accumulated prior to the date of the marriage totalling £415,701.15. Accordingly, the sheriff's finding in fact number 11 (see paragraph [7] above) was insufficient and should be adjusted to incorporate a more accurate

record of the source of funds. Had finding in fact 11 been framed appropriately based on the evidence, proper weight would have been attached to the source of the acquisition cost of B Street and the sheriff would not have determined that there was an economic imbalance which required to be addressed by payment of a capital sum to the respondent in addition to receiving the transfer of the appellant's interest in E Street.

[13] The sheriff's approach treated the loan notes and the encashment value as being equivalent to a contribution of non-matrimonial property. The sheriff referred to the respondent suffering "the loss of savings". By doing so, he failed properly to recognise that for at least half of the period the respondent was acquiring share options/loan notes when she was married. These options/loan notes are a form of deferred income from employment, however, they were matrimonial property at the point of realisation. On repayment, the proceeds were devoted to matrimonial property in which the respondent would have also benefitted. Had the funds not been in cash but had been invested there would have been matrimonial property in which the appellant would have been entitled to a share. The underlying interest in the loan notes was wholly and substantially acquired by the respondent from her efforts during the marriage and thus should not have been treated as a hypothetical special circumstance. The loan made to M and T from the encashment of the loan notes was repaid and applied to matrimonial purposes and, as a consequence, was ultimately reflected in the parties' financial position as at the relevant date; the extent of any loss of investment potential would have been matrimonial property for which there would be no proper reason to exclude from the primary principle of equal division.

[14] In considering the principle in section 9(1)(b) proper regard is also required to the terms of section 11(2). This involves a balancing exercise. The sheriff should firstly have identified all of the economic advantages derived by each party from the contributions of

the other and all the economic disadvantages suffered by either party from the contributions of the other and all the economic disadvantages suffered by either party in the interests of the other party of the family. The sheriff appears to limit its application to the second leg which is only looking at the overall sharing of matrimonial property. There is no consideration of a balancing exercise in the sheriff's judgment. Had the sheriff considered the proper balancing of advantages and disadvantages he would have had proper regard to the significantly greater contribution of non-matrimonial property to the purchase of the former matrimonial home. The sheriff was plainly wrong to ignore, or gave insufficient weight to, the source of funding for B Street as a counter balance to the "loss" of the investment potential of the respondent's loan notes. Even if the sheriff was correct to discount the weight that should be given to the repayment of the mortgage generated by dividends received by the appellant on the basis that such sums are akin to earnings, the total sum released from the sale of the two W street properties (less the respondent's contribution) was still some £138,000 in excess of the sum of £160,500 which the sheriff speculated could have been invested. Thus, if the pursuer had invested the net free proceeds rather than applying it to reduction of the mortgage the "loss" would have been considerably greater than that of the appellant. Although the sheriff does make some reference to the proceeds from these properties being applied to reduce the borrowing of B Street he does not specifically quantify them or properly explain why he discounts them. His reasoning is thus incomplete and contradictory, with the focus on the dividends rather than free proceeds from the properties.

[15] Furthermore, the sheriff's analysis of the application of dividends is flawed. He disregards the evidence that the value of the appellants' company released by the dividends had already been built up as of the date of the marriage. As such, these dividend payments

should be considered differently from, as the sheriff found, "funds coming from his non-matrimonial assets, but which it would be reasonable to infer have grown at least to some extent from his work activity during the marriage". Mr Spier further submitted that in the balancing exercise the sheriff also erred by failing to take account of: (1) the pursuer's financial support generally during the marriage from non-matrimonial assets and (2) the pursuer's commitment to payment of the children's school fees and associated costs since the relevant date and for the remainder of their education.

[16] The significance of the former point is the sheriff appears not to recognise and give weight to the obvious fact that very significant funds (primarily derived from non-matrimonial resources) were applied to the family finances. The sheriff's conclusion that "the husband has succeeded in minimising the value of the matrimonial property by only taking from the companies and trust sufficient for immediate needs". This demonstrates a skewed and unbalanced approach. In relation to the latter point the sheriff upheld a submission to the extent that the latter was not economic advantage to the respondent (*De Winton* v *De Winton* 1998 Fam LR 110*)*. That was not the appellant's primary argument at first instance. The appellant's primary argument before the sheriff was based upon the application of section 9(1)(c): this was narrated by the sheriff but not dealt with by him. The sums involved are considerable. There has been and will be a considerable imbalance against the appellant in the economic burden of supporting the parties' children through their education and all the day to day costs associated therewith. If these additional matters had been properly considered by the sheriff it would have balanced out the "modest additional allowance" component of the award. It follows that in terms of outcome, the sheriff erred in determining that the respondent has sustained an economic disadvantage

which required to be remedied by an award of a capital sum over and above the property transfer orders.

[17] Counsel emphasised that, from the appellant's perspective, the respondent has ended up better off to the tune of £182,000. Paragraphs 9-13 of the appellant's affidavit (document 1, appendix) sets out the arithmetic for the purchase of B Street. The total purchase price was £925,406.04. The amount of the mortgage taken out to purchase the property was cleared by the appellant producing two tranches of monies: £422,873.27 and £415,701.15. The former came from the sale of the two properties in W Street together with a bridging loan account sum; the latter came from the dividends which the appellant described as a "pre-marital" company. The sheriff was in error in concentrating on the dividends and not taking into account the full history of these funds.

The second ground of appeal

[18] Counsel's submissions on this ground focused principally on the issuing of the two judgments and on some of the calculations contained within the September judgment. The sheriff's intentions were set out in his findings in fact and in law. He valued the matrimonial property at a little over £1,000,000. On an equal division, the respondent would have required to make a balancing payment to the pursuer of £12,062. B Street was valued at approximately £1,000,000 and E Street at approximately £675,000. He made a capital award in favour of the respondent amounting to £300,000. The parties were agreed that the respondent should transfer her interest in B Street to the appellant and the respondent have title to E Street, unencumbered by any security. It is a matter of agreement between the parties that there was a small error in the calculation of the balancing payment on equal

division which should have been £11,562 and not £12,062. Counsel submitted that the financial consequence of the foregoing could be set out as follows:

- On equal division wife requires to pay husband £11,562;
- Wife entitled to payment under section 9(1)(b) of £300,000;
- Therefore, husband due to pay wife balancing payment of £288,438;
- In return for transfer of B Street husband pays wife £500,000;
- Therefore, new balancing payment is £788,438;
- In return for transfer of E Street wife pays husband £675,000;
- Final resulting balancing payment due by husband, £113,438.

[19] The sheriff was in error in paragraph [369] when he specified a figure of £158,431 being the outcome of his calculations. It should have been £113,438. That arithmetical error could have been corrected without reconsideration of the merits. It could have been done by way of OCR 12.2(2). No change would have been required to the findings in fact or the findings in fact and law as contained in the interlocutor. However, the sheriff made alterations to finding in fact and law number 9 and the text of his note at paragraph [369]. That is to go beyond what is permitted in terms of the rule. Such changes are limited to clerical or incidental errors. Reference was made to MacPhail, *Sheriff Court Practice (3rd edition)* at paragraphs 5.85-5.88.

The third ground of appeal

[20] The sheriff decided to award interest on the capital sum from September 2018. It was accepted that the appellant had unilaterally terminated the payment of aliment in August 2018. In these circumstances the sheriff held that it was not unreasonable for the respondent to seek interest prior to decree and that as the appellant has access to significant non-

matrimonial capital it would be reasonable for interest to be payable at 4% from September 2018 and at 8% from the date of decree. In her submissions the respondent had referred the sheriff to *Geddes* v *Geddes* 1993 SLT 494. *Geddes* does not assist. *Geddes* provides (a) that interest may be appropriate where one party has had the use or possession of an asset not otherwise taken into account and/or (b) payment of the principal sum is deferred. The latter point does not apply to the present case: the former matrimonial home has been "used and possessed" as the home for the appellant and the parties' children. The respondent has received significant and appropriate compensation for that by having made available to her E Street. The appellant's access to significant non-matrimonial capital is irrelevant.

The fourth ground of appeal

[21] Counsel invited us to recall the sheriff's decision on expenses and to find the respondent liable to the appellant in the expenses of preparation and proof. Having regard to the issues which the respondent did not insist upon or was unsuccessful the sheriff was unreasonable in respect of his determination in relation to expenses in that the respondent only abandoned a significant aspect of the case on the pleadings (that the appellant's interest in the trust was matrimonial property) shortly before the proof commenced. The proof concerned two points of principle upon which the respondent was ultimately unsuccessful namely (a) that the approach in cohabitation cases as a consequence of *Gow* v *Grant* [2012] UKSC 29 made it permissible to consider and value non-matrimonial property for the purposes of an award under section 9(1)(b) – in this case the appellant's interest in a pre-marital trust and associated property holdings; and (b) that it was appropriate to advance a case on a detailed approach to loss of earnings akin to quantification of a claim for personal injuries. In support thereof the respondent led in evidence her expert witnesses. Most of the

proof was taken up with these issues. A chartered accountant was called as an expert witness as to the appellant's non-matrimonial property; such valuation was unnecessary in circumstances where the appellant did not put his resources in issue. Such an examination was unnecessary having regard to the level of the award made by the sheriff. Accordingly, the expert property valuation witnesses should not have been certified as skilled nor should the appellant be required to meet the expenses of that proof in any respect. Certification of the chartered accountant should be limited to the preparation of his report on one of the companies. The cost of the employment witnesses should be borne by the respondent.

[22] The appellant did not pursue the ground of appeal in relation to the uplift in fees.

[23] Accordingly, the court should recall the sheriff's interlocutor of 18 January 2019 ordering payment by the appellant to the respondent of the sum of £158,438 and to find the respondent liable to the appellant in the expenses of the proof.

Submissions for the respondent

[24] Referring to her written note of argument, Senior Counsel submitted that the appeal raises no substantive point of law for the determination of the court. It is well established that financial provision on divorce is a matter for the discretion of the sheriff who hears the evidence at first instance. Similar considerations apply to expenses. Reference was made to *Little* v *Little* 1990 SLT 785; *Jacques* v *Jacques* 1997 SC (HL) 20 and *Cunniff* v *Cunniff* 1999 SC 537.

[25] The judgment requires to be considered as a whole. It was a complex case featuring a number of interconnecting considerations in the application of sections 8-14 of the 1985 Act relating to financial provision on divorce. It was a significant feature of the case that the matrimonial property constituted only a minor part of the available wealth. The appellant

had access to very significant resources that fell outside the definition of matrimonial property. Section 9(1)(a) had a relatively limited role. The respondent had a significant claim under section 9(1)(b). The material findings of the sheriff related to the matrimonial property; the appellant's business interests included the trust and the commercial property interests. The respondent is a chartered accountant who ceased working fulltime in April 2005 from the birth of the parties' first child. The respondent had sacrificed her savings which were a form of shares and loan notes. These contributions consisted in avoiding M becoming insolvent and, when these funds were repaid by M, allowed the appellant to retain profits in T. There was a significant increase in retained profits in T over the period of cohabitation and marriage which was both an economic disadvantage to the respondent and an economic advantage to the appellant. The respondent had suffered economic disadvantage in the interests of the appellant by giving up saving in two policies. She provided some support to the appellant's business. The respondent required accommodation in which to reside and care for the parties' children when they were with her. The respondent had no significant assets other than her interests in the former matrimonial home and she had debts of about £70,000. The respondent had argued that the respective transfers of property were sufficient to satisfy the requirements of section 8(2) of the 1985 Act. The award of a capital sum (£158,438) was made in the exercise of the sheriff's discretion. That was neither erroneous nor incompetent. Reconsideration by an appeal court, even if permissible; would be a difficult exercise in this case. The court cannot replicate the sheriff's appreciation of the evidence. There is no single straightforward point for the appellant to argue. All factors in the case are related to other factors. It is a prime illustration of the point that these are cases which require to be left to the discretion of the first instance judge, unless he has made some fundamental error. In particular, any

weighing exercise is a matter for him or her and is not open for reconsideration by an appeal court.

[26] The sheriff reviewed the applicable law. His statement of the legal principles is accepted and adopted by the respondent. The sheriff took a "modest" approach to the application of section 9(1)(b), distinguishing the section from the provision relating to cohabitants. The respondent does not challenge the sheriff's decision on her loss of earnings and pension. Decisions on these matters are within the discretion of the sheriff on the facts of each case and as such are not open to reconsideration on appeal (*Little* v *Little* and *Jacques* v *Jacques*).

[27] The appellant now seeks to reargue on appeal aspects of the case that he lost at first instance while leaving intact the aspects of the decision in his favour. That fails to appreciate that the sheriff's decision stands as a whole. It is an interconnected, rational and just award reaching a "fair and practical result, in accordance with common sense". It was the sheriff's duty to apply section 9(1)(a) and also to apply whichever of the other specified principles he considered to be relevant in the light of the facts of the case as established to his satisfaction (*Cunniff* v *Cunniff* at page 539 F-G). That is what the sheriff did. The sheriff was aware of the need to apply section 11(2) when considering an award under section 9(1)(b) and he did so correctly. How to apply section 11(2) in any particular case is for the decision for the sheriff at the first instance. It is part of the details which should be left in the hands of the court at first instance and not reopened on appeal (*Little*). However, the sheriff was entitled to take into account the respondent's career sacrifice in general terms, in contrast to the advantage derived by the appellant from her "indirect non-financial contributions"(section 9(2)) in advice and support to the appellant's businesses and her availability to look after the house and children. He was entitled to take into account the

consequences of what had happened to the respondent's encashed loan notes. The respondent suffered a loss whereas the appellant made a gain but it did not fall to be shared under section 9(1)(a) hence the application of section 9(1)(b). The balancing exercise under section 11(2) relates to imbalance between the parties. The sheriff was entitled to conclude that sharing the net value of the matrimonial property equally under section 9(1)(a) would not be sufficient to satisfy the requirements of section 9(1)(b). That the appellant provided financial support during the marriage from "non-matrimonial assets" is no more relevant than the more usual financial support derived from salaried employment. The appellant worked in businesses he owned or were owned by the trust in which he was a beneficiary. He derived an income and used some of this to support the family. The sheriff also found that he retained profits in T. In that he was assisted in doing so by the respondent's indirect contributions and the contribution of her savings. Payment of school fees by the appellant as a wealthy individual is not an economic advantage to the respondent. It is a fulfilment of an alimentary obligation to his children and is consistent with the appellant's wealth. A similar argument was rejected in *De Winton* v *De Winton* (at page 115). The respondent asked for a relevant periodical allowance. How that is dealt with depends upon how much capital the respondent receives. The absence of periodical allowance is contingent upon the respondent receiving £150,000 by way of capital award. The appellant had access to assets amounting to between £8,000,000 and £9,000,000. If the capital sum is changed it will be necessary to revisit the question of periodical allowance. One of the anxieties in this case for the respondent was whether she would be able to get access to money from the appellant because his assets were held in trust. This is a case in which all of the principles involved in the 1985 Act were in play. Section 9(2) defines "economic advantage" and that includes advantage gained either before or during the marriage. "Contributions" means

contributions made either before or during the marriage. The parties lived together before their marriage and indeed the respondent was pregnant before the marriage. Counsel referred to the judgment of Lord Hope in *Gow* v *Grant* at paragraph [36] in holding that section 9(1)(b) involved a "rough and ready" assessment. "Matrimonial property" in section 10(4) is a particular construct. The definition of matrimonial property comes into effect at one particular point. The appellant is trying to use it at an earlier stage in the marriage which it is not open to him to do. The court cannot look at section 11(3) without having regard to needs and resources. The sheriff was entitled to reach the conclusion that he did notwithstanding the source of funds. *Jacques* is the answer to the appellant's case. The appellant did not present a clear picture as to source of funds. The sheriff's finding in fact 11 is sufficient. Having regard to *McGraddie* this court should not interfere with the finding by the original court. It was not clear whether the dividends relied upon by the appellant were in fact declared after the marriage or before.

[28] Mrs Scott then turned to the evidence in relation to the source of funds. Although much of the evidence on this point was obscure, when one looks at finding in fact 11 and paragraph [361] of the sheriff's note the sheriff did take into account the "unequal contributions" to the purchase price. So far as the question of "savings and loans" is concerned the question is whether the sheriff was entitled to do what he did, not whether this court would do something differently. Section 9(1)(b) is not a matrimonial property issue. The sheriff needed to look at the matter in a common sense way which is something which he did. The respondent gave the appellant money which gave him a clear advantage. That was all part of section 9(1)(b). It was simply a question of what is fair. The respondent had suffered a loss of capital and did so in the interest of the appellant. The sheriff took this into account which was a classic exercise in the making of a discretionary decision. The

appellant argues that the monies of the respondent were "matrimonial property". The answer to that is contained in paragraph [351] of the sheriff's September judgment. The sheriff held that it was reasonable to conclude it was matrimonial property at the time of realisation and payment to the husband. However, he considered that there were special circumstances which would have justified excluding it from the calculation of matrimonial property given that it was at least in part sourced from non-matrimonial property and the advantage it had given to the appellant in preserving and growing his own non-matrimonial property which he has continued to keep firmly out of the pool of available assets in contrast with the position of the respondent who effectively surrendered all her savings to him. Put short, he was able to keep his savings which were in trust which were not available in terms of section 9(1)(a). In relation to the appellant's argument that the money was paid back and spent on the family the answer is also found in paragraphs [351] and [352]. The respondent's actions let the appellant keep the monies which are inaccessible to the respondent. The sheriff made specific findings at paragraphs [32], [36] and [37] as to the favourable consequences to the appellant in relation to his various business interests resulting from the actions of the respondent. The disadvantage of the respondent having done what she did is set out by the sheriff in finding in fact and law [6] namely £219,655 being the amount of the original investment together with the return which she could reasonably have expected to receive.

[29] The sheriff did carry out a careful balancing exercise (findings in fact 5-8 and paragraphs [317]-[321] of the sheriff's September judgment). In his note the sheriff analysed the law carefully (paragraphs [316]-[326]). At paragraph [363] the sheriff drew his reasoning together. He concluded that, in addition to equal sharing of the matrimonial property, there should, on account of economic disadvantage, be recognition of the respondent's

commitment to the marriage by giving up her savings and investments. The respondent followed the appellant's example of having no savings during the marriage in the expectation that T would be their pension but she had neither the means nor the resources to follow the example of the appellant in building and retaining non-matrimonial property. The sheriff found that the respondent had ceased her employment and suffered a career sacrifice. Looking at findings in fact [15] and [19] she had previously been earning £48,000 a year whereas she could have been earning £75,000 a year. Based on the various findings in fact the respondent had lost £95,000. The sheriff must have had that in mind, even if he did not accept the respondent's assessment of the loss of income in personal injury terms.

[30] In relation to school fees, the appellant is a very wealthy parent. The respondent has a house, debts and limited income. School fees are aspects of aliment. It is in effect a child's claim against a parent. The sheriff had found that the respondent was in effect, just getting by on her income. He did not award the respondent any periodic allowance. The appellant seems to be arguing for some form of allowance now because of future payments which he may have to make in relation to the school fees.

[31] In relation to the correction of the September interlocutor, the sheriff's interlocutor continued the cause to a hearing to be afterwards fixed to determine the terms of the orders to be made. He did not at that point grant decree. The orders for financial provision are contained in the January judgment. The sheriff made an error in the September judgment to which attention was drawn by the respondent and which the sheriff was bound to address and correct. He explained how he did this in the January judgment. He says he approached the matters under section 9(1)(b) on a "broad brush" basis with the intention of achieving a balancing payment of £158,431. He did no injury to the principles he had applied to deal with the error as he did. It is clear from paragraph [7] of the sheriff's January judgment that

he intended a net payment to the respondent of £158,431. The justice of the case demanded a particular result. In order to achieve that he should have put in a figure of £345,000 and not £300,000. Accordingly, it was a correction of an arithmetical error. So far as correction is concerned one can look at the matter in one of three ways. The first is to treat the interlocutor of September 2018 as being nothing more than a continuation of the cause. That in effect was the only operative part of the interlocutor. Secondly, one can look at the matter as an incidental error in terms of OCR 12.2(2) which allows correction of the interlocutor and the note. (Reference was made to Macphail, *Sheriff Court Practice* at paragraph 5.87 and *Mutual Shipping Corporation* v *Bayshore Shipping Co Ltd* [1985] 1 WLR 625). Thirdly, the Sheriff Appeal Court, being an appeal court, should do whatever is necessary to reach a just result.

[32] Section 14(2) allows the court to make an incidental order relating to interest including the date from which it is payable. The sums are very modest. The cases of *Geddes* and *Sweeney* v *Sweeney (No 2)* 2006 SC 82 support the submission that the sheriff's order was competent. The respondent recognises that on any view interest will run from 18 January 2019.

[33] The decision of a sheriff on expenses is classically a discretionary matter rarely disturbed on appeal (*Howitt* v *W Alexander and Sons Ltd* 1948 SC 154 and *Little)*. The sheriff had heard the proof and detailed submissions on expenses. He was uniquely placed to decide what award of expenses would achieve substantial justice. It would be contrary to longstanding judicial guidance for an appeal court to reconsider the award. The same applies in relation to the question of uplift in fees.

[34] So far as certification of skilled witnesses was concerned the evidence relating to valuation of properties and the companies (including the trust) was held by the sheriff to

remain relevant to the case as presented in terms of section 9(1)(b) (see paragraph [51] of the January judgment).

Reply

[35] In a brief reply relative to the issue of the arithmetical mistake, there were two errors. The first error was truly an error in calculation which it was open to the sheriff to correct. The second error was not truly an arithmetical error and the sheriff went too far in making the alteration. All he had to do was to work through the calculation to reach a sum of £113,438. £300,000 was the sum which he found and to which he should have adhered.

[36] So far as the financial contribution of the appellant to the purchase of the matrimonial home is concerned these were balancing factors and not special circumstances. Referring to *De Winton* at page 71, the sheriff required to balance all the economic advantages and disadvantages and then decide if an order should be made. It was not apparent that the sheriff had carried out that exercise or that he had balanced the respondent's loss against the appellant's significant contributions to B Street. The evidence on this matter was not unclear. The sheriff did not require clarification. The sheriff records the submission made to him at paragraph [228] of the September judgment. The sheriff had the information but he did not use the material and balance it against the respondent's claim.

[37] The exercise of discretion does not amount to a "free for all". The sheriff has a discretion but he requires to exercise judgment in applying the principles based on the evidence to reach a fair outcome. If the process is not clear then it is difficult to see how one can determine objectively that the discretion has been exercised appropriately.

Decision

[38] The starting point in this matter is consideration of the role of an appellate court in cases involving financial provision on divorce. There is no dispute between parties as to the relevant authorities.

[39] The case of *Little* v *Little* is rightly regarded as setting out the general approach. *Little* was a reclaiming motion against the interlocutor of the Lord Ordinary following a proof on divorce. In the course of his opinion the Lord President commented that the general broad power to make financial provision on divorce was originally enacted by section 26 of the Succession (Scotland) Act 1964 followed by section 5 of the Divorce (Scotland) Act 1976 which was couched in similar terms. These provisions were very general as to the powers entrusted to the court. It was well established that the power to make such an order was discretionary and that the Inner House would not be entitled to interfere in the exercise of the discretion entrusted to the Lord Ordinary unless it could be shown that he had misdirected himself in law or failed to take into account a relevant and material factor or reached a result which was manifestly inequitable or plainly wrong. In analysing the statutory provisions of the 1985 Act relating to financial provision, although much more detailed than the earlier provisions, the matter was still one of discretion. The Lord President went on to say:

> "But despite all the detail much is still left to the discretion of the court. This is clear from an examination of s. 8(2), which provides that the court shall make such order, if any, as is justified by the principles set out in s. 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 s. 10(6) and the repeated references in s. 11 to all the other circumstances of the case serve to emphasise that, despite the detail, the matter is essentially one of discretion, aimed at achieving a fair and practicable result in accordance with common sense. It remains as important as it always has been that the details should be left in the hands of the court at first instance and not opened up for reconsideration on appeal" (Page 787 B-D).

An opinion to similar effect was given by Lord Dunpark (at page 790 J-K.) The dicta of the Lord President were expressly approved in *Jacques* v *Jacques* (Lord Jauncey at page 22). Lord Clyde said:

> "The statement of principles in sec 9 by which under sec 8(2)(a) any order must be justified together with the sections 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 judgment 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 (page 25)".

[40] To make an order for financial provision there must be an application to that effect by one or both of the parties (section 8(1)). The orders which the court may make are enumerated in section 8(1) and include a variety of incidental orders in section 14(2). The court's power to make the order is governed by section 8(2) – "(a) justified by the principles set out in section 9 of this Act; and (b) reasonable having regard to the resources of the parties". The principles as set out in section 9 and their application are amplified by section 10 which relates to section 9(1)(a), and section 11 which relates to the other principles. The concept of "matrimonial property" is a key element of the construct. The language of these provisions is couched in terms designed to ensure a fair outcome. As the Lord President said in *Little,* the object is a "fair and practicable result". What constitutes a fair and practicable result will vary from case to case. It seems to us that the cases of *Little* and *Jacques* discourage reopening decisions on financial provision on divorce, leaving their resolution to the court at first instance. An appeal court may only interfere with the decision of a court at first instance in the case of misdirection in law, failure to take into account a relevant factor or reaching a result which is manifestly inequitable or plainly wrong.

[41] This is clearly a case of some complexity on the facts and on the applicable law. The sheriff was presented with conflicting and complicated evidence and many legal issues to resolve. We agree with senior counsel for the respondent that one cannot look at one part of the sheriff's decision in isolation. On a fair reading of the judgment there were several interlocking parts combined together in order to reach what the sheriff considered to be a fair and practicable result.

[42] The sheriff's decision is to be found in paragraphs [316] to [372] of the September judgment. The relevant parts can be reduced to the following essentials.

[43] The sheriff calculated the value of the matrimonial property as amounting to approximately £1.09m. The sheriff acknowledged (paragraphs [361]-[362]) that the appellant had made a greater contribution to the cost of the acquisition of B Street than the respondent. There is a finding in fact at paragraph 11 to that effect. (See also paragraph [15] of the decision.) Acknowledging that was the case, nonetheless, the sheriff took the view that equal sharing should apply. The purchase was largely funded by a mortgage which the appellant paid off using non-matrimonial assets. He concluded that it would be reasonable to infer that these assets would have grown to some extent because of his work activity during the marriage; had the appellant saved or invested in the normal way from his earnings from employment, such savings or investments would have been matrimonial property. That the title was in joint names was a relevant albeit not conclusive factor. The appellant had succeeded in minimising the value of the matrimonial property by taking from the companies and trust sufficient for immediate needs. The sheriff went on to say:

> "In the circumstances and taking account of the resources of the parties under section 8(2)(b), it would seem reasonable not to depart from the assumption that equal sharing is fair sharing of matrimonial property".

[44] However, the sheriff did include as matrimonial property the respondent's pension and endowment policies (see the table at finding in fact 6).

[45] The sheriff took the view that section 9(1)(b) did apply. He considered that there was an advantage to the appellant in the respondent giving up her investments and her savings which could not be measured. The appellant was also advantaged by the respondent's advice and support to the appellant's businesses and her availability to look after the matrimonial home and the children. Although he accepted that the respondent had been disadvantaged by giving up making contributions to certain policies it was not necessary to reflect the loss of opportunity in an award. The sheriff was not persuaded by the respondent's argument as to compensation for loss of career but he did accept her argument as to career sacrifice for the children.

[46] The value of the investments foregone by the respondent was approximately £160,000. The sheriff accepted that it, or some of it, was matrimonial property (paragraph [349]) but there were special circumstances to exclude these items from the calculation of what was matrimonial property. The sheriff considered the resources of the parties. As Mr Spier conceded, the appellant did not put his resources in issue and led little evidence about them. He accepted the consequences in so doing. In any event, the sheriff was able to conclude that the appellant was a man of means. By contrast the respondent had little by way of capital. She had debts of £70,000, excluding legal bills. The sheriff concluded that £3,000 was a reasonable assessment of her monthly expenditure. Unless she received a capital sum, the respondent would only have a house and a limited monthly income. It is also important to note that the sheriff decided not to make an award of periodical allowance. In so doing part of his reasoning was "noting the effect of my proposed award".

[47] One of the notable features of this case was the appellant's interests in the trust and its relationship to various companies. On any view the total of matrimonial property as a proportion of the assets available to the appellant was limited. The foregoing summary of what the sheriff did shows a careful assessment of the relevant pool of assets, the parties' circumstances and the eventual outcome. It included a balancing of the key features of the case. The net result was an award which gave the respondent a home for herself and the children and what can only be described as a modest amount of cash by way of a capital sum. When one looks at the overall picture it cannot be said that the result was, in the words of the Lord President, anything other than fair and practicable.

[48] What the appellant seeks to do is to attack individual components of the sheriff's reasoning. In our opinion that is the very thing which *Little* dictates it is not open to him to do. The sheriff's conclusion was constructed upon an assessment of all of the elements of the case. Removing certain bricks from the construct is not possible without damaging the overall architecture of the edifice. For example, the sheriff's decision was that he should not make an award of periodical allowance, a conclusion which was an integral part of his overall determination. We accept that the Lord President in *Little* left open certain limited grounds for reopening a decision at first instance but the challenges here fall well short of satisfying those criteria. The sheriff was plainly well aware of the source of funds for the purchase of B Street, he was well aware of all of the relevant facts relating to the respondent surrendering her funds to the appellant to assist in supporting his then faltering enterprises and the repayment processes which followed. We do not consider that the sheriff failed to carry out the requisite balancing process. On the contrary, reading his judgment as a whole that was exactly what he did. We are also not persuaded by the appellant's argument as to the payment of school fees, largely for the reasons advanced by the respondent.

[49] It is our view for the reasons given above that the sheriff was correct in law and it was reasonable to award a capital sum in addition to the orders to transfer property. Accordingly the first ground of appeal fails.

[50] The next issue concerns the interaction between the September judgment and the January judgment. As the debate before us proceeded it became clear that there had been a misunderstanding between bench and bar. As is increasingly common, at the end of the proof the sheriff was invited to give a judgment on the issues but to put the matter out by order in order to issue an interlocutor to give effect to the judgement. We were informed by counsel that there is a practice in the Outer House of the Court of Session (not in every case) for the Lord Ordinary to issue a draft opinion to counsel before issuing a final interlocutor. Counsel may then address the Lord Ordinary on any matters arising as to the implementation of the judgement and to correct any arithmetical or other similar errors. It appears that is what counsel expected would happen in the present case. Given the obligations imposed upon the sheriff by the Ordinary Cause Rules (the issuing of a judgment containing findings in fact and findings in fact and law) it is difficult to see how Court of Session procedure can apply to the sheriff court. The September judgment of the sheriff contained findings in fact and findings in fact and law but the operative part of the judgment continued the case to a by order hearing. Unbeknown to counsel until the morning of the hearing, the sheriff also issued a separate signed interlocutor containing the findings in fact and findings in fact and law but with the same disposal namely a by order hearing.

[51] At the by order hearing the sheriff was addressed at some length in some detail as to the September judgment. Put shortly, there were two issues. The first was a relatively modest adjustment to the balancing payment by the respondent to the appellant in respect

of the matrimonial property. The judgment contained a figure of £12,062. It was accepted by both sides that the sum should be £11,562 (i.e. £557,055 minus £545,493). The error was an arithmetical error. The second issue is more difficult. The relevant part of the sheriff's judgment is found at paragraph [369] in which he said:

> "The net effect of my proposed orders would be that the wife is entitled to a half share of the matrimonial property, amounting to £545,493, less the balancing payment of £12,062 – i.e. £533,431 – plus £300,000 in respect of section 9(1)(b), which equals £833,431, from which £675,000 would fall to be deducted in recognition of the value of the house in E Street, which itself should be transferred to her, at the same time that her interest in the house in B Street should be transferred to the husband, bringing the net capital sum due to her to £158,431".

As was set out at paragraph [18] above, on a correct calculation of the figures, the respondent would have received the sum of £113,438 and not £158,431. For the respondent the difference of £45,000 was material.

[52] In the January judgment the sheriff amended finding in fact and law 5 and paragraph [368] of his note by substituting "£11,562 for £12,062" and finding in fact and law 9 and paragraph [367] by substituting £345,000 for £300,000. He also substituted the following for paragraph [369]:

> "The net effect of my proposed orders would be that on equal division of the matrimonial property the wife would be entitled to a half share thereof, amounting to £545,493, to achieve which would require a payment by her to the husband of £11,562, but that would effectively be set against the payment to her of £345,000 in respect of section 9(1)(b), resulting in a net figure of £333,438, being due to her, before taking account of the essentially agreed mutual transfer of interest in heritable property. In return for transferring her interest, worth £500,000 in [B Street] to the husband, the house in [E Street] valued at £675,000 would be transferred by him to her, thus reducing the balancing payment required to be made to her by the husband by £175,000, arriving at a net capital payment due to her of £158,438".

[53] The remainder of the interlocutor set out the orders which gave effect to the September judgment. The sheriff's reasoning in making the adjustment which he did was that the correction was to give effect of his "first thoughts or intentions" (Macphail para

5.87). His plain intention was to achieve a net payment to the defender of £158,431. In order to do that the route chosen by the sheriff was to increase the sum of £300,000 (which he had previously described as being "rough and ready") by £45,000. The appellant says that the sheriff was not entitled to do what he did in relation to the second alteration. It goes well beyond what is permitted by OCR 12.2(2). OCR 12.2(2) permits the sheriff to correct "any clerical or incidental error in an interlocutor or note attached to it". On this point the only authorities to which we were referred are Macphail and *Mutual Shipping Corporation* v *Bayshore Shipping Co Ltd* [1985] 1 WLR 625. The latter relates to English practice and procedure. Given the different regime we do not find it helpful. OCR 12.2(2) follows similar wording in what was rule 84 of the original Ordinary Cause Rules. Macphail notes that section 34 of the Sheriff Courts (Scotland) Act 1876 contained the words "clerical or accidental error". Why the phrase was changed from "accidental" to "incidental" is not clear. Errors in interlocutors do occur. Usually the error will be obvious on the face of the interlocutor (such as a spelling error or an arithmetical error) or may be apparent to parties with knowledge of the case. What happened here was not a clerical error. The first was a simple arithmetical error. The second was not. In relation to the second part of OCR 12.2(2) it is not obvious what the error is "incidental" to. In the absence of further authority we are inclined to approach this issue by reference to the particular circumstances of this case. In fixing a by order hearing and issuing a judgment upon which comments were invited, the sheriff and the parties anticipated (rightly, as it turns out) that some alteration might be necessary to the judgment. The second error seems to have arisen because the sheriff made a mistake in the arithmetical route upon which he relied to reach his destination. The destination was clear and that was a figure of £158,438. The course of action followed by the sheriff did not extend the liability of the appellant to the respondent. Had the error not been

rectified the appellant would have received a benefit which, from the judgement which he issued, the sheriff did not intend. Accordingly, the second ground of appeal fails.

[54] The third ground of appeal is limited to the question of whether interest should be awarded for the period from the date of the September judgment to the date of the January judgment. The sheriff's reasons for awarding interest are to be found at paragraph [16] of the January judgment. In short, the sheriff found that, the appellant having unilaterally terminated the payment of aliment in September, it was not unreasonable for the defender to seek interest prior to decree. The sheriff also found that the appellant had access to significant non-matrimonial capital. The appellant concedes that interest is appropriate at the rate of 8% from the date of the January judgment. He accepted that the making of an award of interest from a date prior to decree is competent (section 14(2)(j) and *Geddes* v *Geddes* 1993 SLT 494). One of the issues in *Geddes* was the basis upon which an award of interest prior to the date of decree ought to be made. The Lord President gave guidance on that issue at pages 500K-L to 501A-B the essence of which is that where a party who has had the sole use or possession of an asset since the relevant date, the whole or part of the value of which is to be shared with the other party on divorce, may be required to pay interest as consideration for the use or possession which he has had between the relevant date and the date of decree. It may also be appropriate where the amount of the principal sum is fixed by the decree but payment of it, in whole or in part, is postponed to a later date. We were also referred to the case of *Sweeney* v *Sweeney (No 2)* 2006 SC 82 which in our view is of no assistance on the period to which interest applies. At the very end of the opinion, the court said that, given the wife had been receiving substantial sums by way of interim aliment, interest from the date of the interlocutor ordering payment and payment itself would not be warranted. In *Geddes* the Lord President made clear that an award of interest must be

justified by the principles set out in section 9 and reasonable having regard to the resources of the parties (see page 499 I-J). Of the two criteria which the Lord President set out, deferred payment does not arise in this case. In the unusual circumstances of this case in which, *de facto*, there were two judgments, the date from which the interest is payable is the date of the September judgment and not before. That was the effective date at which the sheriff concluded a capital sum should be paid to the respondent. We do not consider that, when the opinion in *Geddes* is read as a whole, the Lord President intended that the two scenarios he expounded were intended to be exclusive. The power to award interest is one of the orders open to a sheriff to use and there may be deserving cases falling within sections 8 and 9 which merit such a disposal. We are not persuaded that the sheriff was in error in awarding interest in the way in which he did.

[55] As was rightly conceded, an award of expenses is very much a matter for the decision of the judge at first instance. The issues argued before us replicated the submissions made to the sheriff as is set out at length in the January judgement. The sheriff heard full argument on the matter. Although he awarded expenses in favour of the respondent he modified the award to a figure of 65%. The sheriff heard the proof and was entirely familiar with the case. We do not consider that this is a matter upon which we should, or indeed could, interfere. The appeal on this ground will accordingly also be refused. As requested we shall reserve the expenses of the appeal including the motion for sanction for the instruction of senior counsel.