



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 40
F66/18

Lord Malcolm
Lord Tyre
Lady Wise

OPINION OF THE COURT

delivered by LADY WISE

in the reclaiming motion

by

Mr Z

Defender/Reclaimer

against

Ms X

Pursuer/Respondent

Defender/Reclaimer: Smith KC, A Black; Brodies LLP

Pursuer/Respondent: Brabender KC; Turcan Connell

10 November 2023

Introduction and background

[1] This reclaiming motion (appeal) concerns the extent to which the father of certain children should have contributed and should contribute going forward to the school fees incurred through their attendance at three different boarding schools. The parties to the action have six children and these proceedings concern the youngest three.

[2] Ms X and Mr Z were married, but separated in 2018 and divorced in 2020. Having commenced litigation, they had ultimately agreed all of the financial matters arising from their divorce including liability for payment of school fees, which were to be paid by Mr Z, at least when the parties agreed on choice of school. A detailed minute of agreement narrated what they had agreed and as a result this court dismissed the pursuer's conclusions for payment of school fees, orders of court being unnecessary where there was an enforceable agreement. In October 2022 the issue of payment of school fees was revisited at proof on a Minute and Answers before the Lord Ordinary who issued an opinion ([2023] CSOH 48). The background to the current dispute is explained therein. The Lord Ordinary adopted fictitious names for the children to protect their anonymity and we will do the same to provide continuity. In essence, the Lord Ordinary's decision was as follows:

- (i) that Mr Z would be ordered to meet all of James' school fees at school D until 4 July 2022 and that he would be liable for one sixth of James' school fees from 4 July 2022 onwards;
- (ii) that in relation to Diana, Mr Z was found liable for all of her school fees at the level at which those fees would have been incurred had she stayed at school B until 4 July 2022, but that from 4 July 2022 onwards he was ordered to pay one sixth of Diana's fees at school E;
- (iii) that Mr Z was found liable to pay all of Euan's school fees at school C up to 4 July 2022 and to meet one sixth of those fees from 4 July 2022 onwards.

[3] On 6 July 2023 the Lord Ordinary made orders giving effect to her findings on the issues of principle in relation to liability for school fees. Some of that involved reimbursement to Ms X who had met James and Diana's fees. Having heard argument the Lord Ordinary determined also that Mr Z should be liable in expenses to the extent of seven

eighths of Ms X's expenses of the Minute and Answers procedure. Mr Z challenges those decisions.

Relevant legislation

[4] Orders for aliment in respect of educational expenses are governed by the provisions of sections 3-7 of the Family Law (Scotland) Act 1985. In so far as relevant to these proceedings those provisions are in the following terms:

"3 Powers of court in action for aliment.

- (1) The court may, if it thinks fit, grant decree in an action for aliment, and in granting such decree shall have power—
 - (a) to order the making of periodical payments, whether for a definite or an indefinite period or until the happening of a specified event;
 - (b) to order the making of alimentary payments of an occasional or special nature, including payments in respect of inlying, funeral or educational expenses;
 - (c) to backdate an award of aliment under this Act—
 - (i) to the date of the bringing of the action or to such later date as the court thinks fit; or
 - (ii) on special cause shown, to a date prior to the bringing of the action;

4 Amount of aliment

- (1) In determining the amount of aliment to award in an action for aliment, the court shall, subject to subsection (3) below, have regard—
 - (a) to the needs and resources of the parties;
 - (b) to the earning capacities of the parties;
 - (c) generally to all the circumstances of the case.

...

- (3) In having regard under subsection (1)(c) above generally to all the circumstances of the case, the court—
- (a) may, if it thinks fit, take account of any support, financial or otherwise, given by the defender to any person whom he maintains as a dependant in his household, whether or not the defender owes an obligation of aliment to that person; and
 - (b) shall not take account of any conduct of a party unless it would be manifestly inequitable to leave it out of account.

...

7 **Agreements on aliment**

...

- (2) Where a person who owes an obligation of aliment to another person has entered into an agreement to pay aliment to or for the benefit of the other person, on a material change of circumstances application may be made to the court by or on behalf of either person for variation of the amount payable under the agreement or for termination of the agreement.

(2ZA) On an application under subsection (2) above, the court may—

...

- (b) make an order backdating a variation of the amount payable under the agreement to—
 - (i) the date of the application or such later date as the court thinks fit; or
 - (ii) on special cause shown, a date prior to the date of the application.

27 **Interpretation**

- (1) In this Act, unless the context otherwise requires—

...

‘resources’ means present and foreseeable resources; ...”

Submissions

Reclaimer

[5] In advancing his submissions senior counsel for the reclaimer confirmed that he would not insist in the first of his four grounds of appeal. The three matters with which he continued to take issue related to (i) Mr Z's liability for the whole of James and Diana's school fees (the latter at the lower rate for school B) for the period from December 2021 to 4 July 2022; (ii) the requirement that Mr Z then pay one sixth of the school fees for all three children from 4 July 2022 onwards and (iii) the finding that Mr Z should be liable for expenses of the Minute and Answers procedure to the extent of seven eighths of their total. While initially the grounds of appeal had related to payment of fees for all three children for the period prior to 4 July 2022 that was no longer insisted in for Euan as Mr Z had paid his fees in full for the period to 4 July 2022. The argument in relation to Euan was restricted to the Lord Ordinary's finding that Mr Z should be liable to pay one sixth of his fees from 4 July 2022 onwards.

[6] Mr Smith submitted that the Lord Ordinary had erred in law in relying on Mr Z's resources during the period December 2021 to 4 July 2022 in considering whether he had sufficient resources to pay school fees. The error appeared both at the end of paragraph 87 in relation to James and at the end of paragraph 91 in relation to Diana. In both of those passages the Lord Ordinary had relied on Mr Z's resources for that earlier period rather than his present and foreseeable resources as required by section 4(1)(a), interpreted in accordance with section 27 of the 1985 Act. The assessment of resources required to be those available or foreseeable at the time of proof and prospectively. This retrospective analysis of resources had resulted in the Lord Ordinary failing to take into account that Mr Z was "practically bankrupt" by the time of the proof. While criticisms had been made of monies

spent by Mr Z during the first six months of 2022, the fact remained that the money had gone and by the time of proof Mr Z had lost his employment and was in straitened circumstances. The Lord Ordinary's error had resulted in her making a backdated award of aliment for educational expenses that was not justified. The court should consider whether there are resources available to meet an award of aliment at the time it is made - *Semple v Semple* 1995 SCLR 569. Had the Lord Ordinary proceeded to consider Mr Z's present and foreseeable resources in relation to his ability to pay school fees for the period prior to 4 July 2022 she would have been bound to reach the conclusion that it would be manifestly unreasonable for him to make payment in full now of those earlier school fees.

[7] The next challenge was to the Lord Ordinary's assessment of Mr Z's resources in relation to the period from 4 July 2022 onwards. In assessing Mr Z's resources, the Lord Ordinary had taken account of the potential proceeds from the sale of a reservoir he had purchased in March 2022. Having considered that his capital resources were not easily realisable as a generality, the Lord Ordinary then drew a distinction between Mr Z's farm as not being a present or foreseeable resource for the purpose of paying school fees and the reservoir, which she regarded as "*in a different category in that it can be sold without the proceeds necessarily being applied to the secured loan. It is worth around £107,000.*" (para 102 of the Lord Ordinary's opinion.) Mr Smith submitted that there was no evidence before the Lord Ordinary justifying a finding that any potential proceeds from a sale of the reservoir could be available to fund payment of school fees. There had been evidence from a Mr Gourlay, a director of the private bank of which Mr Z is a customer. His evidence confirmed that there was no standard security over the reservoir. However the evidence was that additional borrowing had been provided for the purchase of the reservoir on the basis that there was sufficient headroom in the existing borrowing over the farm to enable

provision of the funds. Mr Gourlay had not been asked whether the bank would seek repayment of the secured loan or any part of it in the event of the sale of the reservoir.

Accordingly the Lord Ordinary had erred in factoring in the potential proceeds from the sale of that asset when assessing resources for the purpose of payment of school fees.

[8] There were other curiosities in the way in which the Lord Ordinary had approached the issue of available resources. At paragraph 97 of her opinion she had looked to calculate whether Mr Z would have “free income” from which he could pay school fees. She assessed his total annual income going forward as about £161,629 per annum. That figure would fall by about £25,000 gross per annum when the A points he continued to hold through the LLP by which had previously been employed and in which he continued to have an interest, were realised. Overall Mr Z was likely to have a net monthly income of just over £8,000 per calendar month going forward which would then reduce to £6,833 per calendar month. It was submitted that aliment is primarily an income-based liability and on the figures provided Mr Z could not meet payment of school fees from income given the level of his outgoings. It was not accepted that his outgoings were unvouched in the way suggested by the Lord Ordinary.

[9] So far as other assets were concerned, the A points referred to in the Lord Ordinary’s opinion had been sold since the proof but for considerably less than their estimated value at proof of £150,000. However, no vouching was produced to this court confirming the sum received for that asset. Mr Z continues to hold shares in AB Ltd. Senior counsel confirmed there was correspondence about whether or not those shares would be acquired as previously planned but the current situation remained that their estimated value (in excess of £1 million) remained unrealisable. Mr Z continued to have a significant liability to HMRC. He was involved in defending an ongoing damages action at the instance of his ex-

wife, which may result in further legal fees notwithstanding the Lord Ordinary's view that legal fees would not be ongoing. In contrast Ms X has very considerable cash resources, over £500,000 at the time of proof and there was no reason why she could not try to get a job. Mr Smith submitted that unless Ms Z was prepared to pay all of the school fees from cash reserves or otherwise the children may have to leave their respective schools. The Lord Ordinary should have contrasted the unrealisable nature of Mr Z's assets, including the reservoir, at the time she was making the award, with the significant and realisable assets available to Ms X. There was no evidence of a market for the reservoir. The Lord Ordinary had failed to take into account that by the time of the proof Mr Z simply did not have the resources to meet his ex-wife's claim for 50% of the school fees going forward.

[10] The award of expenses made was also challenged as unjustified. The Lord Ordinary had provided a short supplementary opinion on this issue. Senior counsel submitted that it was a struggle to discern the reasons for the decision that Mr Z should be liable for seven eighths of the expenses of the whole procedure. He accepted that it would be unusual for the court to interfere with a finding on expenses which were usually primarily within the discretion of the Lord Ordinary (*Howitt v Alexander & Sons* 1948 SC 154). However, in a family case there was a different dynamic. Following the abolition of the old rule that the husband paid both sides' expenses a practice had developed of each side paying their own expenses. In the circumstances of this case, such an outcome would be particularly generous to Ms X given that Mr Z had enjoyed very substantial success. As the Lord Ordinary recorded, a significant amount of time at proof had been taken up with Ms X's decision to remove Diana from the preparatory school she had been attending, at which the fees were far lower, and remove her to a new school. Mr Z had succeeded in restricting his liability for fees at the new school prior to July 2022 to the level he would have paid at the old school.

He had then succeeded also in being found liable for only one sixth of the school fees for all three children going forward in contrast with the 50% contribution sought by his ex-wife. He had made an offer early in the proceedings that each side would pay 50% of the school fees pending the court's determination on the basis that the party who paid more than the court ultimately awarded would be retrospectively reimbursed. There had been no response to that offer. Notwithstanding the substantial success achieved by Mr Z he would be content with a finding of no expenses due to or by for the Outer House procedure.

Respondent

[11] Ms Brabender for Ms X drew attention to the chronology of the proceedings. A minute varying the divorce decree, which had made no order for aliment, was raised on 3 December 2021. Mr Z was due to stand trial in connection with domestic abuse allegations and it was ultimately agreed that proof in these proceedings should take place after that trial concluded. Mr Z had been convicted of assault and breach of the peace in June 2022 and had resigned his employment on 3 July that year. For that reason the proof had been further delayed until October 2022 so that up to date financial circumstances could be considered. That was the background to the Lord Ordinary's consideration of the two separate periods.

[12] Many of the points made by senior counsel for Mr Z in oral argument had not been focused in the grounds of appeal. For example, the grounds of appeal were silent about the Lord Ordinary's finding that Mr Z had failed to provide vouching for his expenditure or the finding that there was insufficient information to conclude how much he owed to HMRC. There was no evidence before the Lord Ordinary that Mr Z was "practically bankrupt" and any such evidence would have been challenged. Mr Z had net capital resources of £2.2 million at the time of the proof. His estate (or farm) was worth £1.2 million albeit that

there were borrowings of £736,000 secured over it. The shares in AB Ltd were worth over a million pounds. The estimate given at proof of the value of the A points was £188,591 and the reservoir and relative land, unencumbered by any secured debt, was worth £107,000.

The court should not ignore that Mr Z also had resources from income as detailed by the Lord Ordinary. His total income from dividends, pension, A points distribution and two holiday lets, albeit that he diverted that income to his partner, was not inconsiderable. The evidence simply did not support that Mr Z could not contribute anything to payment of his children's school fees.

[13] It was also noted that Mr Z was making no payments of ordinary aliment for the children. There had been a child maintenance service assessment as narrated by the Lord Ordinary but Mr Z had sought and been granted a moratorium of six months on that in accordance with the emergency Covid legislation. Accordingly, Ms X required currently to meet all of the children's outgoings together with the fees and extras from her capital pot which was now much reduced from the £571,000 she had held at the time of proof.

[14] On whether the Lord Ordinary's references to past resources when determining the issue for the period from December 2021 to July 2022 represented an error in law, senior counsel submitted that the attempt to use a few words within a full opinion to contend for a particular interpretation of section 4 of the 1985 Act was not justified. The opinion had to be read as a whole. It was clear that the Lord Ordinary had taken the relative needs of the parties and their children into account together with their respective resources and their earning capacities. Section 4 of the Act required the court to look at all of the circumstances. Those circumstances included that, at a time when he had very considerable income and assets by way of resources, Mr Z had chosen to purchase a reservoir, buy a digger and renovate properties in preference to paying for his children's school fees. Those were

relevant circumstances for the Lord Ordinary to consider. The sums for which Mr Z was ultimately found liable on 6 July 2023 took into account that he had ceased making any contribution at all. He had met Euan's school fees during the period to July 2022, which supported the Lord Ordinary's finding that he had resources from which to pay school fees during that period.

[15] So far as the position going forward was concerned, on the figures assessed by the Lord Ordinary, Mr Z will require to pay only £22,075 for the academic year 2023/2024 as against the £110,000 due by Ms X. James will leave school in the summer of 2024 and the annual fees will then reduce such that Mr Z's contribution for one sixth of the two remaining children's school fees will amount to £15,500. Euan will then leave school in 2025 after which only Diana will continue to attend school. Mr Z's contribution for one sixth of her school fees from that point will be about £7,500 per annum. The backdated period fairly reflected the situation prior to Mr Z resigning his employment in early July 2022. His resources during that period and going forward were only one of the issues that the court had to take into account. This court should be slow to interfere with what was in essence a discretionary decision on the part of the Lord Ordinary. Unless the court was satisfied that she had misdirected herself in law or failed to take into account a relevant and material factor or had reached her result which was manifestly inequitable or plainly wrong, the decision should stand (*Little v Little* 1990 SLT 785 at 786-787).

[16] Ultimately, consideration of Mr Z's resources at a point when he refused to pay but could pay was a relevant circumstance of the case for the Lord Ordinary to take into account. Similarly, his demeanour in evidence and his comment in re-examination that he could have used the proceeds of the sale of his Land Rover for school fees if the children's attitude to him had been different were all factors that the Lord Ordinary had been entitled

to take into account. So far as the reservoir was concerned, this had been purchased six months prior to proof which itself provided clear evidence of a market. As it was not burdened by any standard security and Mr Gourlay had not been asked whether its sale would involve any payments having to be repaid to the bank, the Lord Ordinary had been entitled not to discount that asset as a present and foreseeable resource. It would have been for Mr Z to lead evidence of a lack of marketability and/or consequences of the reservoir being sold and he had not done so. The suggestion that it was somehow incumbent on Ms X to explore whether the reservoir was realisable was without foundation. It was an asset over which Mr Z had full control.

[17] So far as expenses were concerned, a decision on those was entirely discretionary. The Lord Ordinary had case managed the proceedings and heard three days of proof and submissions. She was uniquely well placed to decide on the question of expenses. The most authoritative decision on how to approach questions of expenses in family actions that include financial claims was *Sweeney v Sweeney No. 3* 2007 SC 396. The First Division there confirmed that it is not inconsistent with fairness that a party who is put to expense in vindicating their rights should be able to recover some or all of that expense. There was a particularly important relationship between the judicial award ultimately made and any offer that had been put forward by the obligant. In the present case there had been no offer made that would have avoided the litigation. Ms X required to litigate to proof. She succeeded in relation to the pre-July 2022 period and has secured an order for one sixth of payment of the school fees for all three children going forward. Without having litigated she would not have received any contribution from Mr Z. The issue of conduct of the proceedings is relevant to expenses. Mr Z had also sought an order from the court in his Answers to Ms X's Minute. He had tried to vary the minute of agreement by reducing his

contribution to Euan's school fees to nil. He had been unsuccessful in that. There was simply no basis for this court to interfere with the Lord Ordinary's decision on expenses.

Decision

[18] A party's ability to pay aliment in the form of school fees is not restricted to an income based analysis. In the circumstances of the present case, the Lord Ordinary required to consider the needs of the parties and their children and both income and capital resources before concluding how the liability for school fees could reasonably be met. Dealing first with the argument that she erred in her conclusion that Mr Z is able to pay one sixth of each of the three children's school fees going forward, the analysis of that is contained in paragraphs 92-104 of the Lord Ordinary's Opinion. In brief summary, Ms X has no income other than some rental income derived from letting out part of her home. That home represents a significant capital asset (about £2.5 million in value) and is unencumbered by borrowing. It can and is likely to be sold, but will no doubt require to be replaced by a smaller family home. Ms X also had capital of over £500,000 at the time of proof, which was what remained of the capital settlement she had received on divorce. Mr Z's income from a number of sources had reduced to £161,629 gross per annum. He had produced a schedule indicating a monthly deficit after meeting all of his expenses, but it was largely unvouched. He had capital assets worth about £2.2 million but most were unrealisable, particularly his farm, over which there are significant borrowings, and his shares in AB Limited, which were of uncertain realisability. It was clear that neither party could currently meet payment of school fees from income and that Ms X's available capital was more accessible. Both parties, however, held significant capital assets that required to be taken into account, the conclusion

having been reached that it would be desirable for all three children to remain at their current schools.

[19] In assessing what contribution Mr Z could make to school fees, attention turned to the reservoir that he had purchased during the course of the proceedings. Indisputably, that item of heritable property is unencumbered by secured borrowing. Mr Z holds sole title to the adjacent property where he lives and which includes properties that are let out. At proof he had called his banker Mr Gourlay to give evidence about the circumstances in which an additional loan had been made to him to enable the purchase to conclude. As the bare facts of the purchase and the absence of a formal security over the reservoir were known, the responsibility for leading evidence that the reservoir was not truly unencumbered because the bank might look for repayment of some of the loan secured over the farm were it to be sold rested squarely on Mr Z.

[20] We have considered the evidence of Mr Gourlay, who had provided an affidavit and was examined and cross-examined. Neither side enquired of him whether the bank considered that it would be able to call on Mr Z to reduce his secured borrowings in the event of a sale of the reservoir. The court was left without any evidence that the bank would do so, or what the basis for such a request would be. There was no evidence that the bank had even mooted the idea of additional security when it advanced funds for the reservoir purchase. The documentation put to Mr Gourlay in evidence confirmed little more than that there were errors in some of the detail about Mr Z's situation, as the recorded information was out of date. It seems that the communications about the additional advance were relatively informal. Mr Z was regarded as a high net worth client and the loan to value ratio of the secured property was apparently not of concern. We conclude that the Lord Ordinary was entirely justified in identifying the reservoir as a realisable resource. It had been

purchased only a few months previously, which indicated that it was a marketable asset. More importantly, its purchase represented one of the many examples of Mr Z electing to prioritise acquisition of assets for his own use over meeting his alimentary obligations to his children. That tendency was a circumstance of the case that the Lord Ordinary was fully entitled to take into account.

[21] We can identify no error in the Lord Ordinary's approach to the respective contributions for school fees to be made by each of the parties going forward. A decision that Mr Z be liable for only one sixth of each child's fees took ample account of his presently reduced circumstances. The burden will be far greater on Ms X, whose capital settlement has already been depleted by meeting James and Diana's school fees during the period that Mr Z refused to pay. The decision reached was well within the discretion available to the Lord Ordinary.

[22] On the issue of whether the Lord Ordinary erred in law by failing to rely only on present and foreseeable resources in ordering Mr Z to meet all of James and Diana's school fees for the period December 2021 to 4 July 2022, the context is important. As a result of being convicted of assault of his ex-wife and related breach of the peace charges, Mr Z resigned from his employment. We were told that he knew he would be asked to leave in consequence of the convictions and so left voluntarily. His departure from the business resulted in a very significant drop in income for Mr Z, from well over £500,000 per annum gross to £161,629 gross. The Lord Ordinary divided her analysis of what should be paid for school fees into two separate periods, one relating to the period when Mr Z could have paid and did not and then the period post resignation looking prospectively. There was a marked difference in the level at which the Lord Ordinary determined that Mr Z should meet his obligation to aliment the children by paying school fees as between those distinct

periods. In relation to the earlier period, so far as James and Diana were concerned, the Lord Ordinary stated in terms that she was satisfied that his being made liable for the whole amount was reasonable having regard to his resources prior to 4 July 2022, which was stated to be the “material time” – paragraphs 87 and 91 of the Lord Ordinary’s opinion.

[23] The context of these awards of aliment was that they were new orders and not a variation of an existing order or agreement. While they were two distinct awards relating to different periods, one a backdated award and the other to apply from decree onwards, they represented different components of a global alimentary decision. Section 4(1)(a) of the 1985 Act requires the court to have regard to the needs and resources of the parties and section 27(1) defines resources as being present and foreseeable resources. It would undoubtedly be an error to rely **solely** on resources from a historic period in making an award that would require to be met from current and foreseeable resources. It would not, however, be erroneous to take into account various other circumstances of the case, such as a past refusal to pay when able to do so, in making such an award.

[24] At the time when Mr Z refused to pay James’s and Diana’s school fees, the dispute was unrelated to economic resources but was about choice of school. The Lord Ordinary was entitled to treat this as a relevant consideration. However, we accept the submission made on Mr Z’s behalf that her decision to find him liable for those school fees appears to have been based primarily upon the resources which had been available to him during that period of time. It is not clear that the requirement to consider present and foreseeable resources at the time of proof as one of the factors listed in section 4 was applied rigorously in relation to Mr Z’s ability to pay now for the period from December 2021 to 4 July 2022. To that extent the Lord Ordinary erred in law and it is necessary for us consider the matter of new.

[25] There are a number of factors that require to be considered when determining whether to make an award of aliment for the period to July 2022 and if so at what level. In the circumstances of the present case those factors included, amongst others, the following;

- (i) that Mr Z chose not to pay the school fees necessary for James and Diana's attendance at school at a time when he was well able to do so;
- (ii) that Mr Z's income resources at the time of proof were much reduced but that he still had significant income in comparison with that of Ms X;
- (iii) that Mr Z had chosen to purchase a reservoir and a digger while at the same time refusing to pay school fees;
- (iv) that Mr Z had not vouched his current income and expenditure position fully;
- (v) that Mr Z was making no payments of ordinary aliment for the children;
- (vi) that the parties had agreed in principle on expensive schooling for all three of their children;
- (vii) that Mr Z had paid Euan's school fees after July 2022, illustrating that he was able to find money for school fees after the drop in his income;
- (viii) that Mr Z's capital resources at the time of proof included capital assets that could or were going to be realised, particularly the reservoir and the A points;
- (ix) that a distinction could properly be drawn between reimbursing Ms X for payments she had made while proceedings were ongoing to avoid the children having to leave their respective schools and an assessment of the parties' respective contributions for school fees going forward; and
- (x) that Mr Z's payment of one sixth of the children's school fees going forward would reduce over time as each child left school.

Taking all of those factors into account, we consider that the conclusion reached by the Lord Ordinary was easily justified by the circumstances of the case. Accordingly, even when the focus on past resources in paragraphs 87 and 91 is regarded as erroneous, the overall result was entirely fair.

[26] In any event, the decision that Mr Z should pay all of the children's school fees until the point at which he had to resign from his employment must, as we have indicated, be regarded as one part of a holistic decision. While the court must be satisfied that any order it makes can be met from present and foreseeable resources, the liability for all fees prior to July 2022 is one component of a decision that requires Mr Z to pay only a small fraction of the total school fees bill thereafter. On the information available, we are unable to fault the Lord Ordinary's conclusion that Mr Z can, now and in the foreseeable future, realise funds both to reimburse Ms X for the period to July 2022 and to make a one sixth contribution to the total (albeit reducing from 2024) school fees bill thereafter.

[27] So far as the finding on expenses is concerned, this was a matter for the Lord Ordinary's discretion and which she was best placed to decide. Having heard the proof and against a backdrop of the substantive decisions she had made, the Lord Ordinary took the view that finding Mr Z liable for seven eighths of the expenses occasioned by the Minute and Answers would best reflect the competing arguments about how success had been divided. Two issues were of particular relevance. First, Ms X required to litigate in order to secure orders for payment of any contribution to school fees from Mr Z. Secondly, there had been no extra judicial offer at all by Mr Z as potential obligant, to settle the matter without a court determination. The offer he had made in December 2021 was in effect to make conditional payments of fees that would be reimbursed to him should he succeed at proof. No proposals were made on the basis that proof could be avoided if those proposals

were accepted. Those matters had to be set against the success both that Mr Z had achieved in relation to Diana's change of school and limiting his future school fees contribution and Ms X's own success in having him ordered to reimburse her for the period to July 2022 and securing a contribution for the future.

[28] It is well established that, although the principle that expenses follow success is not applied in its full rigour in financial family proceedings (*Little v Little* 1990 SLT 785 at 790), there is no general rule that each party should pay their own expenses where they have been unable to resolve matters extra judicially. The clear context of the First Division's *dictum* in *Sweeney v Sweeney* (No. 3) 2007 SC 396 to the effect that what will be of primary significance is the relationship of the judicial award to any offer made, was a discussion about offers made with a view to settlement of the case. The present case can be regarded as one in which there was no meaningful offer advanced by Mr Z as potential obligant. Notably, it is also a case where one party (Mr Z) was found to have failed to make full disclosure of relevant material, a matter that the court in *Sweeney* considered relevant as militating away from a finding of no expenses due to or by – see paragraph 7. In our view, the Lord Ordinary's decision on expenses fell within the discretion available to her and cannot be faulted.

[29] For the reasons given, the reclaiming motion is refused. We shall reserve meantime all questions of the expenses arising from the appellate stage of the case.