



SHERIFF APPEAL COURT

**[2024] SAC (Civ) 22
EDI-B231-16**

Sheriff Principal Gillian A Wade KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL GILLIAN A WADE KC

in appeal by

FARZANA ASHRAF

Pursuer and Appellant

against

RICHARD DENNIS, THE ACCOUNTANT IN BANKRUPTCY

Defender and First Respondent

and

BILL CLEGHORN

Party Minuter and Second Respondent

22 May 2024

[1] This appeal revisits the circumstances in which it is competent to utilise an appeal against a final interlocutor as a vehicle to review a prior interlocutor against which leave to appeal was refused at first instance. It discusses the limitations on any general rule which permits such review and the circumstances in which such an approach should not be countenanced. Although this issue was authoritatively addressed by a full bench in *McCue v Scottish Daily Record and Sunday Mail (No 1)* 1998 SC 811 subsequent judicial discussion in the

Inner House provides further guidance as to when such review is either competent or appropriate.

Background

[2] The appeal is directed towards an interlocutor of 6 December 2023 in terms of which the sheriff at Edinburgh granted decree of dismissal following a debate. However the note of appeal does not criticise that sheriff's reasoning on the basis that his decision was the inevitable consequence of an earlier decision of a different sheriff to refuse a minute of amendment seeking to introduce two new craves in the initial writ. That decision, against which leave to appeal was refused, was dated 8 March 2023. The appellant does not disguise the fact that the present appeal is a mechanism to bring under review the earlier interlocutor as there is no other means by which that could be achieved.

[3] The matter came before me as a hearing on the question of competency. There is no dispute that the appeal, in so far as it is directed against the interlocutor of 6 December 2023, is competent as that was a final decree. The issue turns on the far more subtle question of whether such a mechanism is competent to review an earlier interlocutor in respect of which leave to appeal was refused and whether, in all the circumstances, such an appeal should be countenanced.

Procedural background

[4] The case has a somewhat tortuous and lengthy history. Put briefly this is a summary application in which the pursuer and appellant ("the appellant") seeks reappointment of the defender and first respondent ("the first respondent") to the office of trustee in the sequestrated estate of Mohammed Younas.

[5] The appellant commenced the proceedings as a party litigant. The initial writ did not specify in the craves any particular purpose for which the reappointment was sought but on a close reading of the averments it is plain that her objective was to secure title to heritable property at Flat 1/1, 82 Polworth Gardens, Edinburgh (“the property”) which had, at one point, been part of the sequestrated estate of Mahammad Younas. The appellant’s position is that the missives for the sale of the property entered into between herself and the first respondent, in his then capacity as trustee in sequestration, in October 2002 remained extant and that she was entitled to a disposition in her favour. As a fall-back position she sought a letter of comfort in appropriate terms to correct a previous inept attempt to use such a letter to create a link in title.

[6] In the course of the proceedings the appellant decided to instruct legal representation whereupon an expert opinion was obtained from Professor Stuart Brymer of the University of Dundee. Consequently the appellant’s agents prepared and lodged a minute of amendment which sought to introduce two new additional craves, the first ordaining the trustee, if and when reappointed, to implement the missives and the second or alternative crave was to ordain him to issue a corrective letter of comfort with the intention that the appellant would be provided with a means whereby she could seek to register her interest in the property in the Land Register. However this would be subject to determination of a contest between her claim to the property and that of the party minuter and second respondent (“the second respondent”).

[7] On 8 March 2023 a sheriff heard argument on whether the minute of amendment should be received. He decided that the missives upon which the appellant sought to rely were time barred. He therefore refused receipt of the minute of amendment and refused a subsequent motion for leave to appeal that decision. The consequence of his decision was that the appellant’s application for reappointment of the trustee remained extant but without any evident purpose. The action did not fall to be dismissed at that stage as the appellant’s original

crave was, at least on the face of it, valid and competent albeit without purpose. Further procedure was deemed necessary and a diet of debate was assigned for 6 December 2023. On that date a different sheriff granted decree of dismissal. A note of his reasons for so doing was appended to the interlocutor. That interlocutor was a final decree and, in reality, is not challenged. The appellant maintains that by virtue of section 116(2) of the Courts Reform (Scotland) Act 2014 the lodging of a competent appeal opens up all previous interlocutors to review, including the 8 March 2023 interlocutor.

[8] In paragraph [5] of the note of appeal the appellant avers that first sheriff erred in holding that the missives were time barred. Albeit missives were concluded more than 20 years previously on 22 October 2002 he, it is alleged, wrongly concluded that no relevant acknowledgment had been made during the 20 year prescriptive period in terms of section 10(1) of the Prescription and Limitation (Scotland) Act 1973. The sheriff considered that the terms of a letter dated 11 April 2014 from the first respondent's office, upon which the appellant founded, did not amount to an unequivocal admission that the obligations within the missives continued to exist.

[9] Before the sheriff at first instance it was argued that the letter was a clear acknowledgement on the part of the respondent that there was an ongoing entitlement on the part of the appellant to insist on the transfer of title into her name.

[10] The grounds of appeal (para 5) also refer to an exchange of email correspondence between 4 and 14 December 2015. In particular reliance is now placed on an email of 14 December 2015 which was not available to the sheriff at first instance. It was in the following terms:-

"I have now received advice from our legal agents. I have been advised that the missives are still valid and therefore the Accountant would sign a disposition under the

original conditions set in 2002. However, he would require to be re-appointed as trustee in the sequestration before this can happen...”

[11] The appellant contends that although this email was not the subject of discussion before the sheriff considering the minute of amendment it was however referred to in the pleadings and in the inventory of productions. It is this email which the appellant now says constitutes a “relevant acknowledgment.”

[12] The grounds of appeal go on to assert that the final instalment of the purchase price paid by the appellant for the purchase of the property was made on 25 June 2003. It is further averred that the first respondent’s acceptance of that payment was a relevant acknowledgement and would have been known to the sheriff when the matter was before him. It is upon this basis that the appellant contends that the sheriff who refused to allow the minute of amendment to be received has erred. No real issue is taken with the reasoning of the subsequent sheriff to dismiss the application at debate on the basis of the pleadings which were before him, although that was not conceded and the appellant made submissions to the contrary at the debate itself.

[13] It is the appellant’s ultimate contention that the appeal should be allowed and that the interlocutors of both 8 March and 6 December 2023 should be recalled, that the minute of amendment should be allowed (or at least received) and that the record should be amended in terms thereof with the case remitted to the sheriff to proceed as accords.

Interlocutor of 8 March 2023

[14] Before the sheriff at first instance the party minuter and now second respondent conjoined in the opposition to the receipt of the minute of amendment. He is the enforcement administrator of Mr Younas appointed in terms of section 128(2) of the Proceeds of Crime Act

2002. He mounted opposition on a number of grounds including *res judicata* and the issue of time bar. Much of the discussion turned on the terms of a letter dated 11 April 2014 which was said by the appellant to constitute a relevant acknowledgement and interrupted the prescriptive period. After rehearsing the submissions in full the sheriff provides his reasons for refusal to receive the minute of amendment (paras [15] – [18] of his report).

[15] He focusses upon whether a relevant acknowledgment rather than a relevant claim had been made. In that regard the focus was on section 10(1) of the 1973 Act. At paragraph [17] the sheriff explains why he does not consider that the letter to which he was referred amounted to an unequivocal admission that the obligation in the missives continued to subsist or that the first respondent considered that they were binding. He did not accept that there was anything to suggest that the missives were thereby continued or extended in effect. At its highest it was his opinion that there was an acknowledgement that previously there had been agreement in terms of the missives and there had been two undertakings not to oppose steps taken by the appellant to obtain a disposition or thereafter challenge her title. He therefore concluded that the missives had prescribed.

[16] Finally he addresses the issue of the letter of comfort. Having had regard to the qualified opinion of Professor Brymer, the sheriff came to the view that any rights accruing to the appellant would only be created by registration itself and even then only when the Keeper was prepared to accept a letter of comfort for that purpose. That had not happened. As title remained with Mr Younas it appeared that the first respondent could not as a matter of law grant such a letter.

[17] For these reasons the sheriff refused to allow the minute of amendment to be received, refused leave to appeal and made certain orders in relation to expenses. The matter then proceeded to debate at which point it was duly dismissed.

Procedure following the lodging of the note of appeal

[18] Following receipt of the note of appeal answers were lodged on behalf of both respondents and the matter was referred on the question of competency, (SAC Rule 6.9). It was submitted that it was not open to review an earlier interlocutor where permission to appeal had been refused. Under reference to Section 116(2) of the Courts Reform (Scotland) Act 2014 it was submitted that the purpose of the rule allowing earlier interlocutors to come under review was to allow the appellate court to do complete justice in the case. That purpose was not engaged in this appeal because:

- i) the decisions were unrelated. The interlocutor of 6 December 2023 proceeded on the basis of the pleadings which were before the sheriff presiding on that date and there was no meaningful or relevant connection between that and the previous sheriff's decision to refuse the minute of amendment.
- ii) the prior decision of 8 March 2023 had been acted upon in determining further procedure.
- iii) an appeal could not be a vehicle used to unwind procedure in order that a different case can be made in circumstances where an attempt to introduce such a case has already been refused.
- iv) the appeal is an attempt to circumvent the requirement for permission to appeal in terms of section 110 of the 2014 Act.

[19] It was further submitted that the decision whether to receive a minute of amendment or not is a matter for the sheriff's discretion and that the sheriff had not erred in the exercise of that discretion. It is not the function of the appellate court to interfere with the exercise of discretion of a sheriff even if the appellate court may have exercised its discretion differently.

[20] Having regard to the procedural history of the summary application which was commenced in 2016, the prejudice the respondents would suffer in having to address the amendment procedure, the interests of justice and the requirements for certainty and finality, the decision of 8 March 2023 should not now be open to review. The decision of 6 December 2023 is not challenged. There are no competent or relevant grounds upon which to do so. That being so the appellant's appeal is incompetent.

[21] Upon receipt of the answers a hearing on the question of competency was assigned for Monday 26 February 2024. In the course of the hearing the appellant indicated the intention to lodge a minute of amendment before the court proceeded to deal with the question of competency. The hearing was continued until 4 March 2024 to allow the minute to be lodged. Inevitably the first and second respondents lodged opposition to the appellant's motion to have the minute received and the matter came before me on 25 March 2024.

[22] On that date I was invited first of all to consider whether the appellant's minute of amendment should be received. In essence the whole purpose of the appeal depended upon my approach to the minute of amendment. I found myself in much the same position as the sheriff at first instance. Accordingly all parties submitted that I should deal with that question first before proceeding to deal with the question of competency.

Decision on the minute of amendment

[23] The minute of amendment before me was in identical terms to that lodged at first instance. However the arguments advanced in support of the appellant's motion differed to an extent.

[24] Once again the respondents drew the court's attention to the history of the case, the tardiness or delay in bringing the minute of amendment before the court, the doubtful relevance

of the averments which the appellant sought to introduce and the prejudice which would be occasioned should the minute of amendment be received.

[25] The appellant, in a detailed and candid submission, explained that following his instruction the opinion of the expert had not been obtained until January 2023 whereupon the minute of amendment had been prepared and lodged. Although the arguments anent “relevant acknowledgment” which were advanced before the sheriff at first instance focussed on correspondence of 24 April 2014, before me the appellant considered that the terms of email correspondence of 14 December 2015 formed the basis for a more compelling argument. That email, which was in the 4th inventory of productions for the appellant, set out the steps which the appellant would require to take in order to assert her rights. In short the appellant’s position was that there was an inequity inherent in the fact that the appellant had paid for a property which she does not own and to which she appears unable to secure title. Quite responsibly it was conceded that if the minute of amendment were allowed now there would be some prejudice but it was not insurmountable.

[26] The decision whether or not to allow the minute of amendment at this stage in the appeal must not be conflated with the merits of the appeal itself and any argument as to whether the sheriff at first instance has erred. In coming to my decision I was persuaded more by conventional issues such as the lateness of the amendment proposed, the effect which that would have on the conduct of the litigation, the relative prejudice to parties and the requirements for finality and certainty. It occurred to me that if I were to allow the minute of amendment I would in effect be usurping the function of the appeal in its entirety without scrutiny of the sheriff’s decision in this regard. In assessing the competing interests of parties it is of course legitimate to consider the relevancy of the averments which the party seeking to amend proposes to introduce. While I did not offer a concluded view upon the issue of time bar

I was not persuaded that the email of 14 December 2015 was an unqualified admission that the missives remained extant as there were a number of contingencies mentioned therein which would require to purify. Allowing the minute of amendment and remitting the matter back to the sheriff at first instance, although apt to avoid the thorny issue of competency of the appeal, would in fact circumvent the need for the appeal at all. The departure from reliance on the email of 24 April 2014 and the consequent reliance upon the later email of 14 December 2015 was immediately seized upon by the respondents. It is difficult to conclude that a sheriff erred in the exercise of his discretion if his decision was based on an entirely different premise from that now advanced. It appeared to me that if the appeal were deemed competent this issue, along with others would be at large for consideration.

[27] I was not persuaded that there was any good reason for the minute of amendment coming so late despite the valiant efforts of the agents now instructed for the appellant. The overall progress and conduct of the litigation has to be considered and it appeared to me that embarking upon an amendment procedure at this stage would not only result in prejudice to the respondents but would significantly delay bringing these matters to a conclusion.

[28] Accordingly I refused the appellant's motion to allow the minute of amendment. On the basis that my decision would have a significant bearing on the conduct of the appeal I granted the appellant's motion to continue the hearing on competency to a further hearing on 18 April 2024.

Issue of competency

[29] When the matter called before me on 18 April 2024 the joint position came to be that I should proceed to deal with the question of competency on the basis of the written submissions which the parties had lodged in advance of the previous hearing.

Submissions on behalf of the appellant

[30] Under reference to *Macphail* 4th Edition paragraph 18.123 the appellant submitted the starting point to be that: "An appeal is effectual to submit to review all prior decisions in the proceedings (whether made at first instance or at any stage of appeal) ... The general intention of this provision is to enable the court, when entertaining a competent appeal, to review prior decisions which had not previously been appealed. Any restriction in that power must be found in another provision which conferred immunity from the review, expressly or by necessary implication..."

[31] It was conceded that by the time the case reached the debate on 6 December 2023 the appellant was bound to fail on the existing pleadings. The continuation of the action had been because dismissal before that date would not have been competent. On a view the appellant remained able to seek the reappointment of the trustee to Mr Younas' sequestrated estate but there was no practical purpose for doing so if the appellant could not establish that the missives for the sale of the property remained in force. The refusal of the minute of amendment in effect precluded such a line of argument. The appellant's position was that the decision of 6 December 2023 was intimately related to the decision of 8 March 2023 and that it would be perverse to regard them as separate, discrete and unrelated.

[32] The appellant refuted any suggestion that there had been any material prejudice (at least going beyond delay and associated expense) occasioned to any party between the two interlocutors. This was despite a period of nine months having elapsed. The appellant argued that the amendments followed instruction of an expert report which recommended that craves directing the trustee, once reappointed, to take steps to act upon a missives were necessary and appropriate. The reappointment of the trustee without purpose, it was suggested, appeared likely to raise further issues in the future. The refusal to allow the minute of amendment to be

received was a substantive one which rendered the proceedings purposeless. Addressing issues of delay it was submitted that the current appeal was presented at the first available opportunity and had good prospects of success because it was at least arguable that the “documents” within the court process demonstrated that the prescriptive period was interrupted. Those documents were not considered by the sheriff at first instance because they were not brought to his attention.

[33] In conclusion it was submitted on behalf of the appellant that to refuse to open up the interlocutor of 8 March 2023 for review would be to refuse to do complete justice in the appeal as a whole. In this particular case it was submitted that the materiality of the proposed amendment meant that its refusal was appropriate for reconsideration by the Sheriff Appeal Court in due course.

Submissions on behalf of the defender and first respondent

[34] Put shortly the first respondent submitted that this court should not entertain the appeal. This position was advanced on the basis that the statutory scheme for appeals is intended to prevent incidental appeals against procedural decisions and to create certainty in litigation. The first respondent characterised the decision to refuse the minute of amendment as procedural in nature and pointed to the time and delay associated with the requirement to prepare for the debate on 6 December 2023.

[35] Having regard to *AS v Poor Sisters of Nazareth* [2008] UKHL 32 2008 SC (HL) 146, [20] per Lord Hope, an appeal which seeks to undo procedural decisions should only be considered by an appeal court where there has been a grave miscarriage of justice.

[36] Without further specification the first respondent submitted that the purpose behind the present litigation is to reverse the effect of previous decisions of the High Court of Justiciary

and Court of Session in relation to the property concerned. The arguments advanced of the first respondent were largely connected with expediency.

Submission on behalf of the party minuter and second respondent

[37] The second respondent approached the matter in a slightly more nuanced fashion.

While conceding that the appeal is competent in so far as it represents an appeal against the final decision of 6 December 2023 the focus was on the legitimacy of using this as a device to bring the earlier decision under review. The two decisions should be seen as separate and distinct. Section 110(2) of the 2014 Act provided the mechanism for review of the 8 March 2023 decision and permission to appeal having been refused further procedure took place. The decision of 6 December 20123 was reached on the relevancy of the pleadings as they stood at the time of the debate and there was no connection between the two. The second respondent made reference to the case of *Crabbe v Reid* 2019 S.C. (S.A.C.) 33 per Sheriff Principal Turnbull, as he then was, paragraph [23] page 37 and the policy considerations articulated there and submitted that on a proper construction of section 116 of the 2014 Act the appeal should not be countenanced. Reference was also made to *Prospect Healthcare v Kier Build* 2018 SC 155 paragraph [23] on page 161.

[38] In particular the second respondent submitted that the scope for review of a prior decision is limited where either some other provision excludes the prior decision from review or the prior decision has been acted upon as a basis for further procedure (*McCue v Scottish Daily Record & Sunday Mail Ltd* 1998 SC 811 at pages 814I to 815A). Based on the foregoing it was submitted that it was not competent to seek to challenge a prior decision which was not related to the merits of a decision subject to the appeal especially where leave to appeal has been refused. The second respondent also classifies the decision to refuse the minute of amendment

as procedural decision and as such should not be open to review on appeal especially where permission to appeal that particular decision has been refused.

[39] In short the argument for the second respondent concludes that it is not sufficient for the appellant to argue that if the minute of amendment had been received, if answers had been lodged to it and if that amendment had subsequently been allowed then the pleadings might have looked different by the time of the debate or eventual proof. It is submitted that the appellate court should not speculate on what may or may not have occurred had the minute of amendment been received. Parliament had placed certain limitations upon the class of decisions which require permission before an appeal can be brought. This appeal would effectively circumvent the statutory provisions and intentions. The risk of proceeding along that route would be to undermine the certainty and finality principle, and undermine the discretionary nature of the sheriff's decision.

[40] In conclusion the second respondent invites the court to determine that the mechanism which the appellant sought to utilise in order to attack the decision of 8 March 2023 should not be countenanced in the absence of any real challenge to the decision of 6 December 2023 and accordingly the appeal should fall to be refused.

Discussion and decision

[41] The starting point is to consider the legislative provisions governing the competence of appeals to the Sheriff Appeal Court. The Courts Reform (Scotland) Act 2014 sections 110 and 116 provide *inter alia* :

“110 Appeal from a sheriff to the Sheriff Appeal Court

(1) An appeal may be taken to the Sheriff Appeal Court, without the need for permission, against—

- (a) a decision of a sheriff constituting final judgment in civil proceedings, or
- (b).....

(2) An appeal may be taken to the Sheriff Appeal Court against any other decision of a sheriff in civil proceedings if the sheriff, on the sheriff's own initiative or on the application of any party to the proceedings, grants permission for the appeal.

.....

(6) This section is subject to any provision of this or any other enactment that restricts or excludes a right of appeal from a sheriff to the Sheriff Appeal Court.

.....

116 Effect of appeal

(1) This section applies to—

(a) an appeal to the Sheriff Appeal Court under section 110, and

(b)

(2) In the appeal, all prior decisions in the proceedings (whether made at first instance or at any stage of appeal) are open to review.

(3) Any party to the proceedings may insist in the appeal even though the party is not the one who initiated the appeal.

.....”

[42] It is common ground that the appeal from the decision of 6 December 2023 is competent because his decision is a final judgment (section 110(1)). However no ground of appeal is directed to that decision. That decision is not criticised. The only purpose of this appeal is to bring the decision of 8 March 2023 under review. That decision required permission in terms of section 110(2). Permission was refused. In terms of section 116(2) the effect of marking a seemingly competent, albeit, baseless appeal is to open up all prior decisions for review. Any limitation on that straightforward, statutory provision would require to be derived from another provision, expressly or impliedly limiting the scope of section 116(2).

[43] The question of competency of an appeal which primarily seeks to review earlier interlocutors was comprehensively considered in *McCue v Scottish Daily Record and Sunday Mail Ltd 1988 SC 811* in which a bench of five was convened to consider what, at that time, appeared to be the somewhat conflicting authorities bearing on the point and to provide clarity.

Although that case turned on the provisions of the equivalent legislation and derivative rules applicable in the Court of Session (section 52 of the Court of Session Act 1868 and r 38), it was

held that it was the general intention of the statutory framework to enable the court, when entertaining a competent reclaiming note or motion (or in this case appeal), to review prior interlocutors which had not been previously reclaimed against and any restriction on that power had to be found in another provision which conferred an immunity from review, expressly or by necessary implication; and that, as there was a competent reclaiming motion by the pursuer, the actings of parties consequent on a prior interlocutor could not effectively disable the court from reviewing that interlocutor, although such actings could lead the court to the conclusion that the prior interlocutor ought not to be interfered with.

[44] Accordingly the court in *McCue* drew a clear distinction between situations where a reclaiming motion (or appeal) was competent and the court could review a prior interlocutor and situations in which, irrespective of whether the appeal was competent or not, it should open such an interlocutor up to review.

[45] In that case, although the Lord Ordinary had refused leave to reclaim against an interlocutor ordaining the pursuer to find caution, it did not follow that it was incompetent for the court to review the interlocutor ordering caution when considering a reclaiming motion against absolvitor following a failure to find caution. Accordingly the reclaiming motion was competent. However in delivering the opinion of the court the Lord Justice Clerk (Cullen) added

“It remains for us to say that in so far as the opinions in the decisions dealing with the actings of parties after a prior interlocutor have indicated that subsequent review was excluded as not being 'competent', those observations are disapproved, for the reasons which we have already given. The true question in such cases is not one of competency but of whether the court should exercise the power of review which is available. During the course of the discussion our attention was drawn to cases in which it was held that it was incompetent to reclaim against an interlocutor pronounced on the claimer's motion with a view to submitting a prior interlocutor to review (*Watson v Russell* 1894 21R 433; *McGuinness v Bremner plc* 1988 SLT 340). Once again it does not appear to us that the true objection to a reclaiming motion

against an interlocutor pronounced on the reclaimer's motion or of consent is that it is not competent. It is that the court should not normally countenance it".

[46] This a nuanced point and the distinction is not always clear. In the present case there is really no question of competency. The appeal is *prima facie* competent. So far as the actings of the parties are concerned the appellant neither made nor consented to the prior interlocutor. She did not accept it. On the contrary she sought leave to appeal it, which was refused leaving her very little alternative than to proceed to debate on the pleadings as they existed in the knowledge that the outcome was likely to be unfavourable. The appellant was clearly well aware that only then was a further opportunity for review possible.

[47] In exploring further the circumstances in which the court "should", as opposed to "could", review a prior interlocutor it was observed by the Lord Justice Clerk at page 821 para C -H that,

"..... the review of a particular prior interlocutor may present substantial difficulties if the court is to achieve justice and fairness as between the parties."

He went on to consider whether the subsequent actings of the parties might preclude review in some circumstances and whether different considerations may apply at the end of the case. Under reference to Lord Morison in *Ferguson's Trustee v Reid* (at p 718) it was pointed out that there might be a distinction between situations where the interlocutor sought to be reviewed dealt only with procedure and did not deal with the merits of the case. The court also considered that much would turn on the relationship between the prior interlocutor and the final judgment which is the subject of the reclaiming motion or appeal. He concluded:-

"No general statement can be made as to the facts which will be relevant on either side of the question whether the court should review a prior interlocutor, let alone what facts will be determinative on that question. However, it is plain that, during the course of the proceedings, importance may attach to actings which have followed on the prior interlocutor; and in the end of the day, to the relationship between the prior interlocutor and the final judgment which is the subject of the reclaiming motion or appeal."

[48] In this case the respondents submit that because further procedure followed the earlier interlocutor it can somehow be said to have been relied upon by the parties in determination of further procedure. I am not persuaded by that argument. Unless the appellant abandoned the action altogether at that stage she had no alternative but to proceed to debate in order to obtain a final determination. Her crave remained extant although without purpose. Although she was inevitably doomed to failure at debate any concession made at that stage would have had an impact on her ability to appeal. The appellant had no choice but to proceed with the pleadings as they stood. I do not consider that the course she took would preclude subsequent review of the earlier decision.

[49] Similarly both respondents are at pains to categorise the decision to refuse the minute of amendment as procedural rendering it less likely that the court would be prepared to countenance a review. They characterise the decision to refuse the amendment and the decision to dismiss the appeal as two separate and distinct decisions and the second respondent submits with that a link between the two could only be established if one speculates that the minute of amendment was not only received but answered and then allowed in whatever form it ultimately took. This is entirely speculative because it involves working on a hypothesis of what would then have happened if the minute of amendment had been allowed and how the pleadings might ultimately have looked at the point of debate.

[50] Irrespective of whether or not these points are well made, and may be determinative when considering whether the 8 March 2023 interlocutor should be interfered with in order that justice and fairness is achieved between the parties, they are, in the words of the Lord Justice Clerk (Cullen) matters pertaining to whether the appeal should be countenanced and not to its underlying competency.

[51] The application of *McCue* was further considered in *John Muir Trust v Scottish Ministers* 2017 SC 207 and subsequently in *Prospect Healthcare (Hairmyres) Ltd v Kier Build Ltd (No 1)* 2018 SC 155. In *John Muir Trust v Scottish Ministers*, which primarily concerned the grant of planning consent for a wind farm it was held that it was not competent to seek to counter claim in order to challenge a previous interlocutor refusing to make a protective expenses order as it had nothing to do with the interlocutor being reclaimed. It also came after the proceedings had been concluded. The circumstances of that case were therefore quite different from those in the instant case. Furthermore there is no note of what if anything was submitted to the court on the issue of competency and upon what part of the decision in *McCue* the court was founding. It is clear that the issue of the protective expenses order which had been refused and in respect of which leave to appeal had also been refused had had no effect on the subsequent conduct of or decisions made in the case. As a matter of pragmatism the question was academic standing the stage the proceedings had reached. In dealing with the issue at paragraph [57] Lord President (Carloway) stated that previous interlocutors may only be opened up for the purposes of doing justice in respect of an interlocutor which has been competently reclaimed. Thus he tested the competency of the appeal by having regard to the complete irrelevance of the refusal of the PEO to the substantive issues being reclaimed.

[52] In *Prospect Healthcare (Hairmyres) Ltd v Kier Build Ltd (No 1)* the court was, as in this case, faced with an objection to the competency of a reclaiming motion, the intention of which was to review not the interlocutor reclaimed against but an earlier interlocutor. It was recognised that this required analysis of *McCue* and the more recent decisions in *John Muir Trust (supra)* and *Clark v Greater Glasgow Health Board* 2017 SC 297.

[53] In *Prospect Healthcare* the Court was favoured with full submissions in relation to the effect of the decision in *McCue* and the limitations on the general rule it laid down. The

defenders and reclaimers argued that the statement in *John Muir Trust* that it was not competent to challenge a prior interlocutor which had nothing to do with the merits of the interlocutor reclaimed, was not supported by *McCue*.

[54] In delivering the opinion of the court the Lord President (Carloway) clarified that the purpose of RCS 38.2(1), (and we may assume it's equivalent in the Sheriff Court Rules) requiring leave to appeal certain decisions at first instance was to enable causes to progress efficiently to a conclusion at first instance and not to confer a general immunity from review following final judgement. He goes on :

“[23] Rule of Court 38.6(1) provides that a reclaiming motion shall have the effect of submitting to review all previous interlocutors. The intention of this rule, as with its origins in sec 52 of the Court of Session Act 1868, is to allow the appellate court ‘to do complete justice’. This does not mean that, where there is a competent motion for review of a final interlocutor, every prior interlocutor can be opened up. The scope for review is limited (Clark v Greater Glasgow Health Board, Lord President (Carloway), delivering the opinion of the court, para 37, following *McCue v Scottish Daily Record and Sunday Mail (No 1)*, Lord Justice-Clerk (Cullen), delivering the opinion of the court, pp 814, 815). There are limits in relation to procedural interlocutors where there has been acquiescence or the interlocutor has been acted upon as a basis for further proceedings (eg Clark). Subject to the qualification that, in certain respects, the issue may not be one of pure competency (*McCue*, p 824), as a generality it is not competent to seek to challenge an interlocutor which ‘has nothing to do with the merits of the interlocutor which is subject to the reclaiming motion’ (*John Muir Trust v Scottish Ministers*, Lord President (Carloway), delivering the opinion of the court, para 57). This has to be read, however, along with the caution against making general statements about the ascertainment of the relevant determinative facts in *McCue* (p 821). Importance requires to be attached to the relationship between the prior interlocutor and the final judgment (*ibid*)

[24] In this case, there is a competent reclaiming motion against the interlocutor of 14 July 2017 which dismissed the action, and the third-party claim, ‘in respect that the defender’s [and third party’s] expenses have been paid’. That interlocutor was dependent upon, and interlinked with, that of 15 June 2016, which determined the liability of the parties for the expenses of the cause. There is a direct relationship between the two interlocutors. As distinct from the position in *John Muir Trust v Scottish Ministers*, the earlier interlocutor was a precursor to the later one. For reasons similar to those in *McCue v Scottish Daily Record and Sunday Mail (No 1)*, where an interlocutor competently reclaimed against is dependent upon an earlier one, it will be competent, in terms of RCS 38.6(1), to review that earlier decision. For these reasons, the pursuers’ note of objection is repelled.”

[55] The matter has more recently been the subject of discussion in the Sheriff Appeal Court in *Crabbe v Reid* 2019 SC (S.A.C.) 33 where the issue was whether the court ought to countenance an appeal against a final interlocutor granted unopposed. Following debate the sheriff had sustained a plea of prescription and had assoilzied the respondents in respect of one of three craves of the initial writ. Subsequently the sheriff dealt with the expenses to date and allowed a proof before answer in relation to the remaining two craves. The pursuer and appellant sought to appeal these interlocutors at that stage but the appeal was held not be incompetent on the basis that there was no final interlocutor. Thereafter the respondents sought decree of dismissal which was granted. The appellant neither lodged opposition to that motion nor appeared, indicating that it was her intention to appeal the final interlocutor when it became available. Although recognising that the appeal against the final interlocutor was strictly speaking competent, the respondents argued that an appeal should not be countenanced in the circumstances because the interlocutor appealed against had been granted unopposed. This raised again the nuanced question of competency versus countenancing of an appeal. In reviewing the authorities above Sheriff Principal Turnbull, as he then was, held that although the final interlocutor complained of had not been opposed, taking all of the interlocutors together it was necessary to countenance an appeal in order to do complete justice on the merits and the appeal was allowed to proceed to a further hearing.

[56] Therefore the starting point is that the effect of a competent appeal is to open up for review all prior decisions in the proceedings. There is no practical difference between the rules applicable to the sheriff court (section 116(2) of the 2014 Act) and those in operation in the Court of Session (r38(6) of the current Court of Session Rules (Act of Sedereunt (Rules of the Court of Session 1994) in this regard. There is no suggestion that the appeal against the interlocutor of 6 December 2023 is *prima facie* competent. The question is whether on an application of the

principles which can be distilled from the case of *McCue* and the subsequent authorities following thereon the general rule should be limited or restricted.

[57] In summary the following general principles can be derived:

- i) The requirement for leave to appeal certain procedural decisions at first instance is designed to secure the expeditious journey of the proceedings towards conclusion and final determination in the court below and to avoid repeated interruption in that process. It does not confer a general immunity from review following a final interlocutor in that forum. Accordingly the refusal of leave to appeal does not, of itself, prevent further review of the decision after a final interlocutor is issued.
- ii) The rules, referred to above provide that an appeal shall have the effect of submitting to review all previous interlocutors to allow complete justice to be done by the appellate court.
- iii) Even where there is a competent motion for review of a final interlocutor that does not mean that every prior interlocutor can be opened up. The scope for review is limited.
- iv) Procedural interlocutors, where there has been acquiescence or the interlocutor has been acted upon for further proceedings, should not be revisited.
- v) As a generality it is not competent to seek to challenge an interlocutor which has nothing to do with the interlocutor against which the appeal is taken. The relationship between the prior interlocutor which a party seeks to open up and the final interlocutor is important.
- vi) Where the interlocutor competently appealed against is dependent upon an earlier one it will be competent to review the earlier decision.

vii) Even where such an appeal is competent, the facts and circumstances prevailing in a particular case may be such that the court should not countenance the appeal in which case it could refuse to assign further procedure.

[58] Applying those principles to the facts of the instant case the fact that the sheriff at first instance refused leave to appeal is neither here nor there. It does not make any difference to the decision of this court in relation to the further progress of the appeal. Applying the general rule, on the basis that the appeal against the later decision is competent it follows that the interlocutor of 8 December 2023 is open to review if this court considers it necessary in order to do complete justice in the cause. That general rule would only be limited if the decision could be characterised as purely procedural, and the appellant had either acquiesced in it or it had been relied upon for further procedure.

[59] While a decision about whether or not to allow a minute of amendment is undoubtedly procedural in nature the reason for that decision was entirely related to the sheriff's decision in relation to the question of time bar and the operation of the long negative prescription. He was, in effect being asked to determine whether or not the case was time barred on the basis of the submissions before him, without preliminary proof or debate on the matter. One can well see why he might have refused the minute of amendment on the basis that it certainly came at a very late stage in the proceedings and there would be identifiable prejudice to the respondents in allowing the issue to be explored when a debate had already been assigned on the pleadings as they stood. In refusing leave to appeal he secured the expeditious disposal of the case and was no doubt aware that a final interlocutor would afford the appellant an opportunity to revisit his decision following the general rules outlined above. In the meantime his decision ensured the expedition progress of the case on the pleadings as they stood.

[60] However this is not a case in which the decision, even if it can be truly characterised as procedural was either acquiesced in or relied upon to determine further procedure. The appellant did not accept the decision. She tried to appeal. For the reasons already given the further procedure which was followed was the one option available to the appellant apart from outright abandonment of the cause. Accordingly review is not precluded on the basis of the principle identified at (iv) above.

[61] Turning then to the relationship between the two interlocutors I do not consider it can be said that the decision to refuse the minute of amendment has “nothing to do with” the refusal to receive the minute of amendment. The latter was the inevitable consequence of the former. The appellant could not advance substantive arguments about the missives or the effect of the correspondence lodged in process, whether that be the letters of 24 April 2014 or the email of 14 December 2015 because she had no basis on record for so doing. In his decision to refuse receipt of the minute of amendment the sheriff quite clearly made a substantive decision that the long negative prescription applied and that the missives were no longer extant. That is a very fundamental legal decision and not a purely procedural one. He essentially decided the case. It would not in my view, do justice in the case, if there was no mechanism by which to review that conclusion. Far from being separate and distinct the two interlocutors are, in this case, inextricably linked. But for the decision of 8 March 2023 the case might not have been doomed to failure at debate. Therefore the appeal does not fail the test of competency on this ground.

[62] Finally I am not persuaded that this is a case where, irrespective of the competency of the appeal the facts and circumstances prevailing are such that the court should not countenance either the appeal itself or further procedure. Despite what has been submitted it is my view that once an appeal to this court is deemed competent on a reference under Rule 6.9.2.

it is incumbent on the procedural appeal sheriff to assign further procedure whether that be under Chapter 7 or Chapter 8 of the Rules (Act of Sederunt (Sheriff Appeal Court Rules) 2021). While there has undoubtedly been significant delay and, as conceded by the appellant, prejudice to the respondents may well have occurred, these factors are not insurmountable and the question of time bar, being a matter of law and having had such a significant bearing on the sheriff's decision at first instance is one which it is apt for this court to consider to ensure complete justice is done in the cause.

[63] That being so I shall appoint the matter to proceed under Chapter 7. Accordingly an interlocutor specifying the timetable to be complied with and assigning a hearing will be issued in due course. The expenses occasioned by the hearing on the minute of amendment and the question of competency are reserved meantime.