SHERIFF APPEAL COURT

[2021] SAC (Civ) 32
SAC/2021/DUN-A79-11

Sheriff Principal D L Murray
Appeal Sheriff A M Cubie
Appeal Sheriff T McCartney

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D L MURRAY

in appeal by

JOHN CAPE, t/a BRIGGATE INVESTMENTS

Defender/Appellant

In the cause

INGRID ALEXANDRA GRAY and CATHERINE ALEXANDRA SWEATON OR DEENEY

Pursuers/Respondents

against

JOHN CAPE t/a BRIGGATE INVESTMENTS

Defender/Appellant

Defender/Appellant: Logan, Advocate; Baillies Law
Pursuers/Respondents: MacRae; GFM Law

18 October 2021

[1] The respondents own two flats (hereinafter referred to as "Flat A" and "Flat B") in Dundee which they let out to tenants. They engaged the appellant to collect rents and factor the properties for them. The respondents raised an action for count reckoning and payment ("CRP") in 2011. The action has had an elongated and unsatisfactory procedural history, about which we shall say more later. The appellant appeals against the decision of the

sheriff on 27 February 2020 which *inter alia* ordered him to make payment to the respondents of £35,000.

Grounds of appeal

[2] The appellant initially advanced seven grounds of appeal, the first of these which related to affidavits was not insisted upon. The final ground related to the award of expenses. As counsel for the appellant explained the other grounds were encompassed by the single proposition that the core parameters of what the sheriff could do were fixed by the terms of the record of objections which had been produced for each of the properties and in determining himself what was payable he had fallen into error.

Submissions for the appellant

[3] Counsel for the appellant adopted his written submissions and supplementary submissions. He confirmed he did not propose to undertake a detailed analysis of the evidence and explained it was not part of his case to challenge the findings of the sheriff that the appellant was an unreliable or dishonest witness. He accepted that those were findings which the sheriff was entitled to make.

[4] He undertook an analysis of the procedure for a CRP under reference to Macphail *Sheriff Court Practice* 3rd edition at 21.02-21.11; the article by WJD (1950) 66 SLR 276 quoted therein and the summary as set out by Lord Ericht in *Herberstein* v *TDR Capital* 2021 CSOH 64 at paragraphs [26] and [27].

[5] The procedure has two stages. At the first stage the pursuer invites the court to order the defender to produce an account of the intromissions so that the true balance due to the pursuer may be ascertained. The initial writ in the first stage is only concerned with

whether the defender is liable to account to the pursuer and the writ should not contain averments anticipating objections to an account (*Worbey* v *Elliott* 2014 CSOH 19). If, at debate or a proof the pursuer establishes an obligation to account, or if a defender, as the appellant did in this case, accepts his obligation to account, the court will order the defender to lodge what accounting he can of his intromissions, and procedure moves to the second stage.

[6] The purpose of the second stage is to ascertain what (if any) sum is due to the pursuer so the court can grant decree for payment of a specified sum. If the pursuer is not content with the accounting lodged by the defender, the pursuer may challenge the accounting. The pursuer does so by lodging a note of objections.

[7] The appellant submitted that the sheriff had erred in his approach and had failed to take into account the practice and procedure to be followed in the second stage of a CPR. He allowed the proof to range into many areas for which there was no record. The interlocutor of 18 February 2014 fixed a proof on the records made up of the objections and answers for each of the properties. The options record had therefore served its purpose and fell to be disregarded. The article by WJD quoted by *Macphail* at paragraph 21.10 makes the following point:

> "the golden rule to be kept in mind is that the original condescendence and the answers thereto and the defences are concerned with one thing only – the defender's liability to account. If, as usual, that is not disputed then the original pleadings need not, and so far as possible should not, contain any controversial matter at all … If liability to account is established, or if it is not disputed, the proper procedure is to make an order for the production of accounts, and to allow objections to the accounts to be lodged and answers put in to the objections. The objections and answers will probably require to be adjusted and the record will usually be made up upon these pleadings and be closed, when adjusted, in the usual way."

On that basis the sheriff was in error to have regard to the original record.

[8] At paragraph [115] the sheriff deals somewhat peremptorily with the numerous objections to competency and relevancy of the evidence. The sheriff misquoted and misinterpreted the reference he made to the passage in Maclaren *Court of Session Practice* at 654 which properly reads:

> "When the account has been produced under this general conclusion, it is quite competent for the pursuer to state any objection and claim which such account may raise, although not specifically mentioned in the condescendence."

[9] The sheriff was in error when he suggested the accounting produced by the defender was not an accounting. The court's interlocutor of 7 July 2011 was in the following terms:

> "The sheriff, having heard parties' procurators; Discharges [T]oday's Options Hearing; Holds that the Defender's Productions number 6/1/1 and 6/1/2 of process constitutes the accounts ordered to be produced by the Defender; Allows 28 days for the Pursuer to Lodge Note of Objections and Allows 14 days thereafter for the Defender to lodge answers; Assigns 1 September 2011 at 10am as a procedural hearing."

This determined that the appellant had produced accounts. It was therefore for the respondents to prepare and lodge accurate and intelligible objections to specific aspects of the account. Thereafter, it was for the appellant to respond to these objections. The sheriff was restricted to consideration of such objections as were relevantly and specifically stated. The sheriff had fallen into error in reaching a view that was for the appellant to prove his accounting.

[10] The sheriff had made reference to *McGivney Construction Limited* v *Kaminski* 2015 CSOH 107. Mr Kaminski had set up a company to compete with the pursuers, of whom he was a director, in breach of his fiduciary duties. There was an action of CRP in relation to the sum that was properly due to the pursuers. The scope of the proof was set out at paragraph [10] of the judgment. Lord Woolman identified five questions for a decision, three of which related to the objections which had been lodged to the accounts. These

questions were specific and did not provide a basis on which the sheriff sought to rely for his consideration of this case. Lord Woolman, like the sheriff, found Mr Kaminski's evidence incredible and unreliable but related that to the specific objections in the account. Thus, in *Kaminski* Lord Woolman considered specific issues on which he had the benefit of expert testimony from both sides. This was in stark contrast to the instant case where there was no expert analysis of any of the figures and no adequate attempt made to identify specific questions for the sheriff to adjudicate on. The respondents' position in essence amounted to "I don't know what was done and I don't trust the defender". *Kaminski* is not an authority for a proposition that inadequate accounting opens the door to some broader discretion or broader action which allows the decision-maker to find what he concludes is a just result.

[11] In the course of the proof and indeed prior to the commencement of proof the appellant objected to the specification of the objections to the accounts. It was submitted that these were the only objections to be considered to the defender's accounting, and the sheriff erred in law in rejecting the defender's objection that the objections failed to properly give notice of the basis of the pursuer's objections. The evidence on the objections should have been excluded as inadmissible. There was consequently no proper basis for findings in fact 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28 or 29 nor for findings in fact and law 3, 4, 5, 6 or 7. These findings should be deleted from the judgment.

[12] The sheriff erred by discounting all the third party invoices and Briggate invoices produced by the defender. There was no specific objection in relation to copy invoices produced and the sheriff appeared to have proceeded erroneously on the basis that he *ex proprio motu* had title to decide there must be an element of fraud or forgery in respect of the invoices. That failed to recognise that in cross examination the first respondent withdrew

from any suggestion that the invoices might be fraudulent. With regard to the Briggate invoices the force of the respondents' objections was that there had been a secret profit. Thus the sheriff's consideration of the Briggate invoices ought to have been restricted to the issue of secret profit. Absent specific objection to the extent that the invoices related to work which had not been done or been overcharged or been deficient in any respect the sheriff ought to have accepted these invoices as valid. It was nothing to the point given the terms of the objection to secret profit that the sheriff did not believe the appellant that the work had been undertaken.

[13] The sheriff relied on the decision of Lord Coulsfield in *Smith's Trustees* v *Cranston* 1990 SC 164 which had not been referred to by either of the parties and the parties were not given the opportunity to address him on that case. Macphail *Sheriff Court Practice 3rd Edition* 17.29 sets out the procedure which should have been adopted. Counsel conceded that this court could address the matter in the manner proposed by Lord Coulsfield. However, even if the approach of Lord Coulsfield was available to the sheriff and a broad brush approach could be taken to resolve matters, the appellant submitted there were flaws in the sheriff's reasoning and arithmetic which should not stand.

[14] On the hypothesis that the sheriff had rejected the evidence of the appellant and preferred the evidence of the respondents it was submitted that he would have concluded that the appellant was liable for the relevant objections to the account namely £1050. That figure was derived from the alleged shortfall of rent received in May 2007 amounting to £220 for Flat A, £220 for Flat B, a further shortfall of £110 for Flat B and to the credit said to have been given to the tenants for a period when they were without water amounting to £500. If the sheriff also accepted the objections to expenses of £504.60 and £891.47 for Flat A and of £129 for Flat B the relevant objections would total £2,575.07.

[15] Even if these substantive arguments were not successful there were flaws in the sheriff's calculations. At paragraph [132] following an explanation of his calculation he identified a balance due by the appellant of £34,641.81. In the following paragraph he noted that the respondents had acknowledged that there are third party invoices (excluding the Briggate invoices and the Morgan Timber Preservation invoice already accounted for) amounting to £5,996.64. He then indicated: "Given the state of the Defender's evidence I am not prepared to accept that all of these can be properly deducted." Therefore by inference he accepted there could be some deduction for these invoices, but adopting a broad brush approach he found that the sum should be rounded up to £35,000. That is illogical as it increases the sum due by the appellant rather than reducing it to take account of such expenditure.

[16] In respect of the appeal against the award of expenses, both parties in submission to the sheriff requested that he reserve the question of expenses and the sheriff erred in arriving at his decision on expenses without having heard submissions. Expenses had been reserved following the discharge of a previously fixed proof and parties should have been given the opportunity to make submissions. The sheriff had erred in making a decision without giving the parties the opportunity to address him on the matter. If the appeal is allowed to the extent asked the matter is at large for this court. In that event nearly all the evidence led at proof will have been irrelevant and that should have an implication in expenses.

[17] Counsel adopted his written submissions and invited the court to allow the appeal, quash the award of £35,000 and substitute an award of £1050 as the sum which could be ascertained to be due or alternatively, if the further valid objections were accepted, £2575.27.

Submissions for the respondents

[18] The respondents adopted their note of argument and the written submissions presented to the sheriff. The appellant was put to proof on how much money he had collected on behalf of the respondents and how much money he had actually paid out, whether on expenses or refunded deposits. The resultant difference would represent the sum due to the respondents. The only certain sum was the amount the respondents had actually received, which was accepted as being £39,711.75.

[19] The respondents challenged the appellant's proposition that the original record should be ignored as proof was not allowed on it. The respondents relied on the interlocutor of 21 June 2018 in which the sheriff closed the record, and allowed the parties a three-day proof on their respective averments.

[20] Neither the account produced for Flat A or the account produced for Flat B made reference to deposits either being received or repaid. The accounts were incomplete insofar as detailing the rental income the appellant received. In relation to the items of expenditure in condescendence 3 of the objections record for each property the respondents had set out the deductions objected to. That was on the basis that the respondents did not know if the costs were incurred, the specified work done, or if payment was actually made by the appellant. There was no ambush of the appellant. The first-named respondent in cross-examination had agreed that some of the charges seemed reasonable but that concession did not answer the question of whether the costs had actually been incurred and paid for by the appellant. With the exception of the witness Sid Morgan the appellant relied on his own testimony and periled his case on the sheriff accepting his testimony as truthful as to expenditure actually paid out by him on behalf of the respondents.

[21] The averment as regards secret profit arising from the Briggate invoices was a fall-back position. The appellant gave no detail of how these invoices were made up and there was no averment that he had undertaken this work himself. The sheriff was entitled to discount these invoices as there was no credible or reliable evidence of what work had been done.

[22] The appellant's analysis of *McGivney Construction Limited* did not assist him. The fact that there were five issues identified in that case did not mean the respondents here are not entitled to say we do not know what the appellant did and what he actually paid in respect of all of his transactions. Mr Kaminski failed to satisfy the court on the disputed sum of £74,633. In the instant case the appellant failed to satisfy the court of any expenditure being incurred apart from the Morgan Timber Preservation invoices.

[23] In *Smith* v *Barclay* 1962 SC 1 Lord Justice-Clerk (Thomson) makes clear that the appellant had been ordered to produce an intelligible account of his intromissions. Such an account was not produced in the instant case. It was accepted that at the options hearing on 7 July 2011 the sheriff had held the productions 6/1/1 and 6/1/2 constituted the accounts ordered to be produced by the appellant, but that did not make them true and accurate. The veracity of the accounts fell to be resolved at proof. The objections made by the respondents were relevant and specific. The respondents at proof satisfied the court that they did not know what expenditure was incurred by the appellant. The burden of proof initially resting on the respondents was discharged leaving the appellant to lead credible and reliable evidence to answer the objections and demonstrate the monies expended by him for which he would be entitled to take credit. The invoices lodged by the appellant were not probative. The sheriff's findings in relation to the lodging of receipts demonstrated the incredibility and lack of reliability of the appellant. The sheriff, found the appellant to be

neither credible nor reliable and was entitled to disregard all of the third party invoices produced which were not spoken to by other witnesses. Likewise the sheriff was also entitled to disregard the Briggate invoices. He was accordingly entitled not to give credit for any such alleged expenditure.

[24] In relation to expenses, the appellant's opposed motion was outstanding in relation to the expenses of the three-day diet of proof; in terms of the interlocutor of 22 September 2017 the sheriff had reserved those expenses. However having regard to the judgment, and the broad discretion available to him, the sheriff was entitled to find the appellant liable to the pursuers in the whole expenses. The respondents invited the court to refuse the appeal and adhere to the interlocutor of the sheriff.

Decision

CRP procedure generally

[25] The procedure in actions for CRP is not laid out in the rules. The appellant made reference to an article (Procedure in Actions of Accounting (1950) 66 SLR 276) when the practice was to identify the writer by initials; WJD must refer to Sheriff W Jardine Dobie, responsible for Dobie's Sheriff Court Practice. Despite the passage of time since the article was written it has much to contribute to modern practice. In particular Sheriff Dobie identified what he described as a state of considerable dubiety and confusion existing in many courts, arising from the combination and confusion of the two separate stages in the procedure. That confusion still exists.

[26] We make the following observations: An action for CRP is a means of a party seeking payment of sums due in circumstances where the party is not aware of the precise

amount due. The defender must account for his or her intromissions with the pursuer's funds and pay any balance found due. (*Smith* v *Barclay*; and *Herberstein* v *TDR Capital.*

[27] There are two stages to the procedure. In the first stage, which proceeds by way of initial writ and defences, the pursuer asks the court to order an accounting of the intromissions in order to determine the true balance due to the pursuer if any. That part of the procedure is concerned only with the issue of whether the defender is liable to account to the pursuer: such cases are rare. (*Worbey* is an example).

[28] The purpose of an action for CRP is not the provision of documents, but the payment of sums due; what matters is an accounting (*Herberstein*). The books, invoices or accounts are the "raw material" on the basis of which the accounting is made up (*Smith*): "The real question is how much, if any sum, the defender justly owes the pursuer, not whether the books were properly kept" (*Walker Civil Remedies* p306).

[29] Although the writ should not normally contain averments anticipating objections to an account (*Worbey*), there may be circumstances (see *Cunningham-Jardine* v *Cunningham-Jardine's Trustees* 1979 SLT 298) where the pursuer has received accounts and is in as good a position to formulate his claim in the summons as after the formal lodging of accounts.

[30] The procedure follows the ordinary procedure and if, after debate or proof, the pursuer establishes an obligation to account, then the court will order the defender to lodge an accounting of his intromissions and the procedure moves to its second stage, the purpose of which is to determine what (if any) sum is due to the pursuer. (*Herbertstein, McGivney Construction Limited*).

[31] Normally the dispute relates to the sum due and involves, as Dobie says:

> "an attack on some of the items on the debit or credit side either as individual items or as covered by some question of principle which may affect a number of them"

[32] The provision of an accounting by the defender is the procedural step whereby the pursuer is provided with a document or documents which he can challenge by lodging a note of objections to which the defender lodges answers. The note of objections should state precisely what is objected to and be set out in such a way as to make the items to which objection is taken readily identifiable (*Dobie*).

[33] A timetable should be allowed for adjustment; a record of the objections and answers should be made up. This period of adjustment should be closely managed by the presiding sheriff to focus issues in dispute and not allowed to be extended unnecessarily. At the end of that adjustment process a record should be made up. The second stage is aimed at consideration of the account so the court is able to consider the items in the account and the challenges made thereto. It is desirable the objections and answers are aligned to the account to allow the account to be considered sequentially with each item being either verified; or the basis of challenge accepted and the account modified accordingly. The objections and answers can contain preliminary pleas if there is a complaint in relation to relevancy or specification. (*Guthrie* v *McKimmie's Trustee* 1952 SLT (Sh Ct) 49). At a procedural hearing the court can determine procedure and assign a debate or proof or proof before answer applying the same test in relation to debate as for standard ordinary procedure. The court then rules on the objections and answers. The sheriff at this point should consider whether the case is suitable for a remit to a man of skill. If it is not the case will proceed to proof for the court to determine what if anything is due to be paid, identify the precise amount due and grant decree for payment of such sum.

[34] The objections should be specific enough to give proper notice of the basis on which the challenge is made.

[35] The onus to establish a liability to account is on the pursuer. Where a defender admits liability to account, the burden of proof initially rests on the objector: The onus may, however, shift to the person relying on the accounts. It will depend on the circumstances of a particular case (see *McGivney Construction Limited* paragraph [13]-[14] and the cases therein).

Application to the instant case

[36] If, as here, there were preliminary pleas on the specification of the objections, the next step in the process should be a debate. There is no indication in the interlocutors that was sought by the appellant. We sought to explore with counsel for the appellant, who was not instructed at first instance, why the matter was not taken to debate as opposed to proof before answer, but he was unable to enlighten the court. We note above *Dobie's* recognition that the second stage after a record of objections and answers is made up "the matters in dispute will require to be resolved by debate or proof in the usual way." While the challenge to the specification would in our view not have been successful for the reasons we explain below, it should have resulted in the appellant appreciating that evidence would be required to support the expenditure claimed in the account.

[37] Counsel for the appellant argued that the original pleadings were to be ignored but that is not correct. The purpose of the record on objections and answers is to focus the issues which arise from the accounts. That, contrary to the submissions for the appellant, cannot render the original pleadings *functus*. They clearly still have relevance as the crave for payment rests in the original pleadings and need not be repeated in the second record, but it is important that the objections to the account are crisply and clearly expressed.

[38] The focus of the appeal centres on the appellant's submission that he did not have fair notice of the challenges to the accounts, and the respondents' position that the objections to the account made patently clear what was challenged by the respondents. The key averment of objection by the respondents is in the following terms:

> "Esto any of the invoices produced by the [Defender] … were properly incurred by the [Defender] on behalf of the [Pursuers] the amount of any payments, if any [were] actually made by the [Defender] in respect of any of the invoices is not known and not admitted."

On the specification point, we quote what the sheriff says at paragraph [116]:

> "The thrust of the Pursuers case was that where the Defender has purported to deduct items of expense, for example for painting, they cannot be sure that this work was carried out and if it was, what the true cost was. In effect, that the Defender's account was entirely unreliable."

We reject the appellant's argument that there was a lack of specification. We find no error in the sheriff's assessment that the appellant was put on notice that the pursuers did not accept the figures in the accounts as set out in condescendence 3 of the objections record for each of the properties. In these circumstances it should have been apparent to the appellant that it was necessary to lead evidence to support his figures. Indeed it is telling that the sheriff accepted the evidence of Mr Morgan, the sole independent witness called for the appellant, who spoke to an invoice from his company Morgan Timber Preservation for fitting vents and a damp-proof course for Flat B. We do not accept the portrayal of the proof as an ambush. We recognise that general and vague challenges to an account are not to be countenanced but what was done here was a direct rejection of the account. The appellant was contrary to the submissions made on his behalf put to proof on the expenditure which he claimed in the account was to be deducted from the sums due to the respondents. That would have had no more effect had it been set out line by line that each specific entry was not accepted. The respondents' position which must have been tolerably clear to the

appellant was that they were seeking verification that specific work had been undertaken and that it cost the sum claimed in the account. We do not accept, given that context, it was as the appellant suggested, necessary that challenge should be directed specifically at each item of expenditure. Such repetition would neither have assisted the appellant in responding to, or the court in considering, the case averred by the respondents. While there could have been greater precision in the averments made by the respondents the pleadings did give fair notice of the challenge made and may be distinguished from being vague and general criticism of the administration of matters as rejected in *Guthrie*. A primary aim of pleadings is to give an opponent fair notice of the case which is being made against them. There is no substance to the complaint that such notice was not given to the defender in this case.

[39] In the interlocutor of 7 July 2011 the productions 6/1/1 and 6/1/2 of process were accepted as being accounts ordered to be produced by the defender. It reflects adversely on all concerned with this action that following the lodgement of those accounts which were lodged in advance of the options hearing on 7 July 2011 it took nearly 7 years before the proof finally commenced on 20 March 2018. The interlocutors demonstrate the regrettable lack of progress. By interlocutor of 26 February 2013 the sheriff closed adjustment of the appellant's accounting and the respondents' notes of objection and appointed a proof thereon for 13 May 2013 with a pre proof hearing on 30 April 2013. Following no appearance by the appellant decree was granted in favour of the respondents. That interlocutor was appealed successfully, but only after a motion was granted allowing the appeal to be received late. Both parties then failed to appear at a diet on 22 October 2013 and the case was dismissed. That interlocutor was also successfully appealed. A second proof was fixed for 13 May 2014 with a pre proof hearing on 29 April 2014. The pre proof

hearing was continued until 6 May 2014, when on joint motion the sheriff discharged the second proof and allowed the case to be continued for a joint minute and negotiations. A third proof was fixed for 3 November 2014 with a pre proof hearing on 20 October 2014. This hearing was continued until 27 October when the third proof was discharged and a fourth proof fixed for 16 February 2015 with a pre proof hearing on 12 January 2015. This was discharged on the appellant's motion and a fifth proof fixed for 26 March 2015 with a pre proof hearing on 9 March 2015. That proof did not proceed due to administrative error and was discharged on 23 March 2015 to dates to be afterwards fixed. On 7 March 2017 *ex proprio motu* the sheriff fixed a fifth proof on 20 June 2017 with a pre proof hearing on 6 June 2017. That diet was discharged and a seventh proof was fixed for 20, 21 and 22 September 2017 with a pre proof hearing on 7 September 2017. The pre proof hearing was continued until 18 September 2017 for discussions. The proof did not commence on 20 September 2017 and was adjourned until the following day at the request of parties. On being told that meaningful discussions were ongoing the sheriff again adjourned the proof on 21 and 22 September 2017 and fixed a procedural hearing for 7 November 2017, when on joint motion the case was sisted. The sist was recalled on 7 June 2018. An eighth proof was fixed for 20, 21 and 22 November 2018 when evidence was finally led. The sheriff in the interlocutor of 15 May 2019 imposed a timetable for the exchange and adjustment of written submissions. The interlocutor of 9 August 2019 records that the respondents submissions were only received by the appellant on Tuesday 6 August 2019 and the sheriff recast the timetable requiring final submissions by 18 October 2019. That chronology demonstrates that both parties failed to progress the case with due expedition and the sheriff did not adequately control the progress of the proceedings. As noted above, an appropriate

timetable for adjustments of the objections and answers should be established and the sheriff should make every effort to ensure that it is adhered to.

[40] We find there to be no substance in the appellant's position. We are satisfied that the sheriff had regard to the terms of the note of objections lodged by the pursuers. He has had regard to the observations of Sheriff Walker in *Guthrie* that objections are not a vehicle for general criticisms and points out, in our view correctly, that the thrust of the pursuers' case was whether the defender had purported to deduct items of expense, for example for painting. He could not be sure this work had been carried out, and, if it was, what the true cost was. The respondents' averment was that the defender's account was entirely unreliable. That is broad reaching but in the circumstances of this case cannot be said to have been vague. We consider that the appellant was given fair notice that he required to satisfy the sheriff that items of expenditure identified by the respondents in article 3 of the objections records for both Flat A and Flat B were properly deductions which he was entitled to make from the rent received. The sheriff also made reference to the decision of Lord Woolman in *McGivney Construction Limited*. As is noted in *Smith* v *Barclay* where the defender admits liability of account the burden of proof rests with the objector. Lord Woolman in *McGivney Construction Limited* recognised that onus may shift to a person relying on the accounts, and that would depend on the circumstances of the case. Lord Woolman at paragraph 14 of his judgment:

> "Where the evidential burden lies may, however, be irrelevant as 'questions of onus usually cease to be important, once the evidence is before the court': *Sanderson* v *McManus* 1997 SC HL 55 at 62G per Lord Hope of Craighead. The court makes its factual findings after evaluating all the testimony, oral and written. It can draw an adverse inference if a party fails to lead the evidence it would be expected to lead"

[41] The sheriff found that the invoice from Morgan Timber Preservation amounting to £3,650 about which he heard independent evidence was a valid item of expenditure which fell to be deducted from the sums due to the respondents. That but emphasises the appellant's failure to vouch satisfactorily other expenses which he claimed as deductions. We accept in the circumstances the sheriff was entitled to reject the Briggate invoices as being worthless and self-serving, and was entitled to conclude he did not believe the defender that the work was done which invalidates these claims in the account.

[42] We must address one other matter: the sheriff should have invited the parties to make submissions in relation to *Smith's Trustees* v *Cranston.* We note the terms of the decisions in *Lindsay* v *Giles* 1844 6D 711 per LJC Hope at 800 and in *Brebner* v *British Coal Corporation* 1988 SC 333 per LJC Ross at 340 where he suggested that the Lord Ordinary had stated he would obtain considerable assistance from a case which was not cited to him and which arose in another context. The case should have been put out by order to give parties the opportunity to address the sheriff on this authority which he had identified. Parties had the opportunity in the course of the appeal to address us on the import of *Smith's Trustees* v *Cranston* and we consider there is no prejudice in these circumstances to the appellant. We do not, however, find the case to be as helpful as the sheriff found it. Rather we approach the matter on the sheriff's findings that he did not accept the other expenditure as being proved, which resulted in his making no allowance for it.

[43] The sheriff has however fallen into error in the final aspect of his calculation. He is in error when he states that any presumption ought to be in the pursuer's favour. No such presumption exists. The task for the sheriff was to determine whether the appellant was entitled to reduce the sum due to the respondents by the sums claimed for expenditure incurred in the accounts. The sheriff explains why he was only prepared to accept a

deduction for the Morgan Timber preservation invoice which was supported by independent evidence. His proposition that:

> "I am prepared to largely offset the unaccounted deposits with these sundry invoices and, in consideration of the potential for other unknowable and unaccounted for sums, simply round up the balance to £35,000"

which, he explains as "the Court's best estimate of the sums due from the Defender to the Pursuers" does not withstand scrutiny. We find no basis on which the respondents are entitled to the amount of deposits paid by tenants. These are sums which fall to be repaid to the tenants absent a finding that they have been utilised to deal with rent arrears or damage. We do however accept the sheriff was entitled to reject the sundry invoices. Given the sum which should have been paid as rent for the period between February 2006 and October 2010 (the joint minute erroneously refers to October 2006) was agreed, we are also concerned at his approach in increasing the sum agreed in the joint minute by £580 less commission. In the circumstances we consider that the sum of £34,641.81 should be reduced by that £504.60 being what he described as unaccounted rent less commission and his computation should not include any rounding up. We therefore conclude that the sum which he found due by the appellant to the respondents should be reduced from £35,000 to £34,137.21. We shall therefore delete finding in fact 29 and substitute "The Defender withheld the sum of £34,137.21 from the rent that was properly payable to the Pursuers".

[44] The solicitor for the respondents invited the court to amend finding in fact 21, but there was no cross appeal against that finding and it is not material to the disposal of the appeal.

[45] In relation to the seventh ground of appeal, the appellant criticised the sheriff for dealing with expenses when parties had jointly submitted that a separate hearing on expenses should be assigned. In these circumstances we accept that the narrative by the

sheriff that: "There is no suggestion by either agent that the normal rule on expenses would not prevail and each sought an award in the event of success" appears to be an error on his part. Thus while it is well understood that appeals in expenses are to be discouraged we accept that in this case we should not uphold the finding of the sheriff who we accept has either proceeded on a misapprehension of the position, or failed to adequately explain the reasoning underlying his finding on expenses.

[46] The case requires to call before the sheriff to consider the pursuer's application for an uplift in fees. The appropriate course is therefore for us to recall the interlocutor insofar as it relates to expenses and to remit the matter to the sheriff to enable him to reconsider the matter of expenses at first instance along with consideration for the application for an uplift in fees. So far as the expenses of the appeal are concerned, substantial success lies with the respondents and it is therefore appropriate that we award the expense of the appeal in their favour.