SHERIFF APPEAL COURT

[2017] SAC (Civ) 31
DUN-F187-16

Sheriff Principal D C W Pyle
Sheriff Principal D L Murray
Sheriff Principal M W Lewis

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D L MURRAY

in appeal by

RH

Appellant and Pursuer

against

RH

Respondent and Defender

Appellant: Spier, advocate; Brodies LLP
Defender: Innes, advocate; Balfour + Manson LLP

30 October 2017

[1] The appellant craves the court to grant a residence order and *interim* residence order of the parties' son aged 5 and for interdict and *interim* interdict. The case called before the sheriff on the respondent's motion under section 14(2) of the Family Law (Scotland) Act 1986 to sist the cause on the grounds that proceedings with respect to the matters to which the application relates continue outside Scotland, namely Tennessee, and that it would be more appropriate for those matters to be determined in the proceedings outside Scotland. The

appeal is against the decision of the sheriff following a debate to uphold the respondent's second plea-in-law and to sist the cause under section 14(2).

Background

[2] The sheriff sets out the background in her note which substantially reflects a Joint Minute of Admissions. We have supplemented this with the information provided by Ms Innes who appeared before the sheriff and has been instructed throughout in relation to procedural matters before Dundee Sheriff Court. The parties were married on 13 August 2011 in California, USA. The parties have one child, hereinafter referred to as "C", who was born on 3 December 2011 in California and is now aged 5. The parties and C are all American citizens. The appellant also has a child from a previous relationship, who resides in California as do the appellant's parents. After C's birth, from 5 December 2011 until 7 June 2012 the respondent was on deployment, as a US marine, in Japan, South Korea, Thailand and the Philippines. When the respondent returned to the USA the parties lived together initially in California. From January 2013 until May 2015 the parties resided together with C in Sewanee, Tennessee. A nanny, who is from Tennessee, was employed to assist with the care of C. Over the summer of 2015, the parties and C travelled to Oklahoma, Michigan and California. In August 2015, the respondent commenced post-graduate studies at St Andrew's University. He entered the United Kingdom for that purpose as a student tier 4 migrant, with entry clearance to 30 January 2017. From August 2015 until October 2015 the appellant and C were in California visiting the appellant's parents. On 18 October 2015 the appellant came to Scotland with C to be with the respondent. The appellant and C entered the United Kingdom as the dependents of the respondent and were accompanied by the nanny. The nanny returned to Tennessee on or about 1 May 2016. At the beginning of

February 2016 the respondent moved out of the accommodation which the parties previously shared in St Andrews. On 15 April 2016 the initial writ raising proceedings before Dundee Sheriff Court was warranted. On 20 April the respondent filed a complaint for divorce, temporary injunction and temporary restraining order in the Chancery Court, Franklin County, Tennessee ("the Tennessee court"). On 28 April 2016 the appellant's US attorney wrote to the respondent's agents in Tennessee to advise that she was instructed on behalf of the appellant to seek dismissal of the Tennessee proceedings and the temporary restraining order. On 26 July 2016 the Tennessee court refused the appellant's motion to dismiss the Tennessee proceedings for lack of jurisdiction and determined that Tennessee was the child's home state for the purposes of the Uniform Child Custody Jurisdiction and Enforcement Act ("the UCCJEA") and thereafter stayed proceedings. On 23 September 2016 the appellant's interlocutory request to appeal the order of the Tennessee court of 26 July in terms of Rule 9 of the Tennessee Appellate Court Rules was refused and the stay granted on 26 July 2016 was lifted.

[3] On 20 October 2016, the Home Office issued the appellant with a Notice of Curtailment of her leave to remain. Her leave to remain and that of C was curtailed with effect from 19 December 2016. On 9 December 2016, attorneys acting for the appellant submitted to the Home Office a timeous application for leave to remain in the UK, on behalf of the appellant and C. As a result of the application, the immigration status of the appellant and C, which pertained prior to curtailment continues pending the determination of the application. The application was ongoing at the date of the hearing before the Sheriff and remained ongoing when the appeal called before this court.

[4] On 4 November 2016, the Tennessee court granted a default judgment and a hearing on the merits was fixed for 12 December 2016. On 12 December 2016, following hearing

evidence from the nanny and the respondent, the Tennessee court granted decree of divorce and designated the respondent as custodian and primary residential parent of C. The appellant was awarded supervised parenting time in terms of a parenting plan order. On 9 January 2017 the appellant's attorneys lodged notice of appeal against the decree granted on 12 December 2016. The appellant's appeal proceeded as of right, but unless the order of 12 December 2016 is stayed by the Court of Appeals in Tennessee, the terms of the order remain in force notwithstanding the appeal. This appeal is now fixed to be heard, by the Court of Appeals in Tennessee, on 8 November 2017. After the oral hearing before the sheriff on 28 March 2017, the parties were made aware of an order made by the Court of Appeals in Tennessee, which had identified a defect in the decree from the Tennessee court, because it failed to set out the amount of child support to be paid by the appellant and failed to address the respondent's claim for attorney fees. An order amending the final decree of divorce dated 7 April 2017 was made, but this has no impact on this appeal.

The Court Proceedings in Dundee

[5] On 19 May 2016 Sheriff Drummond having heard parties' procurators granted an *interim* order in terms of the appellant's craves 4 and 5, to interdict the respondent from removing C from the care and control of the appellant or anyone to whom the appellant granted temporary care and control of C; and to interdict the respondent from removing or attempting to remove C from the jurisdiction of the court or from the United Kingdom in terms of section 35 of the Family Law Act 1986. She ordained parties to lodge further submissions regarding the appellant's right to remain in the United Kingdom and to clarify any court orders that have been made in the jurisdiction of Tennessee. On 6 June Sheriff Drummond on the appellant's unopposed motion recalled the *interim* interdict

granted 19 May and of new granted *interim* interdict, to interdict the respondent from removing C from the United Kingdom in terms of section 35 of the Family Law Act; continued matters to an options hearing and assigned a proof. That options hearing was then continued on the respondent's motion to 18 August 2016 to ascertain the outcome of proceedings in Tennessee. On 18 August on the appellant's motion a Preliminary Proof and Pre-Proof Hearing on the respondent's pleas-in-law 1, 2 and 3 was ordered at dates to be afterwards fixed. On 23 September the Record was closed and 10 January assigned as Preliminary Proof with a Pre-Proof Hearing on 20 December. On 5 January the cause called again before Sheriff Drummond and she discharged the Preliminary Proof assigned for 10 January and continued the cause for a further Pre-Proof Hearing. On 10 January, she appointed parties to produce a Joint Minute of Admissions to incorporate agreement on *inter alia* the appellant's current immigration status and the history of court proceedings in Tennessee; and required parties to be in a position to advise the court what evidence, if any, was necessary to address the preliminary pleas. On 30 January at a diet of debate the case called again before Sheriff Drummond and the Joint Minute of Admissions was lodged and the sheriff allowed a Minute of Amendment for the appellant to be received; allowed a period for answers; discharged the diet of debate and fixed 2 March as a Rule 18 hearing. On 2 March Sheriff Drummond allowed the Record to be opened up and amended in terms of the Minute of Amendment as adjusted; closed the Record of new and allowed parties a hearing on the defender's motion to sist. This hearing took place on 28 March and the sheriff issued her judgment which is the subject of this appeal on 30 May 2017.

The decision of the sheriff

[6] The sheriff's reasoning is found in paragraphs [43] to [49]. She identified at

paragraph [43] that the first step in determining a motion under section 14(2) is for the respondent to satisfy the court that the Tennessee court is the appropriate forum for the action to proceed and the essential test is how real and substantial the connection is between the forum and the dispute between the parties. The sheriff indicated that she was satisfied that there was another available forum. She accepted that the reasoned decision of the Tennessee court, which was reached after argument, was sufficient for her to be satisfied that it had competent jurisdiction. She noted that parties were agreed that she could not take a view on the merits or prospects of success of the appellant's appeal.

[7] The factors which the sheriff recognised as being relevant were: i the welfare of the child; ii the habitual residence of the child; iii where the child actually is; iv the appropriateness of the forum; v whether there is real and close connection with the forum; vi the circumstances in which the proceedings were commenced in the competing for a; vii expedition; viii the means of the parties and the expense of the competing fora and ix such other factors as to the court shall seem appropriate.

[8] In her evaluation of these factors, the sheriff found that the welfare of the child was indeed the paramount consideration and had to be considered in two contexts as set out by Lord Osborne in *Calleja* v *Calleja* 1997 SLT 579. The first of these was which court should decide what the child's best interests require. The second, which will only arise where it has been determined that the Scottish court rather than the foreign court shall decide the matter, is what the requirements of the child are.

[9] The sheriff at paragraph [48] attached some significance to the fact that the parties are American citizens. She noted that the child was born in California and had lived in America until he came to Scotland in October 2015. His maternal and paternal family

members live in America. The respondent currently lives in Tennessee which is the place where the family lived longest together.

[10] In paragraph [49] she noted it was not in dispute that C is habitually resident in Scotland and the Dundee court has jurisdiction. However the fact that the parties came to Scotland for the purposes of the respondent's post graduate studies and had entitlement to stay only until January 2017 led the sheriff to conclude that the appellant's residence in the United Kingdom can "be described as precarious" and she may be required to return to the United States with C "at any stage." She placed no weight on the timing of the commencement of the actions as a factor, observing that both actions were raised within a week of each other and dismissing the suggestion that it was inappropriate for the respondent to have raised the action in the Tennessee court. Witnesses speaking to C's current welfare and to his recent life are based in Scotland, whereas his family members and his nanny are in America. She concluded that the Tennessee proceedings were further advanced and if proceedings were ongoing in two jurisdictions there was a risk of lack of certainty, which would be prejudicial to the welfare of C.

[11] In reaching her conclusion the sheriff identified that in *Hill* v *Hill* 1991 SLT 189 Lord McCluskey had held the Supreme Court of Ontario was the parties "home court", as both the parties and the child were Canadian and was better placed to decide what was in the child's best interests. She explained she took a similar view here. The parties and child are American. The family members living in America are more closely connected to the Tennessee court than Dundee Sheriff Court. The Tennessee court had already divorced the parties after hearing evidence from the respondent and the child's nanny and was in her view much better placed to decide what was in C's best interests. Accordingly she sustained

the respondent's second plea-in-law (*forum non conveniens*) and thereafter sisted the cause under section 14(2).

Submissions for the Appellant

[12] The appellant challenges whether the sheriff was correct in law *et separatim* exercised her discretion reasonably in pronouncing the interlocutor of 30 May 2017.

Under reference to the classic statements of the law in relation to *forum non conveniens* by Lord Kinnear in the case of *Sim* v *Robinow* (1892) 19 R 665 referred to in the more recent case of *RAB* v *MIB* 2009 SC 58 and the speech of Lord Goff in *Spiliada Maritime Corp* v *Cansulex Ltd* [1987] AC 460, it was submitted the application of the plea of *forum non conveniens* requires a tripartite approach: (1) the party advancing the plea requires to demonstrate that there is another available forum of competent jurisdiction; (2) if established the party taking the plea requires to discharge the evidential burden, that the forum is a clearly or distinctly more appropriate forum in which the case may be tried more suitably for the interests of justice, interests of the parties and the ends of justice; and (3) if those two thresholds are passed where there are no other circumstances by reason of which justice requires that a stay should nevertheless not be granted. It was submitted that section 14(2) reflects a statutory expression of the plea, and the application of the section requires to be on the basis of the well understood principles developed at common law. Section 14(2) also engages the requirement that in any determination regard be had to the welfare of the child as the paramount consideration., this being seen from the decision of Lord McCluskey in *Hill* v *Hill* and the decision of the Inner House, adopting the reasoning of Lord Osborne, at first instance, in *Calleja* v *Calleja*.

[13] It was submitted that the sheriff had erred in law in determining that the application of the principal of *forum non conveniens* developed in the case law was only a relevant and not decisive test. The sheriff expressed doubt about the application of the principles of *forum non conveniens*, in relation to a motion to sist under section 14(2) and in particular section 14(2)(a). She incorrectly considered that the decisions in *Hill* v *Hill* and *B* v *B* 1998 Fam LR 70, which adopted that approach, were binding upon her. Her erroneous reasoning gave rise to doubt that she had properly considered the principles, given her expressed reservations on their application in the light of her reading of the terms of the section. Even if she did not err in law as to the test she was to apply, she erred in law in having exercised her discretion unreasonably in applying the "relevant test" she purported to apply.

[14] In relation to the first of the threshold tests, the sheriff had erred in concluding that the respondent had established there was another court of competent jurisdiction when the appellant's substantive participation in those proceedings was only to challenge the court's jurisdiction. She had failed to give proper weight to the fact that the proceedings in Tennessee were subject to jurisdictional challenge on appeal. This distinguished the case from *RAB* v *MIB* where an authoritative determination on jurisdiction had been made by the Court of Appeal.

[15] It was accepted that the sheriff had correctly identified the second threshold test as being the forum with which the dispute between the parties has "the most real and substantial connection." However she had failed to properly identify what the dispute was, for which the connecting factors required to be identified and assessed, had failed to properly identify the connecting factor between the dispute and the natural forum for its resolution and had not had proper regard or given due weight to the burden which falls on

the respondent in establishing such a connection between the dispute and the connecting factors. In terms of *RAB* v *MIB* at paragraph 23 these require to be:

> "potent factors indicating not merely convenience, but that the (Tennessee court) is clearly or distinctly the more appropriate court and the one with more closely connecting factors … to the welfare of the child "

The true dispute between the parties in this case against which the motion to sist on the basis of *forum non conveniens* required to be assessed was what present and future arrangements for the child are in his best interests. It should be looked at primarily from the standpoint of the parties having separated rather than their past family life together. The dominant and obvious feature was the *status quo* at the date of separation, 1 February 2016. At that date and at the date of determination by the sheriff and on the hearing before this court, C and the appellant were habitually resident in St Andrews. The child attends a local school, goes to a local church, has access to appropriate health care and remains integrated into a social and family environment in the location where the parties last lived together as a family.

[16] The sheriff had fallen into error by giving undue weight to the Tennessee court determining matters because the parties had resided in Tennessee for a longer period than they had in Scotland and had omitted to take account of the fact that immediately prior to moving to St Andrews the child and appellant had been living in California rather than Tennessee. A court in Tennessee would enjoy no particular special advantage in assessing relevant evidence and would be at a profound disadvantage in terms of obtaining direct information as to the child's circumstances in relation to any order for disclosure of medical or school reports or indeed seeking independent material such as child welfare or psychological reports, factors which did not appear to have been taken account of by the sheriff. Rather the sheriff appeared to have placed weight on how long the parties have

been living in Scotland at the time proceedings were raised, yet had critically failed to take account of the fact that remained the position when she was considering the issue in March 2017.

[17] The sheriff had erred in taking account of a prospective change to the appellant's immigration status. The sheriff should have properly had regard to the position as it stood when she determined the matter and recognised that the appellant and C were entitled to be resident in the UK. The sheriff was in error in concluding that the appellant's "precarious residence" in the UK, even if that were correct, was a relevant factor in the application of the test for *forum non conveniens*. Accordingly she should have found the habitual residence of the child at that point of her consideration was within the jurisdiction at Dundee Sheriff Court. She should have discounted the uncertainties over the appellant's appeal against her immigration status and the prospect that at some future date she and C may require to leave Scotland. The pre-eminent ground of jurisdiction should be the habitual residence of the child which in this case is Dundee Sheriff Court. That habitual residence is the pre-eminent ground of jurisdiction is reflected, endorsed and applied internationally under and in terms of the Hague Convention on the Civil Aspects of International Child Abduction 1980.

[18] The sheriff erred by placing inappropriate weight on the number of potential witnesses residing in the USA and failed to give sufficient consideration to those located in Scotland. As was made clear in *RAB* v *MIB* at paragraph 28 a witness counting competition does not assist in a decision as to whether a court of primary jurisdiction should be displaced.

[19] The sheriff's note was further flawed by the fact the alternate forum contended for is Tennessee and not the USA at large. The sheriff should properly only have considered factors in relation to the Tennessee court and not what might be described as "American"

connecting factors. The onus on the respondent was to demonstrate that the natural and appropriate forum was the Tennessee court and not any court within the USA. Undue weight was placed by the sheriff on a decision of the respondent to raise proceedings in Tennessee, which proceedings have resulted in orders being made particularly where the orders had been made without a full and proper inquiry. The appellant only entered the Tennessee proceedings in relation to the issue of jurisdiction. The sheriff was in error when she stated the proceedings in Tennessee were "much further ahead than those in Dundee Sheriff Court". The final orders made by the Tennessee court belie the fact that the appellant has been and remains the primary carer for C and the orders are in conflict with the extant orders for interdict made by Dundee Sheriff Court.

[20] It was accepted in the course of submissions to the court that, in the event of the jurisdictional point being unsuccessful, the appellant would seek leave to have the Tennessee Appeals Court remit the matter back to the Tennessee court to reconsider the substantive matters in a contested process.

[21] The sheriff's approach was also erroneous in that she purported to carry out what was akin to a balancing exercise rather than being satisfied clearly and distinctly by the respondent that the Tennessee court was the appropriate forum.

[22] Further, given that there were disputed issues of fact in relation to the parties' plans on the conclusion of the respondent's studies in St Andrews, the circumstances and basis in which the action in Tennessee was raised, the status of any undertaking the respondent was prepared to give, the extent to which the appellant can participate in proceedings in Tennessee while the appeal was yet to be determined and the enforcement and compatibility of competing orders issued in Dundee Sheriff Court and the court in Tennessee, the sheriff should have recognised that certain matters required a Preliminary Proof before

determination and she erred in not fixing such a Proof, contrary to the appellant's motion before her.

[23] In relation to the third leg of the test and whether the "interests of justice require a different outcome" the sheriff failed to give proper consideration to the best opportunity for expeditious resolution of the issue and failed to address the concern that there is a jurisdictional vacuum pending the determination of the appeal proceedings in Tennessee and to have regard to the practical arrangements for any enforcement of the Tennessee judgment in Scotland. The law requires that the case should be substantially resolved in early course [*SM* v *CM* 2017 SLT 197] and the sheriff erred in failing to give due account to the progress before the court in Dundee, which was seen in the extensive pleadings. With further proper case management, the case was capable of early resolution. For these reasons, the appellant invited the appeal to be allowed and the sheriff's interlocutor recalled, the motion for a sist refused, the respondent's plea of *forum non conveniens* repelled and the case remitted back to Dundee Sheriff Court to proceed as accords.

Submissions for the Respondent

[24] Counsel for the respondent moved the court to refuse the appeal submitting the sheriff had applied the correct legal test and properly considered the relevant factors giving no grounds for the court to interfere with her exercise of discretion. The sheriff had identified that section 14(2)(a) contains a broad discretion as to whether a case ought to be sisted where there are proceedings continuing outside Scotland. Her analysis ultimately adopted the approach of Lord McCluskey in *Hill* v *Hill* and Lord MacLean in *B* v *B* and had regard to the common law principles of *forum non conveniens* in reaching a conclusion on the application of section 14(2). The sheriff had applied the correct legal tests, she had had

regard to the factors to be considered, in considering *forum non conveniens* as set out in the definitive exposition by Lord Goff in *Spiliada Maritime Corp* v *Cansulex Ltd* as adopted by the observations of the Inner House in *RAB* v *MIB*. Contrary to the submission of the appellant, a court is not required to be satisfied to the extent of certainty that the other court has competent jurisdiction. The sheriff was correct to accept the decision of the Tennessee court in a reasoned opinion that it had jurisdiction as being the appropriate court to reach a view of the law of Tennessee. She was also correct in recognising that in *RAB* v *MIB* the English Court of Appeal had also already considered the matter of jurisdiction. However the principle to be derived from *RAB* v *MIB* was that where the foreign court had already opined that it has jurisdiction the Scottish court could not look behind that, even if the matter is subject to appeal. Indeed, the fact the appellant was appealing against the Tennessee court's decision demonstrated that she had access to the Tennessee courts and the appellant's oral submissions now recognised that in the event that the appeal on jurisdiction was unsuccessful, the appellant would make further motions to the appellate court for reconsideration of the substantive decisions of the Tennessee court.

[25] When read in context section 14(2)(a) is designed to avoid concurrent proceedings with the risk of conflicting orders which are contrary to the interests of the children. The sheriff properly considered the welfare of the child as a paramount consideration in the context of the decision she was asked to make. The key factor impacting the welfare of C was the fact that allowing concurrent proceedings to run would give rise to the risk of conflicting orders, thus creating uncertainty which would be contrary to C's welfare. The interim interdict currently in place interdicts the respondent only from removing C from the United Kingdom, the previous interdict against removal from the care and control of the appellant having been recalled. The sheriff was correct in her analysis that the litigation was

further progressed in Tennessee and also correct in concluding that any orders made by Dundee Sheriff Court would only have relevance if the appellant was successful in arguing that the Tennessee court did not have jurisdiction and if she succeeds in obtaining the leave to remain in the United Kingdom. Given a context where the appellant's ultimate goal is return to the United States with the child, orders made by the Scottish courts would lack utility. Indeed if the appellant's application for leave to remain in the United Kingdom is refused she and C will have to return to the United States and further proceedings in Scotland would be meaningless. The appellant has had and continues to have access to the Tennessee court to advance her position.

[26] Contrary to the position as argued by the appellant the sheriff reached no conclusion on the enforceability or relevance of undertakings given by the respondent in relation to the Tennessee proceedings. In addition the parties' plan on conclusion of the respondent's studies was simply irrelevant. The sheriff was entitled to proceed on the basis of the joint minute of admissions and was entitled to determine the matter without a preliminary proof. The sheriff at paragraph 43 of her note had correctly posed the question she had to answer: Was the Tennessee court the appropriate forum for the action to proceed? She correctly recognised that the onus of proof was on the respondent and noted "the essential test is how real and substantial the connection is between the parties". She thus adopted what Lord Goff had said in *Spiliada Maritime Corp* v *Cansulex Ltd* 477G-478H.

[27] It was submitted that the sheriff had clearly appreciated the issue before the court was in relation to proceedings between the Scottish and Tennessee jurisdictions and not the Scottish and "United States" jurisdictions. Neither was it disputed that no stay had been sought of the Tennessee order pending appeal. The appellant's expert had submitted there were steps which could be taken to seek an emergency order relating to the welfare of the

child on the child's return to the United States. The sheriff had proper regard to the circumstances in which the Tennessee proceedings came to be raised and the sheriff properly considered the respective stages of the proceedings in Scotland and Tennessee and the reasons for the same. The proceedings in Tennessee are significantly further advanced to the Scottish proceedings: substantive orders regarding residence and contact for the child have been made by the Tennessee court. Accordingly the sheriff was entitled to reach the conclusion which she did and there is no basis for the court to interfere with her exercise of discretion, so the appeal should be refused.

Discussion

[28] The core issue in this appeal is the interpretation of section 14(2) of the Family Law Act 1986 and its application to the facts. Section 14(2) provides as follows:

> "Where, at any stage of the proceedings on an application made to a court in Scotland for a Part I order, it appears to the court—
>
> (a) that proceedings with respect to the matters to which the application relates are continuing outside Scotland or in another court in Scotland;
>
> (b) that it would be more appropriate for those matters to be determined in proceedings outside Scotland or in another court in Scotland and that such proceedings are likely to be taken there,
>
> (c) that it should exercise its powers under Article 15 of the Council Regulation (transfer to a court better placed to hear the case); or
>
> (d) that it should exercise its powers under Article 8 of the Hague Convention (request to authority in another Contracting State to assume jurisdiction),
>
> the court may sist the proceedings on that application or (as the case may be) exercise its powers under Article 15 of the Council Regulation or Article 8 of the Hague Convention."

[29] It is a matter of regret that it came to the court's attention in the course of drafting this opinion that the sheriff had apparently not been referred to the current version of section 14(2) of the Family Law Act 1986, which we quote above, and that this was not specifically drawn to the attention of the court. The amendment arises from the incorporation into UK law of Council Regulation (EC) No 2201/2003 of 27 November 20013 in relation to jurisdiction and the recognition and enforcement of judgments in matrimonial matters. The amendment removes the interpretative challenge with which the sheriff had been concerned as a result of the insertion of the word "or" between sub sections (a) and (b) in the previous formulation of the section.

We propose to adopt what was said by Lord McCluskey in *Hill* v *Hill* (*supra*) at page 192 because it is of equal application in the sheriff court and has even greater force with the removal of "or" between sub section (a) and (b).

> "In any case in which the Court of Session has to determine questions relating to the custody of and access to a child or children the paramount consideration is the welfare of the child or children. As the court has jurisdiction under s. 10 of the Family Law Act 1986, it follows that the welfare of James is the paramount consideration bearing upon the court's decision, even in relation to an essentially preliminary decision as to jurisdiction such as the court has to make under reference to s. 14 (2)….. The test (though it is not decisive) of asking which court is the "more appropriate" court is introduced into s. 14 (2) (b) but not in s. 14 (2) (a); I cannot believe that the court exercising its discretion under s. 14 (2) (a) should not regard that test as a relevant one, albeit not decisive."

Lord McCluskey's approach must be correct, and with the current formulation of the section the discretion clearly applies in the consideration of to both 14 (2) (a) and (b). This means the court is not bound to grant an application for sist where there are proceedings out with Scotland, but rather has to reach a view whether to sist as an exercise of discretion. Looking at the section as a whole and having regard to the common law background to a plea of *forum non conveniens*, it is a matter of impeccable logic that regard should be had to the

principles enumerated in the authorities to reach a view. This also accords with Lord Maclean's observations, when the section was in its previous form, in *B* v *B* 1998 Fam LR 70:

> "When a court in Scotland considers a motion to sist proceedings in terms of s 14(2)(a) or (b) it must in both cases, in my opinion, have regard to the principle of *forum non conveniens*... in applying the principle of *forum non conveniens* the court in the exercise of its discretion may sist the proceedings in Scotland if 'it is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of the parties and for the ends of justice' (see *Sim* v *Robinow* (1892) 19 R per Lord Kinnear at p 668,"

[30] Lord Maclean expressed doubt as to whether it was correct to say that the welfare of a child in a case such as this is the paramount consideration. We respectfully do not share that doubt and instead agree with Lord McCluskey that section 10 has application and therefore the court must have paramount regard for the welfare of the child. This was considered more fully in *Calleja* v *Calleja* 1997 SLT 579, which was not cited in *B* v *B*, where the Inner House upheld an appeal against the Lord Ordinary's decision for other reasons, but made no criticism of the analysis of Lord Osborne. We note in particular the reference at page 588 to *In Re F* [1990] 3 All ER 97 where the Lord Ordinary quotes with approval the dictum of Lord Donaldson MR at p 100":

> "The welfare of the children is indeed the paramount consideration, but it has to be considered in two different contexts. The first is the context of which court shall decide what the child's best interests require. The second context, which only arises if it has first been decided that the welfare of the child requires that the English rather than a foreign court shall decide what are the requirements of the child, is what orders as to custody, care and control and so on should be made."

In the present case we therefore proceed on the basis that the relevance of the welfare of the child as the paramount consideration is in the context of which court will decide what orders shall be made, rather than any substantive decision as to what orders ought to be made.

[31] We have some sympathy with the submissions of the appellant that the sheriff, despite her erroneous view that she was bound by the Outer House decisions in *Hill* v *Hill* and *B* v *B* which she should have viewed as being only highly persuasive, was unduly influenced by the decision of the Tennessee court that it had jurisdiction and that it had divorced the parties and made orders in relation to C.

[32] The authoritative statement on the principles to be applied in considering a motion for sist on the ground of *forum non conveniens* is set out by Lord Goff of Chieveley in *Spiliada Maritime Corp* v *Cansulex Ltd at page 476*:

> 'The basic principal is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie where the case may be tried more suitably for the interests of all the parties and the ends of justice.'

Lord Goff sets out a tripartite approach: (1) the party advancing the plea requires to demonstrate that there is another available forum of competent jurisdiction; (2) if established the party taking the plea requires to discharge the evidential burden, that forum is a clearly or distinctly more appropriate forum in which the case may be tried more suitably for the interests and ends of justice and the interests of the parties; and (3) if those two thresholds are passed where there are no other circumstances by reason of which justice requires that a stay should nevertheless not be granted.

[33] The terms of section 14(2) were also considered by the Inner House in *RAB v MIB*. There the issue of jurisdiction had already been authoritatively determined by the English Court of Appeal whereas in this case the appellant maintains her challenge to the jurisdiction of the Tennessee court and that is the subject of an appeal to the Appeals Court in Tennessee. We agree with the sheriff that the decision of the Tennessee court on jurisdiction after argument is sufficient for her to find it was a court with jurisdiction, which

satisfied the first leg of the tripartite test: another available forum of competent jurisdiction. We do however consider in the second leg of the test that the prospective uncertainty arising from the appeal is a factor to be considered in looking at whether the Tennessee court is a more appropriate forum for the cause to be tried in the overall interests of justice.

[34] Accordingly, the court being satisfied that the Tennessee court is a forum with jurisdiction, consideration should turn to the second leg of the test where it is for the respondent to satisfy the court that the Tennessee court is the appropriate forum for the action to proceed. The sheriff was satisfied that the Tennessee court was the more appropriate forum, for the reasons we have summarised in paragraphs [6]-[11] above.

[35] In order to determine whether some other forum is more appropriate, the court should first look to see what factors there are which point in that direction. Lord Goff at page 477 indicates his preference to adopt the expression used by Lord Keith of Kinkel in *The Abidin Daver* [1984] AC 398 at 415: "where he refers to "the natural forum" as being that with which the action had the most real and substantial connection." Thirty years on from the decision in *Spiliada Corporation*, the House of Lords' hesitation about whether the Latin brocard *forum non conveniens* is apt to describe the principle has even greater resonance and we find the description of the more natural forum to be more expressive.

[36] We recognise this is a difficult and finely balanced case and such cases are always going to be fact specific. The factors which we are about to refer to should be looked at in the context of which forum is best placed to secure the welfare of the child. Those listed by Lord Mclean are (i) the habitual residence of the child at the time an application for a residence order is made; (ii) which forum is more convenient for the bulk of the evidence to be led; (iii) in an urgent matter, in which jurisdiction are decisions likely to be reached more expeditiously and after more thorough consideration; (iv) in what circumstances were

proceedings commenced in both jurisdictions and (v) where the children presently are and how they got there. In a particular case there may be other factors which a court will find should also be taken into account but we consider the factors listed above will be key factors.

[37] The sheriff did have regard to all five factors. Indeed she identified a further four factors, which we set out in paragraph [7] and which we accept were relevant in the instant case, but we consider she has fallen into error in not having sufficient regard to habitual residence which weighs heavily in our view where the paramount consideration is ultimately the welfare of the child. The sheriff appears to have been deflected from the importance of habitual residence by focusing on what she described as the precarious nature of the appellant's residence in the United Kingdom.

[38] The court with jurisdiction based on the present location of the child, where there is no question of any dislocation from the established habitual residence, is likely to be the most appropriate for the hearing of evidence. This is also reflected in paragraph 12 of the Council Regulation which while not applicable to a case where the other court is in the United States also reflects the importance to be accorded to habitual residence.

> "(12) The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility."

We observe that with live links and modern technology the weight to be attributed to the location of the bulk of witnesses may be of less significance and a witness counting exercise is to be deprecated. However the Scottish court is in the instant case likely to be best placed to secure documentation or reports to assist it in making a determination on the ultimate issues which it will have to be determined for the welfare of C. The Tennessee court appears

to have reached a view based only the evidence of the respondent and the nanny. As matters stand the child is currently in Scotland and that weighs heavily with us in the desirability of a court in Scotland being the natural forum to determine matters relating to residence, contact and the overall welfare of the child. We consider this to be of key relevance even if as in the instant case there may be uncertainly about where C will be located in future, which may be neither Scotland nor Tennessee.

[39] The sheriff made reference to the "home court". The same expression was used by Lord McCluskey in *Hill* v *Hill* when he preferred the Supreme Court of Ontario because both parties in that case and the child were Canadian, the court had ready access to the circumstances in which the parties lived and were living and was much better placed to decide what was in the child's best interests. We consider the sheriff has fallen into error, not necessarily in her use of the phrase "home court", but in considering the same factors apply in the instant case as applied in *Hill* v *Hill*. The first point of distinction is that in *Hill v Hill* the settled family home was in Ontario and the child had been removed to Scotland from that location by the mother. In the instant case the last family home for the parties and the child was in St Andrews. At the time of the application before the sheriff and now the appellant and child are habitually resident in Scotland, whereas in *Hill v Hill* habitual residence was in Ontario. We consider there to have been persuasive factors in *Hill* v *Hill* for Lord McCluskey to conclude that a return to the Supreme Court of Ontario was appropriate and could be characterised as the "home court" which are not present here. While the sheriff is correct to identify that C had lived the greatest part of his life in Tennessee, given the various locations he had lived in his short life that is not in our view a significant factor. Having regard to the transient lifestyle of the parties we are unable to accept that the Tennessee court offers a more appropriate forum to determine the issues. In particular

Dundee Sheriff Court will be better placed to secure relevant evidence of the current circumstances and arrangement's for securing C's welfare.

[40] The sheriff appears to have been deflected from the importance of habitual residence by focusing on what she described as the precarious nature of the appellant's residence in the United Kingdom. In our view she has thus fallen into error. The respondent submitted that the appellant's ultimate goal was to return to the USA. While that may be true it cannot be submitted with certainty that she would return to Tennessee. That consideration does not feature in the analysis of the sheriff and lends some support to the appellant's contention that the sheriff may have considered the Tennessee court as an "American" court. We conclude that what we recognise as being a precarious immigration status for the appellant and C caused the sheriff to fail to give sufficient regard to the status quo in considering the welfare of the child and which was the more natural forum for the case to be heard.

[41] Although we accept that the appellant's connection with Scotland is tenuous due to the uncertainty of her immigration status, we also consider there to be some weight in the argument that the court in Tennessee, while it may have jurisdiction to consider the matter, may not indeed be the most appropriate court to consider the matter. We note in passing the references made in Lord Goff's speech in *Spilliada Maritime Corp* v *Cansulex Ltd* at p 476 on the different approach within the United States and Canada where there may be choices between competing jurisdictions within a federal state and a strong preference is given to the forum chosen by the plaintiff.

[42] Where here, in contrast to the situation in *Hill* v *Hill*, there is no suggestion of any impropriety on the child being resident in Scotland there is considerable merit in the overall interests of justice in determining the interests of the child even only on a temporary basis by the court with jurisdiction on the basis of the child's habitual residence. That view is but

reinforced when as here there may be a dispute as to the court best placed to deal with the matter when the child leaves Scotland in the event of C returning to a state other than Tennessee. But that is to speculate as to future events and we focus on the position as it was when the sheriff had to consider the matter, (which remains the position).

[43] We accept that the welfare of the child is a very significant factor and while any decision of the Dundee Court may be transient in the event of the appellant and C leaving the jurisdiction of Dundee Sheriff Court it places the court in Dundee in a highly advantageous position to make a determination while the child and appellant are habitually resident within its jurisdiction. We therefore find that the sheriff has fallen into error in not giving sufficient weight to this factor.

[44] The position is inherently uncertain at present given the imminent appeal hearing before the Court of Appeals in Tennessee on 8 November. While we accept that a decision of the appeal court in favour of the respondent would put beyond doubt the question of jurisdiction of the Tennessee Chancery Court, it may also find in favour of the appellant and allow the substantive matters to be reopened which would materially change the position on the extent of progress in the Tennessee action. As we outline above this is a factor to which the sheriff should have had regard in assessing the more appropriate court.

[45] We are also conscious of the need to progress cases involving children promptly and so long as the child remains resident here there may well require to be a determination of the Scottish courts to enable enforcement of any decision of the Tennessee Court. It is highly likely that evidence will be required of the child's current circumstances before any decision is reached. In practical terms therefore the continuance of the action before Dundee Sheriff Court even if subject to appeal would in our view be in the overall interests of justice and that the sheriff in Dundee is best placed to progress matters in the meantime and should

continue to do so. We find therefore that the sheriff erred in deciding that the Tennessee Court was the more appropriate forum and the sist should be granted, we need not have regard to the third leg of Lord Goff's test. Finally, for completeness we would record that we accept that the sheriff was entitled to proceed on the basis of the joint minute of admissions.

[46] Accordingly, we shall recall the interlocutor of the sheriff of 30 May 2017, repel the respondent's second plea in law, recall the sist and remit the cause back to the sheriff in Dundee to proceed as accords.

[47] Both parties submitted that expenses should follow success and the appeal warranted sanction for junior counsel. We agree and sanction the appeal and hearing before the sheriff on 28 March 2017 as suitable for junior counsel. Having found in favour the appellant we shall award expenses in her favour for the appeal and for the hearing before the sheriff on 28 March 2017.