

SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2024] SC EDIN 6

EDI-A359-22

JUDGMENT OF SHERIFF ROBERT D M FIFE

in the cause

MRS VIOLET MAY MILLAR or PRINGLE

Pursuer

against

DONALD STEWART WIGHTMAN

Defender

**Pursuer: Forrester, Solicitor Advocate; Ennova Law, Solicitors, Glasgow
Defender: Young, Advocate; Davidson Chalmers Stewart LLP, Edinburgh**

Edinburgh, 1 November 2023

The sheriff, having resumed consideration of the Note of Objections and Answers and the cause, finds the following facts to be admitted or proved.

Findings in fact

[1] Mrs Pringle and her late husband Mr Pringle purchased a flat at 2/2 58 Corstorphine High Street, Edinburgh ("the flat") in 1976. The Pringles did not use the flat. The flat remained unoccupied for many years.

[2] Mr Wightman is a former solicitor. Mr Pringle first met Mr Wightman some years prior to 2007, when Mr Wightman acted as a solicitor for the Pringles in some property transactions. Mr Pringle represented the interests of Mrs Pringle in all matters.

Mr Wightman had no commercial dealings with Mrs Pringle prior to the death of Mr Pringle in 2015. Over time, Mr Wightman and Mr Pringle became friends.

[3] In or around 2007, Mr Wightman became aware the flat was unoccupied.

Mr Wightman and Mr Pringle discussed the flat. Mr Wightman suggested that if the flat were to be occupied by a tenant, the Pringles would not have to pay any ongoing costs.

[4] Dr Moffat was a paying guest at the guesthouse run by Mr Wightman's wife. He stayed there for a number of months in 2007. Mr Wightman and Dr Moffat became friends.

Dr Moffat ran a charity. He was looking for somewhere to stay longer-term.

[5] Mr Wightman discussed with Mr Pringle about Dr Moffat moving into the flat.

Mr Pringle and Mr Wightman agreed Dr Moffat could move into the flat, and Mr Wightman would deal with the practical arrangements with Dr Moffat and take over all responsibility

for the flat including overheads, maintenance, repairs and expenses. There was no

discussion about rent. Mr Pringle had no expectation of receiving any rental income. This

was an informal agreement between the two of them as friends. The agreement was not

recorded in writing. Mrs Pringle was not involved in the discussions or the agreement.

Mr Pringle had no further involvement with the flat before his death in 2015. The Pringles

made no payments in respect of the maintenance or running costs of the flat after 2007.

[6] The flat was unfurnished. Prior to Dr Moffat moving into the flat around August

2007, Mr Wightman furnished the flat at his own expense. Dr Moffat agreed with

Mr Wightman to pay rent of £600 per month. This was an informal agreement between the

two of them as friends. The agreement was not recorded in writing. There was no lease.

[7] Dr Moffat made rental payments totalling £14,400 between 2007 and 2009. Dr Moffat

was then financially unable to pay rent. Dr Moffat paid no rent after 2009. He has continued

to occupy the flat since then.

[8] Mr Wightman paid for various overheads and running costs for the flat.

Mr Wightman paid council tax for the flat for a number of years. Dr Moffat paid council tax for some other years. The arrangement was very informal.

[9] Mr Wightman produced an accounting of his intromissions in terms of the interlocutor of 20 September 2022.

[10] Mr Wightman provided no figures or any vouching for any outgoings paid by him for the flat for the period between 2007 and 2009.

[11] Any payments made by Dr Moffat to Mr Wightman after 2009 were not payments of rent.

[12] It was in March 2022 that Mrs Pringle was first aware of Dr Moffat being a tenant of the flat when.

Findings in Fact and in Law

[13] The defender had a duty to account to the pursuer of his intromissions with the flat.

[14] The defender has produced an accounting in terms of the interlocutor of 20 September 2022. Repels the second and third pleas in law for the pursuer.

[15] Prior to 3 March 2022, the pursuer did not and could not with reasonable diligence have become aware that she had suffered a loss. Repels the third plea in law for the defender.

[16] The defender is due the pursuer the sum of £14,400 in rental payments. Repels the second plea in law for the defender.

[17] The defender is due the pursuer interest on the said sum of £14,400 as follows: (1) at 4 per cent a year (half the judicial rate) on £14,400 from 1 August 2007 to 1 September 2009,

being £1,152; and (2) at 8 per cent a year from 1 September 2009 to the date of decree, 1 November 2023, being £16,320, and a total of £17,472.

[18] Grants decree against the defender for payment to the pursuer in the sum of £14,400 together with interest of £17,472 to 1 November 2023.

Witness Evidence

Mrs Violet Pringle

[19] Mrs Pringle signed an affidavit as her evidence. Mrs Pringle and her late husband James Pringle lived together at 15 Caroline Terrace, Edinburgh until Mr Pringle died in January 2015. In 1976, Mr and Mrs Pringle purchased a flat at 2/2, 58 Corstorphine High Street, Edinburgh (“the flat”). The title was taken in joint names and the survivor.

Mrs Pringle has been the sole owner of the flat since Mr Pringle died.

[20] The flat was unoccupied for many years. Mr Wightman carried out some legal work for Mr Pringle and the Pringles. Later they became friends. At the time of Mr Pringle’s death in 2015, Mrs Pringle understood Mr Wightman had arranged for the flat to be occupied by a charity, but she was unaware any of the arrangements about the flat or what had been agreed between Mr Pringle and Mr Wightman.

[21] In around March 2022, Mrs Pringle was made aware by her solicitor, Mr Wilson, that Dr Moffat was living in the flat and there was a charity which had something to do with archaeology.

[22] After Mr Pringle’s death, Mr Wightman visited Mrs Pringle at Caroline Terrace from time to time. In around 2017, Mr Wightman bought Caroline Terrace from Mrs Pringle for £375,000, with a date of entry 21 July 2017. Payment was to be made by instalments:

£70,000 on 21 July 2017;

£30,000 on 21 August 2017, and

£500 per month from 1 September 2017, with the final balance being paid no later than 14 June 2019.

[23] Mr Wightman made the initial payment of £70,000 and Mrs Pringle granted a Standard Security over the property until payment of the balance. Mr Wightman failed to make the agreed payments. There was a further payment of £30,000 in 2019 and some payments of £500, but the balance was not cleared in the agreed time. The Standard Security was called up on 19 August 2021. In due course, the property was sold for about £625,000.

[24] Mrs Pringle did her best to answer the questions, acknowledging that some of the events occurred many years ago. Mrs Pringle was unable to assist the court beyond what was stated in her affidavit. Mrs Pringle was doing her best to tell the truth at all times. Her memory over the period 2007 – 2017/18 was generally poor. Her recollection of events beyond what was recorded in her affidavit was unreliable, partly due to the passage of time and partly on account of her age.

David Wilson

[25] Mr Wilson was a solicitor with Ennova Law, Edinburgh.

[26] Mrs Pringle was introduced to Mr Wilson as a client by Mrs Ann McKenzie who was a solicitor and Mrs Pringle's attorney under a Power of Attorney. Mr Wilson was provided with a copy of the offer and acceptance for the sale of Caroline Terrace and to call up the Standard Security over the property as payment of the balance of the purchase price had not been made by Mr Wightman. The property was ultimately sold in early 2022 for £625,555. The sums due under the Standard Security were paid. A further £27,000 was paid to Mr Wightman's solicitor for a postponed Standard Security over the property. Mrs Pringle

had not consented to that postponed security. The balance was held in trust, pending the outcome of the current proceedings.

[27] Mr Wilson became aware of the flat in Corstorphine in February 2022 when Mrs Pringle told him she owned the flat. Mrs Pringle thought the flat was occupied by a charity free of charge. She had gone to the flat to see for herself and saw the name on the door: Dr Moffat and reference to a company Soutra Archaeo-Medicine Limited. Mrs Pringle instructed Mr Wilson to carry out some enquiries. Mr Wilson searched the company name at Companies House. There was a company of that name. He checked the list of directors and found that one of the directors was Brian Moffat. Another of the directors was William Davidson with an address in Pathhead which Mr Wilson recognised. Mr Davidson had been a C.A. with whom he had dealt with previously. Initially, Mr Wilson wrote to Mr Davidson but received no response. A further letter was sent to the company at the Corstorphine High Street address. The following day, 3 March 2022, Mr Wilson received a telephone call from Dr Moffat. Mr Wilson recorded a file note of that telephone call (production 5/2/7) which was an accurate note of the call. The following are extracts from the file note:

“He was concerned at the suggestion no rent was being paid for the property. He had been in the property for about 15 years and the rent is £600 or £700 per month. It has been increased a couple of times during that time. He could not remember the exact amount because he inherited £55,000 and paid all of it to Wightman by way of advance rent, so as far as he is concerned the rent is at least up-to-date.”

“Wightman told him that he was the solicitor for Violet Pringle and had her authority to deal with the property. All payments have therefore been made to him. Dr Moffat understood that they were being passed on to Mrs Pringle and that she knew what was going on.”

[28] Dr Moffat told Mr Wilson he had lived in the flat for about 15 years. The flat was his home and for housing and archive for a charity he was running. As for rent, he said he was paying rent since the outset. He was quite unclear about what rent was payable. It had been £600 and might now be £700 per month. He said he was paying rent to Mr Wightman. Mr Wightman had told him he was Mrs Pringle's solicitor, that he was acting for her and that payments of rent were being passed on to Mrs Pringle. He told Mr Wilson rent was up-to-date and maybe some paid in advance. He said he had received an inheritance and paid that as an advance to Mr Wightman. Mr Wilson reported to Mrs Pringle about the call with Dr Moffat.

[29] Mr Wilson told Dr Moffat no further payments should be made and asked him to write to Mr Wilson to say how much he had paid. Mr Wilson received a letter from Dr Moffat dated 9 March 2022 (production 5/2/8). In that letter Dr Moffat stated "all due rent has been paid". The letter went on to state that Dr Moffat was in the process of purchasing the flat through Mr Wightman and that an advance of £60,000 had been paid to Mr Wightman. Dr Moffat was being encouraged to raise further funds towards "an (yet undisclosed) agreed sum". Mr Wightman did not have authority to sell the flat. Dr Moffat went on to state that the charity's funds "are entangled in a complex manner." That caused Mr Wilson concern. He looked at the accounts for the charity back to 2010. There had been no financial transactions at all since 2010.

[30] Mr Wilson replied to Dr Moffat by letter dated 14 March 2022 stating Mr Wightman did not have the authority of Mrs Pringle to deal with the property, to charge rent or to agree to any sale of the property and that no money should be paid to him. Dr Moffat did not respond to that letter.

[31] When Caroline Terrace was sold, Mr Wilson received instructions to raise an action of count reckoning and payment against Mr Wightman, the current court action.

[32] In the defences to the action, Mr Wightman said the flat was let to Dr Moffat in July 2007, that the rent was £600 per month and that in addition to the rent he had separately paid to Mr Wightman by way of loans £17,000 on 3 February 2017 and £47,000 on 23 March 2017. It was Mr Wightman's position that the "loan payments" had no relation to any lease of the flat.

[33] Mr Wilson wrote to Dr Moffat on 23 August 2022 (production 5/2/10) requesting additional information about these matters. Dr Moffat replied on 7 September 2022 stating the lease may have been informal as he could not remember signing a formal lease.

Dr Moffat agreed he had paid £17,000 and £47,000 to Mr Wightman by way of loans to him. Further, around 2010 Dr Moffat found himself in a poor financial position. He had to use foodbanks and stopped paying rent.

[34] Mr Wilson was of the view the reference to loans being made to Mr Wightman was entirely inconsistent with what Dr Moffat had said in the telephone call on 3 March 2022 and inconsistent with the letter from Dr Moffat dated 9 March 2022.

[35] Commenting on Dr Moffat's affidavit, it was Dr Moffat who called Mr Wilson not vice versa. Mr Wilson did not have Dr Moffat's contact number. Dr Moffat was not alarmed when he spoke to Mr Wilson on 3 March 2022.

[36] The questions from Mr Wilson did not cause Dr Moffat to panic. Dr Moffat was quite adamant rent had been paid up-to-date and that there were no arrears.

[37] Mr Wilson was an independent witness. He was credible and reliable.

Donald Wightman

[38] Mr Wightman was a retired solicitor. He had known Mr Pringle for a number of years before his death in 2015. He considered Mr Pringle a friend. He had some recollection of professional dealings with him. Mr Wightman had no dealings with Mrs Pringle.

[39] Mr Wightman recalled some discussion with Mr Pringle that it was not sensible for the flat in Corstorphine to remain empty when there were maintenance and insurance costs to be paid.

[40] Mr Wightman first met Dr Moffat when he came to stay in his wife's guesthouse for a couple of months in around 2007. He described Dr Moffat as a friend. Dr Moffat was looking for somewhere to stay long-term. Mr Wightman mentioned the possibility of him moving into the Corstorphine flat.

[41] Mr Wightman discussed this with Mr Pringle. Mr Wightman stated "obviously they agreed" but he had no recollection of discussing this with Mrs Pringle.

[42] Mr Wightman initially stated there was a lease as a lease was required, but later doubted whether there was ever any lease.

[43] Some informal arrangement was reached between Mr Wightman and Mr Pringle about letting out the flat. Mr and Mrs Pringle had no involvement at all in the arrangements. Mr Wightman took responsibility for furnishing the flat and agreeing a rent of £600 per month with Dr Moffat. Mr Wightman's understanding was that he would take over everything to do with the flat, being the "minuses and pluses". He would receive the rent from Dr Moffat, pay any outgoings, and retain any balance left over. During the period 2007-2022 when Mr Wightman received invoices for shared expenses for the flats at Corstorphine High Street, he paid a one-sixth share. Mr Wightman produced a number of invoices.

Rental Payments

[44] Dr Moffat stopped paying rent in around 2009/2010. Mr Wightman could offer no explanation why he did not ask Dr Moffat to pay rent: "it just wasn't paid".

[45] Mr Wightman said the later payments from Dr Moffat were loans, not rent: "the two were just not connected in my mind".

[46] Mr Wightman did not want to be out of pocket. The rent received balanced out the outgoings over the years. As Mr Wightman put it:

"No one was concerned about the rent."

[47] In terms of the accounting, the total rent received from Dr Moffat for the flat was £14,400. The rent was paid from 2007 to 2009/2010. Mr Wightman said he did not know why Dr Moffat had not paid any more rent until the present action was raised. He had since been told why Dr Moffat did not have funds.

Payments totalling £99,000

[48] Dr Moffat had made other payments to Mr Wightman totalling £99,000. Payments of £17,000 and £47,000 were made towards the deposit for his purchase of Caroline Terrace because Dr Moffat wanted to buy the Corstorphine flat. Mr Wightman described this as "a fairly loose arrangement" that if Dr Moffat lent him the money for Mr Wightman to pay the deposit of £70,000 for Caroline Terrace, he was going to apply for planning in principle for a house and garden at Caroline Terrace and substantial work needed to be carried out at Caroline Terrace. Once that was completed, Mr Wightman would either sell the plot or sell the whole site to pay back the loans to Dr Moffat and have spare funds to assist Dr Moffat to buy the Corstorphine flat.

Purchase of 15 Caroline Terrace, Edinburgh

[49] Mr Wightman obtained a valuation for Caroline Terrace of £375,000 in December 2016 (production 6/1/1). On 12 December 2016, Mr Wightman made an offer to Mrs Pringle to purchase Caroline Terrace at a price of £375,000 (production 6/2/1). Mrs Pringle accepted the offer. There was no structure for payment of the purchase price by instalments.

Mr Wightman was unable to recall what payments were made or when towards the purchase price of £375,000. As for the loans from Dr Moffat, Mr Wightman stated interest was payable at the rate of 3%, but there was nothing in writing.

[50] Mr Wightman disputed that at the time the Standard Security was called up sums due to Mrs Pringle were £303,602, but he could offer no alternative figure.

“Other advances to fund general purpose work in capital”

[51] This was taken from the accounting and the following figures:

£1,100

£1,900

£1,800

£3,000

[52] This had nothing to do with the Corstorphine flat. Mr Wightman had borrowed £3,000 from a Dr Stone who was a friend and required to pay that back. Mr Wightman could not recall for what the other advances were but they were debts he owed. Dr Moffat lent Mr Wightman payments totalling £7,800 so that he could pay off these debts.

Accounting

[53] The financial records used by Mr Munro in preparing the accounting were recovered from the Corstorphine flat by Mr Wightman and Mr Munro while Dr Moffat was in hospital in 2022.

Loans from Dr Moffat

[54] Mr Wightman said interest was payable at 3% on the loans from Dr Moffat totalling £64,000. This was not in writing. They had to be paid back within a certain time (unspecified). It was always his intention to repay the loans from the sale of Caroline Terrace. As at June 2023, Mr Wightman had not made any repayments to Dr Moffat.

[55] The further loan of £35,000 from Dr Moffat was to enable Mr Wightman to pay something of the order of £24,000 to his solicitors Gibson Kerr and for additional tax. The rest was for renovation work at Caroline Terrace.

[56] Dr Moffat made the various loans to Mr Wightman because he asked Dr Moffat for the money.

[57] Dr Moffat referred to various sums in his affidavit: £64,000 loan; £55,000 inheritance; and £60,000 advance payment. They all represent one sum, not separate amounts.

[58] Mr Wightman was not always a good historian. His recollection of events and detail was at times uncertain. I accepted on the balance of probabilities an informal agreement was reached between himself and Mr Pringle about him taking over responsibility for the flat in 2007. The arrangements between himself and Dr Moffat were, at best, speculative, but I accepted on the balance of probabilities such an agreement was made between the two men.

Dr Brian Moffat

[59] Dr Moffat adopted as his evidence his affidavit, 6/2/4 of process.

[60] While I have no reason to doubt that Dr Moffat did not keep good health, in the course of his evidence he tended to answer questions which caused him some difficulty by claiming amongst other ailments that he had “diminished responsibility”. I treated that evidence with some caution.

[61] Dr Moffat moved into the flat in 2007. He paid rent of £600 per month and stopped paying rent in around 2009. His income dried up at that time. He was reliant on food banks by 2010. He explained he was in line for bequests from four relatives and that he would receive a number of inheritances. He never restarted paying rent. He has not paid any rent since 2009, but continued to stay in the flat.

[62] Dr Moffat met Mr Wightman when staying in the guesthouse run by Mr Wightman and his wife. Mr Wightman arranged for him to move to the Corstorphine flat. He had never met Mrs Pringle.

[63] Dr Moffat made various payments to Mr Wightman because he was asked to and because he was able to from inheritances. Dr Moffat wanted to buy the flat, but did not have sufficient funds. It was agreed between them that he would loan Mr Wightman funds towards the purchase of Caroline Terrace. From the profits of Caroline Terrace when sold, Mr Wightman would repay the loans and then help him to fund the purchase of the flat.

[64] Dr Moffat had a telephone call with Mr Wilson of Ennova Law in March 2022. He did tell Mr Wilson he had received £55,000 inheritance and paid it all to Mr Wightman in advance rent, but it was the same money as the £64,000 of loans made to Mr Wightman.

[65] Following the telephone call with Mr Wilson, Dr Moffat was in a bit of a panic. He may have said what he said as he was “slipping into illness at this time; that might explain the panic.” The letter he sent was plainly inaccurate.

[66] As for the telephone call with Mr Wilson, the reference to the payment of £55,000 to Mr Wightman by way of advance rent was “a clumsy and inappropriate term.” The £55,000 was an inheritance. This was paid to Mr Wightman because he needed the money and “at that time I didn’t. I understood that I was in arrears of rent. I can’t help but combine them/merge them.”

[67] Dr Moffat accepted he was in arrears of rent when he spoke with Mr Wilson. As for the sums of £55,000, £64,000 and £60,000, Dr Moffat said the £55,000 was the same as the £64,000 loan. The £60,000 loan was to be used towards the purchase of Caroline Terrace. The various sums of £55,000, £64,000 and £60,000 did cause some confusion.

[68] Dr Moffat was not always a good historian. On a number of occasions, he gave inconsistent answers to questions. Dr Moffat was well aware he had not paid any rent since around 2009. The arrangements between himself and Mr Wightman were, at best, speculative, but I accepted on the balance of probabilities such an agreement was made between the two men. Mr Wightman made substantial loans to Mr Wightman in anticipation that at some future date Mr Wightman might assist Dr Moffat in the purchase of the Corstorphine flat even though Mr Wightman was not the owner of the flat.

Charles Munro

[69] Mr Munro was a retired accountant who prepared the account of intromissions. He was instructed by Mr Wightman to record transactions between Dr Moffat and Mr Wightman in relation to rent for the Corstorphine flat and other values which were loans

of one kind or another. Mr Wightman provided him with the records. Dr Moffat provided him with information.

[70] The accounting was “as complete as could be in the circumstances.” Under the heading “Advances to DSW to fund purchase of 15 Caroline Terrace, Edinburgh, EH11 2JP” there are payments totalling £99,000. Mr Wightman told Mr Munro he intended to buy the property. He spoke to Dr Moffat who said the same thing. The sums were paid over by bank transfer/cheques directly to Mr Wightman from Dr Moffat.

[71] The accounting was based on what Mr Munro could prove from the receipts for rent Mr Wightman gave to Dr Moffat and through bank account records. Mr Munro spoke to the accounting which he had prepared. He was a credible and reliable witness.

Submissions

[72] The parties lodged written submissions which were supplemented at a hearing.

Submissions for pursuer

Motion

[73] The primary motion for the pursuer was for the court to grant decree as first craved in the sum of £300,000, with interest thereon at the rate of 8% per annum from the date of citation until the date of payment.

[74] Alternatively, the motion was for decree for such other sum as may appear to be the true balance due to the pursuer with interest thereon at the rate of 8% per annum from the date of citation until the date of payment.

Accounting

[75] The defender was under a duty to produce a full Account of Intromissions with rent and all other sums paid by the tenant. The defender had failed to obtemper the interlocutor of 20 September 2022, which provided:

“ii) of consent, ordains the defender to produce a full account of his intromissions with rent and all other sums paid by the tenant of the pursuer’s heritable property flat 2/2, 58 Corstorphine High Street, Edinburgh EH12 7SY no later than 31 January 2023”.

[76] The Account of Intromissions was incomplete for the following reasons:

1. It contains little or no information as to the defender’s intromissions with money paid by the occupant of the flat. The account is predominantly based on the records found within the flat whilst Dr Moffat was in hospital;
2. It does not include the £60,000 that Dr Moffat stated in evidence was in the hands of the defender towards the purchase of the flat;
3. In Dr Moffat’s telephone call with Mr Wilson and correspondence to Dr Moffat stated that all due rent had been paid. This is not reflected in the Account of Intromissions;
4. The information provided to Mr Munro was incomplete and Mr Munro could not have prepared a full Account of Intromissions based on the information provided. The defender sifted Dr Moffat’s records and only provided Mr Munro with the information that he considered relevant. The defender did not provide his bank records;
5. With the exception of the payments received by the defender from Dr Moffat in 2017, no information is provided to show the receipt of payments by the defender;

6. The defender stated that Dr Moffat had made payment in cash and he did not keep a record of what had been paid;
7. The defender had not sought evidence from the guesthouse that might indicate when Dr Moffat took occupation of the flat;
8. In evidence the defender made reference to cheque stubs that have not been produced;
9. Mr Munro confirmed that he was unable to retrieve Dr Moffat's bank records for the period 2006 to 2010. With the exception of two heavily redacted bank statements which purport to show payments of insurance premiums in 2009 and 2010 (pages 20-21 of the Account of Intromissions), the defender did not provide any bank statements for this period;
10. During the telephone call between Dr Moffat and Mr Wilson, Dr Moffat stated that the rent had increased a couple of times. This is not shown in the Account of Intromissions;
11. Page 3 of the accounting refers to three advances totalling £99,000 made in 2017 "to fund the purchase of 15 Caroline Terrace". During 2017, the defender paid the pursuer £72,000 for the purchase of Caroline Terrace. There is a shortfall of £27,000 for which no explanation is given in the accounting. In evidence Dr Moffat was unable to say what the third instalment of £35,000 was for.

Decree by default

[77] As a general principle in an action of account reckoning and payment, once an account has been lodged it is incompetent to grant decree by default for the sum craved failing production of the account. In the present case, the defender had failed to produce a

full account of his intromissions and, in the absence of a full account, the court could competently grant decree by default. In support of that submission, the pursuer relied on *James Chapman v Money Wise (Scotland) Ltd* 2002 ScotCo 210 at paras 13 and 14.

Alternative motion

[78] As the defender had failed to lodge a full Account of Intromissions, the account could not be relied upon to identify the true balance due to the pursuer. The court required to look at the evidence of the witnesses. Dr Moffat had been in occupation since 1 August 2007 and the rent payable was at least £600 per month. The total rent payable by Dr Moffat up to the date of citation would be £107,400. Interest to the date of citation is £63,876.33, bringing out a true balance of £171,276.33.

[79] The court should take into consideration all the sums shown in the account, a total of £121,200 falls to be regarded as payments of rent or insurance premiums for occupation of the flat. The court should reject any suggestion that these payments are loans in the absence of any vouching. The total sum paid by Dr Moffat to the defender was £121,200. Interest until the date of citation is £58,077.85 which brings out a true balance of £179,277.85.

Interest

[80] Interest is payable at the rate of 8% per annum from the date in which the defender received each of the payments from Dr Moffat until the date of citation. Any funds collected in rent belonged to the pursuer. The pursuer relied on the following authorities:

1. Gloag & Henderson, *The Law of Scotland*, 13 Edition, at para 42.15.
2. *Clarke v Clarke's Trustees* 1925 SC 693.
3. *Coxall v Stewart* 1976 SLT 275.

Liability to pay

[81] It was too late for the defender to argue that he was not liable to account or not liable to make a payment to the pursuer. The pursuer relied on the following authorities:

1. *MacPhail Sheriff Court Practice* 4th Edition, at para 21:03.
2. *Paterson v Paterson* 2005 SLT (Sh Ct) 148.

Prescription

[82] It was too late for the defender to argue he is not liable to account or make payment of rent which might have been due by the defender to the pursuer which pre-date 9 June 2017 having prescribed in terms of section 6 of the Prescription and Limitation (Scotland) Act 1973 (“the 1973 Act”).

[83] The pursuer gave three reasons as follows:

1. The pursuer’s loss is a continuing loss in terms of section 11(2) of the 1973 Act and, as such, the prescriptive period has not commenced;
2. That prior to 3 March 2022 (when Mr Wilson received a telephone call from Dr Moffat that he had been living in the flat since around 2007) the pursuer did not, and could not with reasonable diligence have become aware that she had suffered a loss. The prescriptive clock did not commence until 3 March 2022 in terms of section 11(3) of the 1973 Act.
3. In any event, the claim is imprescriptible on the basis the pursuer was induced to refrain from making a claim by reason of fraud on the part of the defender, section 6(4)(a)(i) of the 1973 Act.

[84] In support of the submission that the claim was imprescriptible, the pursuer relied on the following cases:

1. *Dryburgh v Scotts Media Tax Ltd* [2014] CSIH 45.
2. *Heather Capital Ltd (In Liquidation) v Levy & McRae* [2017] CSIH 19.
3. *BP Exploration Operating Co Ltd v Chevron Transport (Scotland) Ltd* 2002 SC (HL) 19 at paras [107] and [108].

Submissions for defender

Motion

[85] The defender moved the court to:

1. Repel the second, third and fourth pleas in law for the pursuer;
2. Sustain the defender's second plea in law and thereafter assoilize the defender;
3. *Esto* the court did not sustain the defender's second plea in law, to sustain the defender's third plea in law and assoilize the defender in respect of any obligation to make payment to the pursuer which arose prior to 9 June 2017 on the basis that these obligations have prescribed;
4. *Esto et separatim*, uphold the defender's fourth plea in law that the sum sued for is excessive.

[86] The defender owed no duty to make payment. The primary position was that the defender was not under any obligation to make payment of any sums to the pursuer. The defender had provided an accounting. The defender was permitted under the terms of the agreement between the defender, the pursuer and Mr Pringle to accept the rent paid by Dr Moffat in return for attending to the landlord's obligations under the lease. The present

action had been raised as the pursuer felt wronged by the defender in relation to the sale of Caroline Terrace which the pursuer felt was for undervalue.

[87] The defender complied with the order of court of 20 September 2022 in that he provided an Account of Intromissions, number 17 of process. Rent was paid by Dr Moffat between 2007 and 2009. The final rental payment by Dr Moffat was in 2009. The defender was not in default. It was incompetent to award a random sum.

Value of the rent received

[88] The rent received was £14,400. That was reflected in the accounting and consistent with the evidence from Dr Moffat.

Attributing other payments to rent

The £99,000 in loans

[89] The pursuer required to prove on the balance of probabilities that payments in the accounting are intromissions properly due to her. It was not enough for her to point to money received and to aver that they must represent rental payments. The onus was not on the defender to prove that the loans he received from Dr Moffat were not rent. The defender provided an explanation of the payments he received from Dr Moffat. Both Dr Moffat and the defender were clear that the payments had nothing to do with rent.

Prescription

[90] In terms of section 6(1) of the 1973 Act, the pursuer's claim had prescribed to the extent that it related to any rent said to have been received prior to June 2017.

[91] The pursuer then relies on fraud and concealment on the part of the defender such that the claim is imprescriptible. That is denied. There can be no fraud or concealment if the defender and Mr Pringle had come to an arrangement in respect of rent.

The rate of interest

[92] The pursuer relies on authorities which relate to intromissions by trustees. Trustees are in a special category. The fact that beneficiaries are entitled to a return on the trust fund is an explanation why there would be different rules for trustees of a fund. The usual rule applies. If any award is made interest ought only to run from the date of decree.

Note

Procedure in count reckoning and payment actions

[93] The procedure in actions of count reckoning and payment was set out by the Sheriff Appeal Court in *Gray v Cape T/A Briggate Investments* [2021] SAC (Civ) 32 at paras 25-35:

“26. An action for count reckoning and payment 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.

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.

28. The purpose of an action for account reckoning and payment is not the provision of documents, but the payment of sums due; what matters is an accounting.

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.

32. The provision on 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.

33. A timetable should be allowed for adjustment; a record of the objections and answers should be made up... 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... At a procedural hearing the court can determine procedure and assign a debate or proof or proof before answer... 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.

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."

Procedure in the present case

[94] In answer 8 of the defences the defender admitted he was under a duty to account to the pursuer for his intromissions with rent and other payments under the lease of the flat under explanation that any arrangements for payment between the defender and Dr Moffat were personal between them and accordingly there was no such duty to account to the pursuer for such payments.

[95] On 20 September 2022, of consent of parties, the court ordained the defender to produce a full account of his intromissions with rent and all other sums paid by the tenant of the flat.

[96] Accordingly, the court determined of consent of parties that the defender is liable to account to the pursuer. That is no longer a live issue. The defender contends he has complied with the order of the court to produce a full account of his intromissions and that in the particular circumstances of the present case no sum is due to the pursuer.

Prescription

[97] A preliminary plea of prescription was taken by the defender prior to the Record being closed, and the defender lodged a Rule 22 Note which referred to the defender's third plea in law and prescription. The defender was entitled to raise the question of prescription at that stage. The pursuer's submission that it was too late is unsound and is repelled.

[98] On the evidence I have accepted, any payments of rent which pre-date 9 June 2017 have not prescribed by passage of time under section 6 of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act").

[99] In particular, in terms of section 11(2) of the 1973 Act the pursuer's loss was a continuing loss and prior to 3 March 2022, the pursuer did not, and could not with reasonable diligence have become aware that she had suffered a loss. That was the date on which Mr Wilson had a telephone call with Dr Moffat, and Dr Moffat said he had been in the flat for about 15 years and the rent was £600 or £700 per month. The defender had the opportunity of explaining to the pursuer about rent received from Dr Moffat but chose not to do so. The defender's third plea in law is repelled.

The evidence

[100] While Mrs Pringle was doing her best to tell the truth, her evidence really came from her affidavit dated 24 March 2022. Her affidavit was admitted in evidence. No objection was taken to any part of the affidavit on the grounds of competency or relevancy.

[101] I found Mrs Pringle's answers to supplementary questions to be of little assistance to the court. Her recollection was poor. That caused me to pause and consider what weight could be placed on the affidavit evidence.

[102] I concluded I could not rely on any factual matters which were in dispute.

Mrs Pringle did not know anything at all about the arrangements for the flat. Accordingly, little weight could be attached to the affidavit. I did accept it was in March 2022 when Mrs Pringle was first aware of Dr Moffat being a tenant following the telephone call between Mr Wilson and Dr Moffat and that prior to 3 March 2022, the pursuer did not and could not with reasonable diligence have become aware that she had suffered a loss.

[103] Given that Mr Wightman was a retired solicitor, I was surprised at the absence of detail and lack of clarity in answers to various questions. I treated his evidence with caution. I accepted he and Mr Pringle had agreed informally that Mr Wightman would take over the running of the flat and that the Pringles would have no ongoing expenses.

Mr Pringle did not expect to receive any rental income.

[104] Dr Moffat was not always consistent in answers to question. I treated his evidence with some caution. I accepted he and Mr Wightman had an informal agreement that he would assist Mr Wightman in the purchase of Caroline Terrace with the intention that, once Caroline Terrace was later sold, from the profit on sale Mr Wightman would assist Dr Moffat in buying the flat.

[105] Both Mr Wilson and Mr Munro were credible and reliable witnesses.

Flat 2/2, 58 Corstorphine High Street, Edinburgh

[106] Mr Wightman and Mr Pringle were known to each for some time prior to 2007.

Mr Wightman carried out some legal work for at least Mr Pringle. Mr Wightman and Mr Pringle became friends.

[107] In around 2007, Mr Wightman and Mr Pringle had some discussion about the flat which had been unoccupied since it was purchased. Over the years, Mr and Mrs Pringle

had expressed no interest in generating income from the flat. Mr Wightman suggested the flat could be occupied by a charity run by Dr Moffat and relieve Mr and Mrs Pringle of paying council tax and any other expenses. On the balance of probabilities, some informal arrangement was agreed between Mr Wightman and Mr Pringle about the flat. The arrangement was not in writing.

[108] Mr Pringle agreed that Mr Wightman would take over responsibility for the flat including furnishing the flat, maintenance and repairs and it can reasonably be inferred that Mr Pringle would not expect Mr Wightman to manage the flat for no return or to be out of pocket.

[109] Mr Pringle gave Mr Wightman keys for the flat. Dr Moffat moved into the flat as a tenant in August 2007. Mr Pringle and therefore Mrs Pringle had no further involvement with the flat prior to his death.

[110] Dr Moffat moved into the flat in 2007 and continues to occupy the flat. A rent of £600 per month was agreed between Mr Wightman and Dr Moffat. There was no written lease.

[111] On the balance of probabilities, Mr Pringle had no expectation that Dr Moffat was to pay rent or that he would receive rental income. Mr Wightman did not inform Mr Pringle that rent was being paid for the flat. There is no evidence that Mr Pringle was aware rent was to be paid by Dr Moffat.

[112] Mr Wightman managed the flat on an informal basis, collecting rent from Dr Moffat and dealing with the property as he thought fit.

[113] In terms of the accounting, Dr Moffat paid rent of £600 per month from 1 August 2007 until 1 September 2009 with payments vouched totalling £14,400. Dr Moffat has paid no rent since 1 September 2009.

The Accounting

[114] Mr Wightman is entitled to assert that on the accounting no payment is due to Mrs Pringle. On the evidence, is Mr Wightman due to make any payment to Mrs Pringle? If so, what payment is due?

Payments of Rent

[115] The only evidence of what rent was paid by Dr Moffat are the vouched payments totalling £14,400 from 2007 to 2009. In addition, there is the oral evidence from Mr Wilson, Mr Wightman and Dr Moffat. I accept as accurate what Mr Wilson recorded in the note of the telephone call with Dr Moffat on 3 March 2022. Having considered Dr Moffat's evidence and the other evidence, I have concluded what he said to Mr Wilson that the rent was paid up to date and the £55,000 he inherited was paid to Mr Wightman as advance rent is not reliable. It is inconsistent with other evidence which I have accepted on the balance of probabilities. Dr Moffat wanted to give the impression the rent was paid up to date, in the knowledge he had not paid any rent since 2009. No other reliance can be placed on the note in determining the substantive issues in this action. Further, the letter of 9 March 2022 to Mr Wilson stating "all due rent has been paid" is not correct.

[116] Dr Moffat paid no rent after 2009. I do not accept Dr Moffat paid £55,000 to Mr Wightman in advance rent.

Payments totalling £99,000

[117] The payments of £17,000, £47,000 and £35,000 in 2017 totalling £99,000 are properly included in the accounting in terms of the interlocutor of 20 September 2022. It is of note the payments were made some nine years after the last payment of rent.

[118] The informal 'loose' arrangement between Dr Moffat and Mr Wightman was highly speculative. There was no loan documentation. Dr Moffat may have been influenced by Mr Wightman to make substantial loans to him to enable Mr Wightman to purchase Caroline Terrace in anticipation that at some future unknown date Mr Wightman might assist Dr Moffat in the purchase of the flat, when Mr Wightman was not the owner. Mr Wightman has never made any repayments of the loans to Dr Moffat. Dr Moffat has continued to occupy the flat.

[119] Mrs Pringle was unable to assist the court in contradicting the purpose of these payments. There is no reliable evidence these were rental payments. While the absence of documentary evidence is unsatisfactory, I have concluded in all the circumstances and on the balance of probabilities, these payments are not attributable to rental payments properly due to Mrs Pringle. They were informal loans from Dr Moffat to Mr Wightman in the context of the agreement between them. No payment is due to Mrs Pringle in respect of these payments.

"Other advances to fund general purpose working capital"

[120] The heading in the accounting is perhaps misleading. In the Answers to the Note of Objections these advances are referred to as costs associated with general maintenance of the flat without any further specification.

[121] Mrs Pringle was unable to assist the court in contradicting the purpose of these payments. There is no reliable evidence these payments were rental payments.

[122] The first payment of £1,100 was apparently to repay an unspecified loan owed by Mr Wightman for which there was no vouching. On the balance of probabilities, it can reasonably be inferred the payment of £1,100, the random payments of £1,900, £1,800 and £3,000 made in 2015, 2016, 2017 and 2021 and all totalling £7,800 were for miscellaneous unspecified debts incurred by Mr Wightman. Mr Wightman persuaded Dr Moffat to pay off these debts in further loans, asking him to make payment as necessary at the time. I again formed an impression of Dr Moffat being encouraged by Mr Wightman to make these loans in the context of the agreement between them,

[123] While the absence of documentary evidence is unsatisfactory, I have concluded in all the circumstances and on the balance of probabilities, these payments totalling £7,800 are not attributable to rental payments, but were further loans from Dr Moffat to Mr Wightman. No payment is due to Mrs Pringle in respect of these payments.

Compliance with the interlocutor of 20 September 2022

[124] The defender has produced an accounting. I had no concerns about the independence of Mr Munro in preparing the accounting. I have concluded on all the evidence before the court that the pursuer has failed to prove on the balance of probabilities the defender is in default of the interlocutor of 20 September 2022. The pursuer's motion for decree in the sum of £300,000 as first craved is refused. The pursuer's second and third pleas in law are repelled.

What, if any, payment is due?

[125] The rental payments vouched totalled £14,400. The defender has made no attempt to quantify any expenditure on the flat during the period 2007 to 2009. While the defender might not have been able to provide some vouching, he should have been able to undertake some assessment of expenditure. For example, he furnished the flat prior to Dr Moffat moving into the property. The defender averred what items he purchased, but has made no effort to cost these items. There are no figures for the running costs of the flat. On the assumption Dr Moffat paid rent, the defender was responsible for all household expenditure including utility bills, insurance, council tax and any maintenance and repair costs during the period from 2007 to 2009.

[126] In the absence of any detail on any outgoings, the court is not in a position to form any view on what costs were incurred.

[127] In all the circumstances, the defender is due the pursuer the sum of £14,400 in rental payments.

[128] Accordingly, I will repel the second plea in law for the defender.

Interest

[129] Interest is a matter for the discretion of the court. In the particular circumstances of the case, I have concluded a reasonable approach to adopt is to apply a rate of 4 per cent a year (half the judicial rate) on £14,400 during the period from 1 August 2007 to 1 September 2009, namely £1,152. As the loss of £14,400 had been incurred by 1 September 2009 interest is to apply at 8 per cent a year from 1 September 2009 to the date of decree, 1 November 2023, namely £16,320 which is payable by the defender to the pursuer. The total interest due by the defender to the pursuer to the date of decree is £17,472.

Decision

[130] I will grant decree against the defender for payment to the pursuer in the sum of £14,400 together with interest of £17,472 to 1 November 2023.

[131] Expenses are reserved. The sheriff clerk will fix a hearing on expenses.