



OUTER HOUSE, COURT OF SESSION

[2017] CSOH 114

P452/16

OPINION OF LADY WISE

In the note by

BILL CLEGHORN, Aver Chartered Accountants

Noter

for an Order under subsection (2) of section 98 of the Proceeds of Crime Act 2002 for authority to carry out the disposal of a right of interest in a family home

against

MARGARET DUNCAN

Respondent

Noter: Ower; Brodies LLP

Respondent: D McLean; Balfour + Manson LLP

31 August 2017

Introduction

[1] The noter is a chartered accountant appointed as enforcement administrator in terms of section 128 of the Proceeds of Crime Act 2002 (“the 2002 Act”) to take possession of the realisable property of James Lynn Calderwood Duncan (“Mr Duncan”). He has brought these proceedings to seek the disposal of the family home at 4 Douglas Street, Blantyre (“the property”) and decree of removal of the said Mr Duncan and his family, including the respondent and her granddaughter, from that property. The proceedings are brought in

terms of section 98 of the 2002 Act. The respondent is the ex-wife of Mr Duncan and opposes the application. A Proof took place as there were one or two contentious issues of fact in addition to the application of the law to the facts being in dispute.

The Agreed Facts

[2] There was substantial agreement in relation to many of the facts and I record my gratitude to counsel for that as considerable efforts were made to limit the scope of the factual dispute at the hearing. A very detailed Joint Minute was presented and requires to be set out in full as it provides much of the background to the legal argument that took place. It was in the following terms:

"The confiscation order

1. In 2007, James Lynn Calderwood Duncan, formerly residing at 4 Douglas Street, Blantyre G72 0DW and now at c/o HMP Prison Shotts, Shotts, Lanarkshire, ML47 4LE ('Mr Duncan') was charged, along with others of being concerned in the supply of cannabis, and with murder.
2. Following a trial before the Honourable Lord Carloway (as he then was) and a jury in November and December 2007, Mr Duncan was convicted of those charges. He was sentenced to a period of five years' imprisonment on the charge of being concerned in the supply of cannabis and he was sentenced to life imprisonment in respect of the murder charge, with a punishment part of 17 years and six months, both sentences to run from 23 November 2007.
3. Subsequently, a Joint Minute was entered into between the Advocate Depute and counsel for Mr Duncan, in terms of which it was agreed as follows:
 - '(1) That the proceeds of general criminal conduct of the said JAMES LYNN CALDERWOOD DUNCAN is £740,075.48.
 - (2) That the realisable assets of the said JAMES LYNN CALDERWOOD DUNCAN are as follows:-
 - (i) His interest in the heritable property at 30 Shawburn Street, Hamilton ML3 9DX.

- (ii) His interest in the heritable property at 4 Douglas Street, Blantyre G72 0DW.
- (iii) The sum at credit of Halifax account roll number [D/....]
- (iv) The sum at credit of Halifax account roll number [2/....].

(3) That a Confiscation Order be made in the sum of £159,248.66.'

4. Accordingly, on 12 January 2009, in terms of Section 92 of the Proceeds of Crime Act 2002 ('POCA'), the court made a confiscation order in the sum of £159,248.66 (Production 23/6).
5. In terms of that confiscation order, Mr Duncan was required to pay to the Sheriff Clerk at Lanark the sum of £159,248.66, within six months from the date of the Order.

The appointment of the pursuer as enforcement administrator

6. By interlocutor dated 15 December 2015, the Noter was appointed, in terms of Section 128 of POCA, as enforcement administrator, to take possession of the realisable property of Mr Duncan, including (but not restricted to):
 - (i) 4 Douglas Street, Blantyre;
 - (ii) Toll Cottage, Lamington ('Toll Cottage'); and
 - (iii) 40 Ayr Road, Rigside.
 (Production 23/1)

Sums paid in terms of the confiscation order

7. Prior to the appointment of the Noter as enforcement administrator, Mr Duncan had paid £81,069.69 of the total sum due.
8. The sums paid include £48,240.77 in respect of the free proceeds of the sale of 30 Shawburn Street, Hamilton, which were received by the Sheriff Clerk at Lanark in or around January 2011, and £17,096.31 in respect of the free proceeds of the sale of Toll Cottage, which were received by the Noter on or around 29 April 2016.
9. The outstanding balance due to be paid in terms of the confiscation order amounts to £61,082.66.

10. In addition, interest in the sum of £46,397.42 remains outstanding, assuming interest to run at 8% a year in accordance with section 117 of POCA. (Production 23/24)

The properties

11. Mr Duncan is the heritable proprietor of 4 Douglas Street, Blantyre, Glasgow G72 0DW, which is the property registered in the Land Register for Scotland under Title Numbers LAN193262, LAN121499 and LAN202705 ('the Property'). (Productions 23/3, 23/4 and 23/5)
12. The Property comprises three titles:
- (i) Mr Duncan purchased the property registered in the Land Register for Scotland with title number LAN121499, for a consideration of £115,000, on 22 October 2004 (Production 23/4);
 - (ii) on 5 February 2007, the property registered in the Land Register for Scotland with title number LAN193262 was transferred to Mr Duncan, for love, favour and affection; and
 - (iii) On 25 March 2008, the property registered in the Land Register for Scotland with title number LAN202705 was transferred to Mr Duncan, for no consideration.
- (Productions 23/5 and 23/3)
13. As at 1 December 2016, the market value of the Property was £115,000. (Production 23/13).
14. Mr Duncan obtained a mortgage in respect of the Property, and granted a standard security over the property in favour of Halifax Plc, which was registered on 12 November 2004. (Production 23/4)
15. As at 30 September 2016, the balance due in respect of the mortgage due to Halifax Plc was £63,726.37. (Production 23/12)
16. Mr Duncan is also the heritable proprietor of 40 Ayr Road, Rigsid, which is registered in the Land Register for Scotland under title number LAN165063. (Production 23/2)
17. Mr Duncan purchased the property at 40 Ayr Road, Rigsid ('the Ayr Road property') on 24 February 2006 for £15,000. (Production 23/2)
18. The Ayr Road property is a commercial property. Mr Duncan operated a café from the Ayr Road property. It was later leased to a tenant, but then damaged by fire. It has a value of approximately £20,000. (Production 23/23)

Family home in terms of Section 98 of POCA

19. The Property is a family home in terms of Section 98(5) of POCA. The respondent resides at the Property.
20. The Noter has asked the respondent to agree to the sale of the Property. She has declined to do so. (Production 23/8)

The respondent

21. The respondent was born on 2 September 1948. She is 68 years of age. She married Mr Duncan on 23 March 1967. The respondent and Mr Duncan were divorced on 4 December 1980. (Production 24/1)
22. The respondent and Mr Duncan have four children, namely JD, CD, JLCD, and RD.
23. The respondent also has eight grandchildren (G aged 27, J aged 24, A aged 21, A aged 18, L aged 15, A aged 15, Christie aged 16, and R aged 8), and one great-grandchild aged 7. Her grandchildren include Christie Wilson, who is the child of CD and her ex-husband IW. Christie was born on 24 December 2000 and is now 16 years old. The respondent lives at the Property with Christie.
24. The respondent has a history of epilepsy since 1995. (Production 24/2).
25. Prior to their divorce, Mr Duncan and the respondent resided in the matrimonial home at 10 Morven Avenue, Blantyre ('the Morven Avenue property').
26. The Morven Avenue property was a council owned property, purchased by the respondent exercising her right to buy in March 2001, for £13,650. Her title to the Morven Avenue property was registered in the Land Register for Scotland with title number LAN150624. (Production 23/14)
27. The respondent financed the purchase of Morven Avenue with a loan from the Royal Bank of Scotland plc, obtained on the basis of her income at the time, which consisted of Disability Living Allowance and Incapacity Benefit.
28. On 15 April 2004, the respondent sold the Morven Avenue property for £48,000. (Production 23/15)
29. The net free proceeds of the sale were £35,530.20. The respondent received a cheque in that sum from Messrs Goldsmith & Hughes, Solicitors, on or around 26 April 2004. She paid it into her account with Halifax plc (Sort Code; Account Number) and thereafter transferred £35,000 to Mr

Duncan's account, which was also with Halifax plc (Sort Code; Account Number). (Productions 24/7 and 24/11)

30. Following the sale of the Morven Avenue property the respondent and Mr Duncan moved into a property at 62 Birdsfield Street, Hamilton ('the Birdsfield Street property'). Mr Duncan's title to the Birdsfield Street property was registered in the Land Register for Scotland with title number LAN 112955.
31. Mr Duncan purchased the Birdsfield Street property in November 2002 for £60,000. (Production 23/17)
32. In September 2004, Mr Duncan sold the Birdsfield Street property for £80,000. (Production 23/18)
33. In November 2004, following Mr Duncan's purchase of the Property, Mr Duncan and the respondent lived at the Property for a short time.
34. In April 2005, Mr Duncan purchased Toll Cottage for £168,401.53. Mr Duncan and the respondent moved into Toll Cottage.
35. The respondent and Mr Duncan attempted to sell the Property, but failed to secure a quick sale. As a result, Mr Duncan and the respondent required to service two mortgages, namely those in respect of the Property and of Toll Cottage.
36. At some point in 2005, Mr Duncan and the respondent moved to a property on Griffiths Way in Carluke ('the Griffiths Way property'). Title to that property was taken in the name of Mr Duncan. Mr Duncan and the respondent also required to service the mortgage for the Griffiths Way property.
37. After purchasing Toll Cottage in April 2005, Mr Duncan started to grow cannabis in the garage of Toll Cottage, for the purpose of sale and distribution. The respondent was aware of Mr Duncan's business activities, in that regard. The funds generated by Mr Duncan as a result of those business activities assisted with the mortgage payments which Mr Duncan and the respondent required to meet in relation to the Property, Toll Cottage, and the Griffiths Way property.
38. Things 'got a bit nasty' because of some of the people that Mr Duncan was involved with. The respondent became concerned at the type of people calling at the Griffiths Way property, to visit Mr Duncan. Mr Duncan and the respondent moved from the Griffiths Way property, which was subsequently sold.

39. Mr Duncan was remanded on 23 November 2007, which is the date to which the punishment part of his sentence backdated.
40. The Respondent moved back to the Property in about 2009, and has resided there since that date.

The respondent's income and expenditure

41. The respondent has not been in regular paid employment, and has not been in receipt of a regular income, other than as follows:

2001/02

Incapacity Benefit - £6,081.65	
Disability Living Allowance - £2,428.15	<u>Total - £8,509.80</u>

2002/03

Incapacity Benefit- £5,972.40	
Disability Living Allowance - £2,736.30	<u>Total - £ 8,708.70</u>

2003/04

Incapacity Benefit- £ 2,411.15	
Disability Living Allowance - £2, 783.10	<u>Total - £5,194.25</u>

2004/05

Disability Living Allowance - £2,853.20	<u>Total - £2,853.20</u>
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2005/06

Disability Living Allowance - £2,939.60	<u>Total - £2,939.60</u>
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2006/07

Disability Living Allowance - £3,021.40	<u>Total - £3,021.40</u>
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42. The respondent's expenditure, insofar as relating to payments made to credit cards and loans, in each of the years 2001/2002 to 2005/2006, was as follows:

- 2001/2002 - £6,284.61
- 2002/2003 - £6,215.18
- 2003/2004 - £12,724.68

- 2004/2005 - £7,366.93
 - 2005/2006 - £4,625.42
43. It follows that, in 2001/2002 and 2002/2003, the respondent was able to make payment of the sums due in respect of credit card and loan payments from the income she received. In each of the following years to 2005/06, she did not have sufficient income from Disability Living Allowance to meet the required payments.
44. The respondent's income is presently approximately £230.60 per week, comprised of: State Pension (£50.99); Pension Credit (£104.61); maintenance from Christie's father (£37.50); and maintenance from Christie's mother (£37.50). Prior to 6 September 2016, the respondent had been in receipt of Disability Living Allowance at the rate of £307.60 every four weeks. Prior to 12 September 2016 the respondent's Pension Credit payment had been £166.46 per week.
45. The mortgage over the Property is in arrears, but the respondent has made certain payments towards the outstanding indebtedness. In recent times, the respondent has made, inter alia, the following payments towards the loan secured over the Property:
- £210 on 29 October 2013;
 - £210 on 26 November 2013;
 - £210 on 27 December 2013;
 - £450 on 2 June 2014;
 - £250 on 26 August 2014;
 - £340.77 on 19 October 2015;
 - £200 on 2 November 2015;
 - £200 on 1 December 2015;
 - £800 on 20 April 2016;
 - £200 on 3 May 2016;
 - £200 on 31 May 2016;
 - £200 on 28 June 2016; and

- £200 on 26 July 2016.

Christie Wilson

46. Christie's date of birth is 24 December 2000. She recently turned 16. Her mother is CW, the respondent's daughter. The respondent is her (maternal) grandmother.
47. Christie has lived with the respondent at the Property with her since about the summer of 2015.
48. Until the end of 2016 Christie was a pupil at school in East Kilbride. She decided to leave school when she turned 16. She is currently undertaking a six month course in Social Care at college.

Alternative accommodation

49. The respondent has her name on the waiting list for a council house.
50. There are a number of privately owned homes in South Lanarkshire available for rent. There may also be properties available for rent through South Lanarkshire Council. The average weekly council rent in South Lanarkshire for 2016/2017 is £63.06 per week. (Production 23/22)"

The Evidence Led at Proof

[3] During the course of the evidence, some of the matters already agreed in the Joint Minute were repeated, understandably as background to both the more contentious areas. I will summarise only the evidence that either elaborated on the Joint Minute or was in dispute. It was agreed that the respondent, Mrs Duncan should lead at Proof and she gave evidence as did her granddaughter, Christie Wilson.

[4] Mrs Duncan gave evidence about the nature of her relationship with her ex-husband. The bare facts of their marriage in 1967 and divorce in 1980 belie a much more complex relationship. Throughout the marriage, the parties' relationship was turbulent and characterised by arguments about Mr Duncan's extramarital affairs. When the parties divorced in 1980, Mrs Duncan was awarded custody (as it then was) of the couple's four

children. While proceedings had been raised because of Mr Duncan's behaviour, following the divorce the relationship of the couple continued almost in a similar fashion to that before the divorce. They separated and reconciled from time to time between the divorce and the time that their first grandson was born about 1997. Thereafter they lived together on almost a full-time basis until Mr Duncan's incarceration following his conviction for murder and the supply of cannabis in 2007. Mrs Duncan continued to visit her ex-husband in prison for around the first 4½ years of his sentence after which the visits stopped, primarily at Mr Duncan's instigation as he wanted the respondent to get on with her own life.

[5] The property in Blantyre that is the subject of the present dispute was purchased by Mr Duncan in 2004. He and the respondent were engaged in a relationship at that time. Property is a semi-detached 2-storey house including attic. There is also an extension at the rear of the building. The house fronts on to a busy traffic route and is in need of some upgrading. The accommodation in the property comprises an entrance vestibule, a lounge, a rear hall/kitchen and a dining room with three bedrooms and a bathroom on the first floor. There is a separate single car garage adjacent to the property which is held under a separate title. One of the central issues in dispute was the extent if any to which the respondent contributed towards the purchase price of the property. That involved some exploration of previous properties owned by either the respondent or Mr Duncan and in which they had lived at different times.

[6] During their marriage the respondent and Mr Duncan had lived for some years at a property at 10 Morven Avenue, Blantyre ("Morven Avenue"). This was a council owned property and the respondent was the tenant. She had moved out of the property and lived with her mother for about a year prior to divorcing Mr Duncan while he remained at Morven Avenue. Following the divorce, Mrs Duncan moved back into the Morven Avenue

property which she purchased, exercising her statutory “right to buy” in March 2001, for a price of £13,650, financed with a secured loan. For some time the respondent serviced the mortgage over the Morven Avenue property and there were periods that she lived there without Mr Duncan, given the volatile nature of their relationship. The situation became embarrassing for the respondent as neighbours in the area got to know the nature of the problems between her and Mr Duncan. For that reason, in about 2003, the respondent decided to live in the property of her daughter, JD who in turn moved into Morven Avenue. In 2004, JD decided she wished to move, so the respondent decided to sell the property, as she did not wish to return there. The agreed proceeds of the sale of the Morven Avenue property were £35,530.20 which sum was credited to the respondent’s Halifax Plc account on 26 April 2004. It was not in dispute that a few days thereafter, that sum was transferred into Mr Duncan’s bank account. The respondent’s evidence was that she had understood that Mr Duncan was keeping the money in his account until they purchased a new property together. However, the documentary evidence (No 35/7 and 35/11 of process) illustrate that Mr Duncan transferred £35,000 in two tranches out of his bank account on 5 May 2004. There was no property purchase immediately following the sale of Morven Avenue. Mr Duncan at that time already owned another property, at Birdsfield Street, which he had purchased in November 2002 for the sum of £60,000. In evidence, Mrs Duncan had a clear recollection that her ex-husband had purchased that property around the time that she had sold the Morven Avenue property. However, the documentary material (No 23/17 of process) illustrated clearly that he had taken entry to the Birdsfield Street property on 4 November 2002. Mrs Duncan also had a clear recollection of she and her husband living for a short period in that property but it was small and the couple decided to move. It was

the sale of the Birdsfield Street property in September 2004 that immediately preceded the purchase of the property at 4 Douglas Street, Blantyre.

[7] The productions relating to the sale of the Birdsfield Street property and the purchase of 4 Douglas Street were put to the respondent. Her recollection was that she and Mr Duncan had instructed a firm of solicitors (Goldsmith & Hughes) to act for them in the sale of Birdsfield Street. The disposition relating to that sale (No 23/18 of process) records that the respondent consented to it as spouse of Mr Duncan and residing with him for the purposes of the Matrimonial Homes (Family Protection) (Scotland) Act 1981. The solicitor involved witnessed the signatures of both the respondent and Mr Duncan on the disposition. It had clearly been inaccurate for Mrs Duncan to be referred to as Mr Duncan's spouse in the disposition, but the respondent indicated that she and her husband did present themselves as a married couple at that time. The respondent neither sought nor was offered any advice about the title position when the Birdsfield property was sold and the property at Douglas Street was purchased. In her mind, she felt she had contributed at least £35,000 to Birdsfield Street from the sale proceeds of the Morven Avenue property. She did not consider it a problem that she had given the sale proceeds of Morven Avenue to Mr Duncan. The couple had been back together for a while by that stage and she felt he had settled down and "stopped his carry on", a reference to his previous extra marital affairs.

[8] The respondent and Mr Duncan lived at Douglas Street for only a short period after Mr Duncan purchased it in November 2004. A new set of traffic lights were erected outside the property and impacted adversely on the respondent's enjoyment of living there. It was partly for that reason that Mr Duncan then purchased Toll Cottage, a remote property close to the River Clyde in April 2005. The respondent and Mr Duncan lived at Toll Cottage following its purchase and allowed Mr Duncan's nephew, Ronnie Duncan, his wife and two

children to reside at Douglas Street. In fact the plan had been to sell the property at Douglas Street to Ronnie Duncan and his wife but the sale did not proceed because of problems with the title, in particular relating to the garage. That resulted in there being two mortgages to service (Toll Cottage and Douglas Street) and the secured loans were changed such that only the interest on the loans was serviced thereafter. The respondent and Mr Duncan did not live permanently at Toll Cottage. There was a move to a property at Griffiths Way in Carluke 2005, so that they could be near their daughter, JD in order to assist her with a very young baby.

[9] Mrs Duncan was asked about the agreed evidence that she was aware of Mr Duncan's activities growing cannabis in the garage of Toll Cottage for the purpose of sale and distribution. Her position was that she was not aware immediately of Mr Duncan's activities. She did then become fully aware of them not long after they moved into the property. However, she was adamant that she had never been aware of his more extensive involvement in cannabis "grow rooms" in Glasgow. She said she did not feel she would have been able to persuade Mr Duncan to stop growing cannabis at Toll Cottage although he did at one stage say he would stop. Mrs Duncan was clear that she was unaware of any threats being made by Mr Duncan's associates until after the police had become involved. She did recall being concerned about the type of people calling at the Griffiths Way property to visit Mr Duncan but found out only much later that threats were being made against him. At one stage the respondent and Mr Duncan moved to East Kilbride and stayed with their daughter, CD, there. The respondent said that she had understood at the time the purpose of the move was to assist CD who had recently divorced. In fact Mr Duncan had an ulterior motive of hiding from his associates who were threatening him. She found out subsequently that the threats related to a cannabis crop being grown in Glasgow and a

dispute about whether the crop had failed or whether it had been sold and the proceeds disposed of by Mr Duncan and possibly by others.

[10] The respondent explained that it was following Mr Duncan's conviction for supply of cannabis and for murder that she moved back to the property at Douglas Street, Blantyre. Thereafter there was a period when she required to vacate the premises as damage had occurred in a storm. She then continued with her efforts to sell the property but when it failed to sell, she moved back there in 2009 and has stayed there ever since. She arranged for Toll Cottage to be let out while Mr Duncan was in prison. However it was badly damaged by tenants and eventually sold in about May 2013 with the net free proceeds of sale being only £17,096.31 which were paid to the noter in about April 2016. When the respondent moved back to Douglas Street, one of her sons and one of her grandsons lived with her. She continues to live there to date and her granddaughter, Christie, has lived with her since about the summer of 2015. The respondent is now being awarded child benefit in respect of Christie (No 35/15 of process). She gave evidence that the property is also used for family gatherings at Christmas and other times and is regarded by the wider family as the family home.

[11] The respondent spoke also to the state of her health. She was diagnosed with epilepsy in 1995 although she had been having seizures before that. As a result of her epilepsy, she is classified as "severely disabled" for the purposes of benefits payments (No 35/3 and 35/5 of process). So far as her financial circumstances are concerned, the respondent's income was agreed in paragraph 44 of the Joint Minute. Her expenditure includes mortgage payments, council tax, building and contents insurance, mobile telephone, Virgin television, gas and electricity, TV licence, Christie's bus pass, food and household items and clothes and other travel. Many of these items appear as debits in the

respondent's bank statements (No 36/6 of process). The respondent said that there is "not a lot" left over at the end of a week. She accepted that she did not pay the interest payments on the secured loan over Douglas Street consistently. She tended to let arrears accrue and then make payments to stave off any enforcement. She said that she did so because there was little point in servicing the mortgage consistently when her residence in the property was under threat.

[12] Under cross-examination copy statements in relation to the account of Mr Duncan into which the proceeds of sale of Morven Avenue had been paid were put to the respondent. She agreed that the balance in that account before the credit of £35,000 from Morven Avenue was received was £7,281 and that five days after the transfer in of that sum, Mr Duncan had transferred out two sums, one of £7,000 and the other of £28,000. The result of that was a balance in the account of £6,741.91, about £500 less than he had held in the account the day before the proceeds of Morven Avenue were transferred in. Mrs Duncan accepted that she could not say what had happened to the £35,000 but she assumed that it had been paid into a different account of Mr Duncan's. In relation to the sale of the Birdsfield Street property, it was put to the respondent that the sale proceeds, received by Mr Duncan in September 2004 following that sale, was the sum of £35,978. The respondent denied that, and claimed the proceeds of sale of Birdsfield Street were £14,000. Her recollection was Birdsfield Street had been purchased for £65,000 or £60,000 and sold for £80,000. She accepted that documentations did not accord with her recollection either as to date or purchase prices. So far as the purchase of Douglas Street was concerned, the respondent was challenged about having made a contribution to that. She accepted that the purchase price of Douglas Street comprised a £50,000 and a £65,000 secured loan. She

accepted that on the face of it Mr Duncan paid the deposit but she regarded the £35,000 that she received from Morven Avenue as her contribution, whether direct or indirect.

[13] The documentation relating to the current secured loan over Douglas Street was put to the respondent. The balance due as at 30 September 2016 was £63,726.37 and only the interest thereon is being serviced. The remaining term of the mortgage was 3 years and 1 month at the time of the last mortgage statement, such that the secured loan will come to an end in November 2019. Mrs Duncan agreed that the sum that would require to be repaid to the lender in November 2019 is about £63,000. She accepted that she had no endowment policy or similar investment from which she could meet that sum. In relation to the extent of her income during the period 2001-2007, Mrs Duncan appeared initially to dispute the figures contained in paragraph 41 of the Joint Minute. She said that she was working in a cafe operated by Mr Duncan for some of those years. She had no recollection of claiming benefits at that time other than her disability living allowance which is not means tested. However, she then accepted that she was not paid income as such for her work in the cafe, that the takings from that enterprise were paid into her husband's bank account. Ultimately she agreed that the impact of paragraphs 41 and 42 of the Joint Minute was that, from about 2003 onwards, her agreed expenditure exceeded her income. However, her position was that through working in the cafe operated by her husband she was contributing to their joint resources in such a way that she regarded herself as making payments to the secured loan together with Mr Duncan. The proceeds from the cafe went into a bank account from which the secured loan repayments were made.

[14] The respondent accepted that a three bedroom property like Douglas Street was a little larger than one person would require for themselves. However, in addition to her granddaughter, Christie living with her, other family members come to the house often and

stayed there occasionally. The respondent accepted also that if allocated a council house for which she is on a list presently, she would be able to afford rent at the current level imposed by the council which is about £63 per week. She accepted that she had not entered the confiscation proceedings in 2009 when representations could have been made in respect of Douglas Street although she indicated that she had consulted a lawyer who she thought might have helped her.

[15] The respondent's granddaughter, Christie Ellen Wilson is 16 years old, having been born on 24 December 2000. She explained that the circumstances in which she came to live with the respondent in the summer of 2015 were that she moved there following an argument with her sister as a result of which her father told them both to leave. Prior to living with her grandmother, she and her sister had always lived with her father rather than her mother. She now regards the property at Douglas Street as her home. She gets on well with her grandmother and is happy living there. The respondent has taken on *de facto* parental responsibility for Christie. When she was still at school in East Kilbride but living with her grandmother, Christie took a bus to school from outside the respondent's home. At the time of proof, she was undertaking a 6 month course in social care at college which she hopes will enable her to undertake an HNC for the academic year 2017/18 before attending university where she would like to study midwifery. She indicated that were the property at Douglas Street to be sold, she would intend to continue living with her grandmother although whether that would be practicable is unknown. She has no desire to return to live with either of her parents. She would be upset if the property at Douglas Street was sold.

[16] The respondent led only one witness and that was the noter, William Thomas Mercer Cleghorn. Mr Cleghorn is a chartered accountant and licenced insolvency practitioner of

great experience. It is some 50 years since he initially qualified as a chartered accountant.

He spoke to his extensive experience in insolvency matters and his more recent Proceeds of Crime Act work. He has appeared as an expert witness in many cases within this jurisdiction and elsewhere.

[17] In relation to the circumstances of the present case, Mr Cleghorn confirmed that he had examined Mr Duncan's banks statements, and noted there were many withdrawals in cash. In his experience this was typical of a situation someone had been involved in the drugs business. Illegal drugs are sold for cash and the money is paid into the supplier's bank account in cash and withdrawn in cash. The frequency of transactions noted in Mr Duncan's bank account was typical of such a business. It was also common for proceeds of crime to be used to acquire valuable property, such as heritable property in an effort to "launder" the money. In relation to the sum of £35,000 transferred into Mr Duncan's bank account on 30 April 2004, Mr Cleghorn was happy to accept that it was the respondent who had provided that sum. However, it was clear that monies totalling £35,000 were transferred out of Mr Duncan's account a few days later. The principles of tracing money proceeded on an assumption that the earlier funds in a bank account are part of what is taken out. This was standard accounting convention practice. In other words, the £3,000 that was held in Mr Duncan's bank account before Mrs Duncan credited the proceeds of sale of Morven Avenue into it, would be deemed to have been transferred out of his bank account first. The second transfer out of £28,000 must have, to some extent, come from the £35,000 transferred in by the respondent. Ultimately, the £35,000 credited to the account was transferred out but to an unknown destination. It had occurred by 16 June 2004 by which time only £2,000 of the £35,000 credited to the account from Morven Avenue could be said to remain using conventional accounting principles.

[18] So far as the net free proceeds of Birdsfield Street were concerned, Mr Cleghorn had seen a statement of information from Crown Office confirming that the net free proceeds of sale of Birdsfield Street were £35,978.62. He had also examined a mortgage statement in relation to that property. His evidence in relation to Mrs Duncan's recollection that the free proceeds of Birdsfield Street had been £14,000 was that the respondent was probably confused between the difference in value from the purchase of Birdsfield Street to its sale (£60,000 increasing to £80,000) and in that confusion had forgotten or had no information about the secured loan. Mr Cleghorn had seen the document showing the amount required to redeem the secured loan over Birdsfield Street at the time of sale was £45,000. It was on that basis that he had been able to verify the free proceeds of sale as £35,978.62.

Mr Cleghorn having traced through the bank account statements, calculated that between November 2003 and March 2005, sums totalling £141,000 had been paid out of Mr Duncan's bank account and over the same period sums totalling £158,805 had been paid in. Many of the receipts had been made in round sum deposits. His understanding was that Mrs Duncan had not been in a position to contribute to the secured loan repayments during the material time.

[19] Under cross-examination, Mr Cleghorn accepted that the tracing exercise he had carried out told him nothing about the underlying intention of the account holder and that he could conclude with certainty no more than that Mr Duncan's account had certain sums paid into it and withdrawn from it. He accepted also that the lodging and withdrawal of round sum deposits did not appear in Mrs Duncan's bank account, the transactions on which appear to be normal domestic ones. The single large sum payment into her account had been the £35,000 from the proceeds of sale of Morven Avenue which, as agreed had immediately been transferred to Mr Duncan's bank account.

The Applicable Law

[20] Part 3 of the Proceeds of Crime Act 2002 makes provision for Confiscation Orders in Scotland. The Confiscation Order made in this case was made under section 92 of the 2002 Act. Section 92(8) provides:

“Before making an order under this section the court must take into account any representations made to it by any person whom the court thinks is likely to be affected by the order.”

[21] Section 98 of the 2002 Act relates to the disposal of a family home. Subsection 1 provides that the circumstances to which it applies are where a Confiscation Order has been made and the prosecutor has not satisfied the court that the person’s interest in his family home has been acquired as a benefit from his criminal conduct. It is agreed that the provision is applicable in this case. The remaining subsections of section 98 are in the following terms:

- “(2) Where this section applies, then, before the administrator disposes of any right or interest in the person’s family home he shall-
 - (a) obtain the relevant consent; or
 - (b) where he is unable to do so, apply to the court for authority to carry out the disposal.
- (3) On an application being made to it under subsection (2)(b), the court, after having regard to all the circumstance of the case including-
 - (a) the needs and financial resources of the spouse or former spouse of the person concerned;
 - (b) the needs and financial resources of any child of the family;
 - (c) the length of the period during which the family home has been used as a residence by any of the persons referred to in paragraph (a) or (b),

may refuse to grant the application or may postpone the granting of the application for such period (not exceeding 12 months) as it may consider reasonable in the circumstances or may grant the application subject to such conditions as it may prescribe.

(4) Subsection (3) shall apply-

(a) to an action for division and sale of the family home of the person concerned; or

(b) to an action for the purpose of obtaining vacant possession of that home,

brought by the administrator as it applies to an application under subsection (2)(b) and, for the purposes of this subsection, any reference in subsection (3) to the granting of the application shall be construed as a reference to the granting of decree in the action.

(5) In this section-

'family home', in relation to any person (in this subsection referred to as 'the relevant person') means any property in which the relevant person has or had (whether alone or in common with any other person) a right or interest, being property which is occupied as a residence by the relevant person and his or her spouse or by the relevant person's spouse or former spouse (in any case with or without a child of the family) or by the relevant person with a child of the family;

'child of the family' includes any child or grandchild of either the relevant person or his or her spouse or former spouse, and any person who has been treated by either the relevant person or his or her spouse or former spouse as if he or she were a child of the relevant person, spouse or former spouse, whatever the age of such a child, grandchild or person may be; and

'relevant consent' means in relation to the disposal of any right or interest in a family home-

(a) in a case where the family home is occupied by the spouse or former spouse of the relevant person, the consent of the spouse or, as the case may be, of the former spouse, whether or not the family home is also occupied by the relevant person;

(b) where paragraph (a) does not apply, in a case where the family home is occupied by the relevant person with a child of the family, the consent of the relevant person."

[22] This case is apparently the first opposed application under section 98(2) of the 2002 Act. There is no directly equivalent provision in England that would allow the delay of the sale of a family home. The English courts do have discretion in relation to the realisation of property, but the court's powers must be exercised with a view to the satisfaction of the Confiscation Order. Accordingly, English decisions under provisions applicable to that jurisdiction require to be considered with a degree of caution.

Submissions made on Behalf of the Parties

[23] On behalf of the respondent Mr McLean invited the court to refuse to grant the orders sought by the noter, failing which to grant the application subject to a condition that the property be disposed to the respondent for no consideration, and failing either of those outcomes to grant the application subject to a condition that the net free proceeds of sale are divided by the noter and the respondent, with the majority going to the respondent. The fourth final fall-back position was that failing any of those first three outcomes the respondent would invite the court to postpone the granting of the order for 12 months. It was argued that the terms of section 98 are sufficiently wide such as to allow the court to take into account the respondent's financial contributions to the property by either ordering that the title be transferred to her or by donating a percentage of the net free proceeds of sale that should be given to her. Mr McLean submitted that a discretion afforded to the court under section 98 permitted either of those outcomes.

[24] It was common ground that the property was a family home within the meaning of section 98 and that the prosecutor had not satisfied the court that Mr Duncan's interest in it was acquired as a benefit from his criminal conduct. Counsel summarised the respondent's reasons for opposing the application. She had not been involved in Mr Duncan's criminal

activities although she accepts that she knew he was growing cannabis at Toll Cottage. But while her knowledge of his criminal activity was a factor to be weighed in the balance it was not as important as it would be under the different position south of the border. Standing the terms of the Scottish provision, knowledge of spouse's criminal activity could never be a "decisive" factor in this jurisdiction. Secondly, the evidence illustrated that some of the equity in the property came from the proceeds of previous properties, in particular Morven Avenue and the Birdsfield Street property. That could not be said to be attributable to any criminal activities and as the repayment method had been changed from capital and interest to interest only for both secured loans, there had been little change in the equity in the relevant property for a considerable period of time, probably since before the period of criminal activity specified in the indictment against Mr Duncan. Accordingly, while the noter was in a position to seek disposal of the property, it was not "tainted" in the way that some of the properties referred to in the English authorities were. Thirdly, it was undisputed that the respondent had transferred the whole of her sale proceeds from her Morven Avenue property to Mr Duncan in April 2004. Regardless of whether a tracing exercise did not result in that sum of money being identified as part of the deposit for Douglas Street, the respondent's evidence was that she expected that money would be used to fund a new purchase. While Mrs Duncan had not used that expression it was an inference that could be drawn from her evidence.

[25] Mr McLean submitted further that the respondent had in many ways been a victim of Mr Duncan's criminality. She is of very modest means. Her weekly income and expenditure figures reveal that she is living "hand to mouth". Sale of the property would result in her losing her family home and it is unlikely that she would be able to buy an alternative property. The best she was likely to achieve was a property rented from the local

authority and the nature and extent of any assistance she might receive from the state was speculative. A sale of the property would cause hardship to the respondent's granddaughter Christie. She had no involvement in any criminality and did not know anything about it. She has found a degree of stability in recent years living with her grandmother with whom she has a good relationship. Christie now has aims for further education. It was unrealistic to conclude that Christie could continue living with the respondent were the property to be sold. She has experienced a considerable amount of instability in the past so far as her living arrangements are concerned. She cannot reasonably live with either of her parents. It would be particularly detrimental to Christie to grant the order. The respondent's health was an additional factor.

[26] Mr McLean accepted that, as an outright refusal of the application would result in the property staying in the ownership of Mr Duncan, that might be thought to be unsatisfactory. It was on that basis that his two main fall-back positions were proposed. Since the essence of the respondent's position was that she had made a significant capital contribution to the purchase of the property and that she continues to make contributions to payment of the secured loan, it might be just to grant the application but with a condition that the noter would dispoise the property to the respondent for no consideration. That was the outcome in the English case of *Crown Prosecution Service v Richards &c* [2006] EWCA Civ 849 albeit in very different circumstances. In that case the judge at first instance found that all but one of the family assets were the proceeds of drug trafficking and that the wife knew of the husband's criminal activities from the outset. The judge ordered the sale of all the properties but granted a declaration that the wife was entitled to payment of a lump sum out of the proceeds. On appeal by the Crown Prosecution Service the Court of Appeal allowed the appeal and set aside the order for payment of a lump sum to the wife. The Note

of Appeal included that the judge at first instance had failed to give sufficient weight to the inevitable consequence of a finding that all of the assets were tainted as the proceeds of drug dealing. The argument in that case was whether any of the assets could be distributed to satisfy the wife's claim for ancillary relief. Ultimately the wife in that case was awarded a lump sum but that related particularly to her present and future care of a child of the marriage.

[27] Mr McLean submitted also that there was some similarity between the provisions of section 98 of the 2002 Act and the terms of section 40 of the Bankruptcy (Scotland) Act 1985, now re-enacted as section 113 of the Bankruptcy (Scotland) Act 2016. While there have yet been no decided cases under section 113 there have been decisions under section 40 of the 1985 Act. One example of the court's approach to the exercise of discretion in the situation of bankruptcy where the sale of a family home was sought could be found in *Burns' Trustee v Burns* 2001 SLT 1383.

[28] Mr McLean urged me to dispose of the proceedings in such a way that would recognise that the respondent had made a capital contribution, albeit indirectly, to the property and that considerable hardship would be caused by the order being granted. His final fall-back submission would be one that would give her and her granddaughter a period of time to consider their future accommodation options.

[29] For the noter, it was submitted that the application should be granted in the terms sought on the basis that the evidence led did not support any refusal of the order sought. In the absence of the respondent's consent what the noter sought was authority from the court to carry out the disposal of the property. As a fall-back position, the noter would suggest postponing the granting of the application for a short period such as three months to enable the respondent's granddaughter in particular to make alternative accommodation

arrangements while not interrupting her studies. Ms Ower submitted that the second and third options proposed by the respondent (ordering a transfer of the property to the respondent which failing a percentage of the sale proceeds) should be regarded as unmeritorious and discounted completely.

[30] Turning to the circumstances on which the respondent relies on record for refusal of the order, these included the state of her health, her financial position and the needs and resources of various family members including Christie Wilson. In relation to the respondent's evidence, counsel for the noter submitted that the following 10 points from that evidence were material to the substantive issue in dispute. These were as follows:

- (i) The only condition from which the respondent suffers is epilepsy. There was no suggestion that it was not well controlled by medication.
- (ii) In April 2004 the respondent sold her property at Morven Avenue and transferred the whole free proceeds of £35,000 to Mr Duncan. At its highest, her evidence was that the £50,000 deposit paid by her husband for the purchase for the property at Douglas Street included that £35,000.
- (iii) Douglas Street is a three bedroomed property valued at £115,000. The respondent accepted in evidence that she could not afford the acquisition of such a property on her own.
- (iv) The secured loan over Douglas Street has a balance of £63,000 outstanding and expires in November 2019. The respondent accepted that the property would have to be sold if the loan was not repaid at that time and there was no evidence that she could raise the funds to pay off the loan. It could easily be concluded that the house will have to be sold at that time.

- (v) The respondent and Mr Duncan lived together as husband and wife notwithstanding their divorce in 1980. He trusted her with his affairs and gave her power of attorney when he was in custody. It was clearly a close relationship.
- (vi) As agreed at paragraph 37 of the Joint Minute, after the couple moved to Toll Cottage the respondent became aware not long after Mr Duncan started growing cannabis for sale and distribution that he was doing so.
- (vii) There were three separate secured loans to be serviced after the purchase of Toll Cottage. The respondent's evidence was that she could not service them and they were paid for by her husband. An inference could be drawn that these were serviced, at least in part, from the proceeds of crime.
- (viii) From about 2003/2004 the respondent's outgoings exceeded her income. That was sufficient to conclude that she had not contributed at all to the secured loan repayments.
- (ix) The respondent could afford to rent a property from the council following the sale of Douglas Street because she will no longer require to service any secured loan.
- (x) The respondent returned to live at Douglas Street in 2009 but Christie Wilson had been residing there only from 2015.

[31] Ms Ower made certain submissions about Christie Wilson's evidence. There is no doubt that her original family circumstances had been chaotic. However, she had accepted in evidence that while she would like to continue living with her grandmother the property was larger than required for the two of them. She had also indicated an intention to live with the respondent wherever the respondent was residing and it was apparent from her

evidence that she had attended school in East Kilbride while initially living with her grandmother that appropriate transport arrangements could be made following a move. So far as the noter was concerned Ms Ower submitted that his evidence should be accepted in its entirety. While there was no doubt that the respondent had given her ex-husband the sum of £35,000 representing her whole proceeds from Morven Avenue that was simply one adminicle of evidence in the case. The respondent had been in receipt of legal advice at the time of the confiscation proceedings and did not enter the process. These proceedings were not the correct stage at which she could make a claim on capital. There was nothing that could be done to rectify any perceived unfairness through giving her ex-husband the capital from her property. She could have claimed in the confiscation proceedings that she had a capital interest. The confiscation proceedings clearly related to the Douglas Street Property as well as others. There was simply no power to transfer title to Mrs Duncan in these proceedings, particularly where she had never had title to the asset in question. In essence she would never have had a proprietary claim to the property. At its highest, had she made a claim for unjust enrichment, she could have achieved at best a sum of money. She could not and should not receive in these proceedings something that she could only receive if she was married to Mr Duncan and sought to divorce him.

[32] Ms Ower submitted further that the only conditions that the court could impose in terms of section 98 were those that would be consistent with the granting of the order.

Those conditions could not extend to giving someone a real right in property to which she had no proprietorial interest. The imposing of conditions could also not extend to awarding a sum of capital to someone who may or may not have a personal right to claim against her former spouse for unjust enrichment. The donation of £35,000 to her ex-husband in 2004 was simply a factor in deciding whether to postpone the application. In any event, it was

not correct to suggest that the respondent received nothing in return for the capital she gave her husband. She has enjoyed the benefit of living in a substantial property that she could not have afforded that was purchased by her husband. That had to be balanced against her argument that she had given the money and received no proprietary interest in return.

[33] In the application of the law to the facts the question of whether to grant or refuse an order involves an exercise of discretion. Reference was made to English decisions such as *CPS v Richards* [2006] 2 FLR 1220. In that case the knowledge by the wife of the husband's drug trafficking was determinative. Ms Ower did not suggest that such a decision was of direct application to this case. The respondent's knowledge of Mr Duncan's criminal activity was simply a factor. Similarly, the case of *Re: O* [2006] EWHC 3543 (admin) in which Collins J had refused an application to realise a matrimonial home in satisfaction of a confiscation order on the basis that the wife was entirely innocent and did not know of the husband's planned criminal activity could easily be distinguished not simply because of the different way in which the English legislation is framed but also because in that case the title of the property was in joint names and the wife could always have sought a minimum of 50% of its value. It was submitted that refusing the order in this case would not be a proportionate outcome balancing the interest of the state in recovering the property as against the respondent's claimed right to occupy it. At best for the respondent a short postponement would achieve a proportionate outcome balancing those interests. It was significant that the respondent, will, on the evidence, require to leave the property in less than three years because refusal of the order would not result in her being able to stay there in the long term. She has resided in a property for many years that she could not have afforded to purchase.

[34] As the English authorities were of limited assistance, Ms Ower also referred to the analogy of Scottish bankruptcy situations. She relied in particular on an example from the sheriff court in the case of *Salmon's Trustee v Salmon* 1988 (sh ct) 49. In that case, the sheriff was faced with an action of division or sale by a permanent trustee against the bankrupt's wife. The family home was the only asset in the sequestration and the wife had very limited resources albeit that her unrealised interest in the family home was substantial. There was one child of the family who had yet to complete his schooling and the property had been a family residence for about 16 years. The sheriff decided that in balancing the interests of the creditors and the public interest and having the sequestration completed within a reasonable period on the one hand and the other considerations referred to above on the other the public interest outweighed the considerations advanced by the wife and decree was granted with extract superseded for four months. Ms Ower suggested that a similar course should be followed in this case. In contrast, in *Gourlay's Trustee v Gourlay* 1995 SLT (sh.ct.7) a sheriff at Glasgow had refused an application to sell a family home in a face of opposition by the debtor's spouse. In that case the stress involved for the debtor in moving from the family home would have been considerable with potentially fatal results and such a move would have been materially detrimental to the health of his spouse. It was suggested that *Gourlay* was an exceptional case with very different circumstances to those before the court.

[35] The applicable provision (section 98(3) of the 2002 Act) in this case contained a non-exhaustive list of three particular aspects that the court must consider. So far as the needs and the financial resources of the respondent were concerned it was submitted that her epilepsy was not sufficient to warrant any specific type of housing. While she is of limited means the amount she pays currently towards the secured loan could be used for a council tenancy. Her claim to have made a direct contribution of £35,000 to the property was not

supported by Mr Cleghorn's evidence using accepted accounting principles. In any event, financial contribution to the property was not a circumstance listed in section 98(3) albeit that it formed part of the general circumstances. It was important that the respondent could have made representations in the confiscation proceedings. The only child of the family who required to be taken into account was Christie Wilson and, as submitted, she was likely to continue to live with the respondent in a different property. Finally, on the length of period during which the family home was used as a residence, while the respondent had been living there for eight years (since 2009) Christie had been living there for less than two years. This factor was insufficient on its own or even taken together with the other circumstances to warrant refusal of the application.

Discussion

[36] There are two separate issues that arise for determination in this case. First there is an issue of principle between parties as to the scope of the court's power in terms of section 98(3) of the 2002 Act. In particular, there is an issue about whether the court has power to make an order granting the noter authority to dispose of the property but subject to a direction that the title shall be transferred to the respondent or that the proceeds of sale shall be divided in a particular way. The second aspect of the case is the consideration of the evidence before deciding what disposal would be appropriate having regard to all the circumstances. I will deal with each of these in turn.

[37] In my view, the provisions of section 98 of the 2002 Act are clearly designed to relieve hardship on spouses, ex-spouses and children who might be rendered homeless by the granting of an order to dispose of the property. The protection is of occupation, not of any proprietary or financial interest. This is clear for a number of reasons. First, in order to

fall within the definition of “family home” in section 98(3), a spouse or former spouse must occupy the property as a residence. The child of the family becomes relevant to the determination only if that child is also occupying the property. Occupation may be with the relevant person (in this case Mr Duncan) as well as a spouse or former spouse and or a child of the family. Importantly, there is no reference whatsoever to any proprietary or financial interest on the part of a spouse or former spouse. Only the relevant person requires to have a right or interest in the property, whether alone or jointly. Just as the protection afforded to those in occupation of a family home by the Matrimonial Homes (Family Protection) (Scotland) Act 1981 applies regardless of whether they have any proprietary interest in it, similarly section 98 of the 2002 Act would appear to protect a restricted category of people whose residence in the family home would be unfairly or unjustly disrupted by an order authorising disposal of the property. The non-exhaustive list of circumstances to which the court must have regard in section 98(3) is clearly directed taking account of the length of time during which the family home has been occupied as a residence and the financial constraints that might impact on a spouse, former spouse or child were the property to be sold with the consequence that the affected spouse could no longer live there. In my opinion the provision is inapposite to distribute capital between the various parties involved or to interfere with the existing title position. There are limited circumstances in which a court can make orders transferring title of heritable property from one party involved in an action to another. The best known example is contained in section 8 of the Family Law (Scotland) Act 1985 which empowers the court, in an action of divorce where one spouse seeks financial provision, to make a transfer of property order depriving a spouse with a proprietary interest in property by transferring it to his or her spouse where that is justified in accordance with the principles of financial provision on divorce. Such a specific statutory

power to transfer property is generally required before the court can become involved in altering title to heritable property. Further, the circumstances in which the court may direct that the proceeds of sale of a property be divided in certain proportions are also restricted.

There is some scope for that in the context of division or sale proceedings. However in the present case, the respondent is not a joint title holder of the property and so division or sale proceedings are not required. In any event, the plain terms of section 98(3) of the Act militate against the interpretation suggested by counsel for the respondent in this case.

While it is clear from subsection (3) that in addition to granting, refusing or postponing an application to dispose of property the court may grant the application subject to such conditions as it may prescribe, interpreting that provision as empowering the court to impose conditions that interfere with title or the distribution of sale proceeds would in my view stretch the statutory language too far. The conditions to which an order may be subject cannot properly extend to granting an application and then immediately thwarting it by ordering the noter to transfer title of the property to the respondent. The context of the order being sought by the noter is that a confiscation order has already been granted that includes the property at 4 Douglas Street as one of the realisable assets of Mr Duncan in respect of which confiscation has been permitted. I consider that the court's powers under section 98 are rather more limited than suggested by Mr McLean.

[38] Of course there may be cases where the parties are still married where the court would require to take into account that proceedings relating to the title to the property or the distribution of its proceeds might also be continuing. It is easy to see the merit in postponing an application of this sort in respect of a matrimonial home where there are ongoing divorce proceedings and in that context there is an application for a transfer of property order. In a situation where the respondent is a former spouse and so her claims to

financial provision on divorce have already been determined, the basis upon which refusal or postponement of an order of this sort may be justified is in my view restricted to the need for continued occupation of the property, whether for financial reasons or otherwise. There was some mention in submissions of whether Mrs Duncan may have or have had a claim in respect of unjust enrichment against Mr Duncan. I express no view on whether any such claim has or would have had a reasonable prospect of success or as to whether it would have prescribed. The relevance of the reference to unjust enrichment in my view is that in principle it can provide a remedy for someone who has given money in the expectation of a set of circumstances that did not ultimately arise. It is a separate route of litigation and cannot form part of the exercise the court requires to carry out under section 98 of the 2002 Act to determine the strength or otherwise of an application. Again, had the respondent brought or indicated that she intended to bring proceedings in respect of unjust enrichment that might be a factor militating in favour of postponement of an order such as that sought by the noter in this case. For the reasons given, I conclude that there is no power under section 98 to grant the orders second and third sought by Mr McLean. Even if I had decided otherwise, I would not have regarded it appropriate to effect such a distribution in the circumstances of this case where, as I explain below, any capital contribution made by Mrs Duncan cannot be traced directly to the purchase.

[39] Turning to a consideration of the evidence before determining whether the grant, refusal or postponement of the order should be the outcome, there were only a very limited number of facts ultimately in dispute. The first of those is the extent of any to which the respondent can be regarded as having made a capital contribution to 4 Douglas Street. I have set out the evidence on this in some detail. In essence, when she sold her property at Morven Avenue Mrs Duncan gave the net free proceeds of sale of £35,530.20 to her

ex-husband. That sum was not immediately invested in other property. It was transferred out of Mr Duncan's account shortly after it was deposited, I can make no findings as to what happened to it thereafter. There is no doubt that during a period when they were living together as if husband and wife albeit divorced Mrs Duncan lost the only capital asset she had at a time when she trusted her husband and did not feel she required to safeguard her position legally. She was confused in her evidence about dates and in relation to the level of the sale proceeds of Mr Duncan's property at Birdsfield Street. I cannot make a finding that Mrs Duncan contributed about £35,000 of the £50,000 deposit paid by Mr Duncan when 4 Douglas Street was purchased. None of that £50,000 can be traced directly back to the proceeds of sale of Morven Avenue because of the movement of the money as identified by Mr Cleghorn and also the passage of time between 2004 and 2007 during which there were numerous deposits and withdrawals on Mr Duncan's bank account such that, apart from the net free proceeds of sale of Birdsfield Street, the source of the deposit for 4 Douglas Street cannot be clearly identified. However, what I do take from this chapter of evidence is that, but for the sale of Morven Avenue and the transfer of the whole free proceeds of sale to Mr Duncan, Mrs Duncan would have either still owned a property or have had some capital to invest. By her own admission she would not have been able to acquire a property as substantial as 4 Douglas Street but the consequence of her disposal of the sale proceeds of her only property is that she now has no prospect of owning her own home again at all. This is a factor to be taken into account as one of the relevant circumstances of the case.

[40] The second issue about which there was some dispute in the evidence was that of the respondent's contribution to the family finances during the years 2003 – 2009. She accepted, ultimately, that her income and expenditure for those years must be as agreed in paragraphs 41 – 43 of the Joint Minute but she maintained that through working in a café for

her husband, the takings of which were paid into her husband's bank account with her not receiving any direct remuneration, she had indirectly contributed to the payment of secured loans of those years. The difficulty with the respondent's position on this issue is that there was no evidence of the number of hours worked or of the level of takings of the café in which she worked for her husband, far less the level of profit. Accordingly I am unable to make any specific finding in relation to any contribution made by her, indirectly, to the servicing of Mr Duncan's secured loans during those years.

[41] Looking at the whole evidence in the case, there are clearly circumstances both in favour of and against granting the order sought by the noter. The needs and financial resources of the respondent and indeed her granddaughter Christie are sufficiently limited that they do not have the freedom to obtain a proprietorial interest in other property. Any house move is likely to be to local authority housing. The property in which the respondent and Christie Wilson reside is a family home and both have expressed a strong desire to remain there. Although Christie's residence in the property is of more recent origin, the respondent has been living in the property for some eight years. She is 68 years old and not in the best of health, although her epilepsy is well controlled by medication and would not prevent a house move. Mrs Duncan had knowledge of Mr Duncan's criminal activity for most of the time he operated in the production and sale of cannabis. That too is a factor to be weighed in the balance. The respondent has, as already indicated, relinquished the only capital she had and has lost out as a result. Christie has a very close relationship with the respondent who looks after her and provides parental guidance and support to her, but her evidence was to the effect that she would be likely to relocate with the respondent if the home was sold. Also, the evidence does not support a conclusion that the respondent and Christie Wilson would be able to reside in the property following expiry of the period of the

secured loan in November 2019. In the absence of any evidence of a source of funds from which Mrs Duncan could use to redeem the loan, her occupation of the property (and Christie's) would come to an end at that time even if the order sought by the noter was refused. I accept also the submission made by Ms Ower for the noter that it is not correct to regard the respondent as having received nothing at all in return for the capital she gave her ex-husband. She has enjoyed the benefit of living in a property that she could not otherwise have afforded and until Mr Duncan's incarceration she did not on the face of it contribute financially to the servicing of the secured loans.

[42] So far as the assistance, if any, that can be derived from the analogy with bankruptcy situations, it seems to me that decisions in that area are particularly fact sensitive, as this case is, and as future applications under section 98 of the 2002 Act will be. The court requires to balance the public interest in enforcement of confiscation orders against the need to take relevant circumstances of a spouse or former spouse and child of a family into account and so avoid undue hardship where possible. I have found the English decisions referred to in submissions of very limited assistance in light of the different context in which those cases took place. In particular, standing the decision I have reached in relation to the inability to distribute capital or property through applications such as the present one and the extent to which a lack of innocence in respect of a spouse's criminal dealings is almost determinative in that jurisdiction, any direct analogy is rendered inappropriate.

[43] In considering all of the evidence and the submissions made to me carefully, I consider that the needs and financial resources of the respondent and Christie Wilson are not particularly significant matters in deciding whether the order sought by the noter should be granted. The limited means of the respondent will alter little should the order be granted. She may secure tenancy for a local authority accommodation in due course, which

failing it is agreed that there are a number of privately owned homes in South Lanarkshire available for rent. Her current financial resources prevent her from acquiring a property of the size and value of the home at 4 Douglas Street. Neither is the length of the period during which Mrs Duncan and subsequently her granddaughter Christie have occupied the family home as a residence a particularly significant issue in this case. The evidence illustrated that prior to Mr Duncan's custodial sentence Mrs Duncan had never been particularly content to live at Douglas Street because of the volume of traffic passing outside the property. She did not live there with her ex-husband for any substantial period of time. Her granddaughter Christie has lived there for a relatively short period. Although I have taken into account the full history of Mrs Duncan having given the only capital she had from the proceeds of sale of Morven Avenue to her ex-husband this is not something that could, even if it was appropriate to do so, be rectified in these proceedings. Refusing the order sought in this case would result in Mr Duncan retaining title to the property and there was no evidence at all about what would happen to the property in that event. The couple have been apart for many years and the respondent said that it was at Mr Duncan's instigation that she had stopped visiting him in prison. I cannot easily infer that refusal of the order would result in Mrs Duncan being able to reside in the property in the long term, standing the date on which the secured loan requires to be redeemed or the property sold in 2019. So far as other circumstances are concerned, I accept the submission made by counsel for the noter that the epilepsy from which Mrs Duncan suffers is well controlled. It would not impede a move to new accommodation. Having regard to all these circumstances and the evidence of Christie Wilson that she is likely to relocate with the respondent I am not persuaded that the circumstances of this case justify refusal of the application. However, I consider it reasonable to allow a period of postponement to enable the respondent and her

granddaughter to secure alternative accommodation. She is already on a waiting list for local authority accommodation and will be able, during the period of postponement, to advise a local authority that in the expiry of that postponement, she will be in urgent need of accommodation.

Disposal

[44] In all the circumstances, I am satisfied that the order sought by the noter should be made. However, I intend to postpone the granting of the application for a period of 4 months, on the expiry of which the noter will be entitled to obtain vacant possession of the property with a view to disposing of Mr Duncan's interest in it, and I will do that by superseding extract. I will reserve meantime all questions of expenses.