SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2021] SC EDIN 24

EDI-A299-19

JUDGMENT OF SHERIFF KENNETH J McGOWAN

in the cause

LYNN SLIGHT

Pursuer

against

JEAN HOPE as Executor Nominate of the late Margaret Denise Tait

Defender

Pursuer: MacColl, Advocate; Forsyth Solicitors
Defender: Ennis, Advocate; Gibson Kerr Solicitors, Edinburgh

EDINBURGH, 30 March 2021

Introduction

[1] This case concerns a claim by the pursuer against the estate of her late civil partner, Margaret Tait ("the deceased"), brought against the defender as executor nominate.

[2] It came before me for debate on the defender's preliminary pleas, numbers 1, 2, 3, 4, 6 and 7, the pursuer having offered a proof before answer.

[3] Both counsel produced written submissions, supplemented by oral submissions.

[4] In the course of argument, I was referred to or considered the following sources/authorities:

i. Civil Partnership (Scotland) Act 2004 ("the 2004 Act");

ii. Family Law (Scotland) Act, as amended by 1986 ("the 1986 Act");

iii. Succession (Scotland) Act 1964 ("the 1964 Act");

iv. *Currie on Confirmation of Executors*, 9th ed. ("Currie");

v. *The Law of Scotland*, Gloag & Henderson, 14th ed. ("Gloag & Henderson");

vi. *The Law of Contract in Scotland*, McBryde, 3rd ed. ("McBryde");

vii. *Civil Remedies*, Walker ("Walker");

viii. *Anglia Television* v *Reed* [1972] 1 QB 60;

ix. *Daejan Developments Ltd* v *Armia Ltd* 1981 SC 48;

x. *Edinburgh Grain Ltd (in Liquidation)* v *Marshall Food Group Ltd* 1999 SLT 15;

xi. *Pert* v *McCaffrey* 2020 SC 259;

xii. *Prudential Assurance Company Limited* v *James Grant & Company (West) Limited* 1982 SLT 423;

xiii. *Shilliday* v *Smith* 1998 SC 725;

xiv. *Tait* v *Arden Coal Company* 1947 SC 100;

xv. *Varney* v *Lanark Town Council* 1974 SC 245.

Background facts

[5] The following matters are the subject of averment by the pursuer and taken *pro veritate* for present purposes:

i. the pursuer and the deceased began living together in 1989;

ii. 1 Cleuch Avenue, North Middleton ("Cleuch Avenue") was purchased in the joint names of the pursuer and the deceased in 2003;

iii. in 2006, while still living at Cleuch Avenue, the couple considered separating;

iv. they decided that the deceased would remain in the property and the pursuer would look for another home;

v. steps were taken to transfer the house into the sole name of the deceased;

vi. the deceased took on sole liability for the borrowing secured over the house;

vii. in return, the pursuer received a capital payment of £50,000.00 from the deceased, which she used to fund the purchase of another house in her sole name at Innerwick;

viii. the couple reconciled and resumed their relationship at Cleuch Avenue, the pursuer having never left there;

ix. in 2007, the pursuer and the deceased entered into a verbal contract in terms of which they would both work towards paying off the loan secured over Cleuch Avenue and that once it was paid off then the property would be transferred into joint names ("the 2007 agreement");

x. the couple entered into a civil partnership on 18 August 2012;

xi. between 2007 until 2017, the pursuer made payments to the deceased which were used to reduce the loan secured over the house, or invested by the deceased with a view to using the funds to pay off the loan at a later date;

xii. based on the agreement that once the loan had been paid off, half of the house would be transferred to her, the pursuer also paid for a number of improvements to the house;

xiii. in June 2018, the couple separated;

xiv. at about the same time, the deceased intimated to the pursuer that she no longer had any intention of returning the title to joint names, but wanted to keep the house in her sole name;

xv. on 26 June 2018, the deceased executed a new will, disinheriting the pursuer and naming the defender (her sister) as her executor and beneficiary;

xvi. both the pursuer and the defender sought independent legal advice in respect of the resolution of their financial affairs consequent upon that separation;

xvii. within a short time, both parties had taken legal advice on the separation;

xviii. the deceased died suddenly on 27 July 2018;

xix. at the time of her death, the deceased remained the sole proprietor of Cleuch Avenue which formed part of her estate which property remained subject to a heritable security.

Submissions for defender

The contract

[6] The pursuer seeks declarator of a contract; that payments were made in furtherance of that contract; that the contract was breached; and then seeks payment of damages for the breach. The averments as to the terms of the contract are set out at Art. 3, p. 5, lines 16-20:

> "On reconciliation they agreed that 1 Cleuch Avenue would be returned into joint names when the loan was paid off. This arrangement was not recorded in writing. The couple reached the agreement that they would both work towards paying off the loan over Cleuch Avenue and that when that was done the title would be returned to joint names…";

at Art. 3, p. 6, lines 12-21:

> "The couple further agreed in March 2007 that capital lump sum repayments of the mortgage over Cleuch Avenue would be made when capital became available. Timing was not of the essence. Both of them had endowment policies, jointly and individually. They agreed to keep these going until maturity and use the proceeds to repay the mortgage. In particular the pursuer's endowment policy and share of the joint endowment policy both due to mature in September 2015 and June 2015 respectively would be used to reduce the mortgage although she was not an owner of Cleuch Avenue. In return for the pursuer's financial contributions [the deceased] would transfer title back into joint names when the loan was paid off in 2015. The pursuer's withdrawal of £50,000 of equity from the property would be repaid into the property by the pursuer and beyond that they would contribute to repayments in equal shares…";

and at Art. 3, p. 7, lines 17-19:

> "In 2014 Cleuch Avenue was re-mortgaged for £182,000 with Skipton until 2016 on a two-year deal and then until 2021 for £130,000 on a five-year deal. The couple agreed that a re-mortgage was a replacement of the mortgage in [the deceased's] name and not its repayment. The timing of the repayment was varied by agreement to 2021 or earlier if the property was mortgage free before 2021".

[7] It is quite clear from these averments that the terms of the contract were that the parties were to contribute equally to the reduction of the mortgage. On its being paid off the property was to be transferred into their joint names.

[8] This is said to be an oral contract agreeing that on the happening of a specific future event following specific actings by the pursuer, the deceased would perform an obligation to transfer heritage. It was an essential term of this contract as pled by the pursuer that implementation of it was not to take place until the mortgage is paid off: the oral agreement was contingent on the happening of a future event.

[9] At Art. 7, p. 16, lines 3-4, the pursuer specifically avers that this future event did not occur:

> "[the deceased] had not paid off the mortgage in full so transfer of title had not been triggered".

[10] There can be no breach of a contract where the essential requirement for its implementation has not occurred. Repayment of the mortgage – a contingent event – was essential to purify this contract. It did not happen. There can be no breach of the contract before it could possibly have been implemented.

[11] The pursuer goes on to aver at Art. 7, p. 16, line 4-p. 17, line 2 that the relationship between the parties ended:

> "On separation at the start of June 2018 [the deceased] made it clear that she did not want to continue to live with the pursuer at Cleuch Avenue or be joint owners. She no longer had any intention of returning the title to joint names. She wanted the

> pursuer to find somewhere else to live. She wanted to keep the property in her sole name."

[12] The pursuer's 5th crave specifically seeks that declaration and the 4th plea in law seeks to support it:

> "[the deceased] being in breach of a material term of the 2007 Agreement … declarator should be granted as 5th craved".

[13] But the deceased was not in breach of a material term. The terms of the contract were that the pursuer and deceased would repay the mortgage and then the deceased would transfer the property into joint names. That was the sum total of the terms of this oral contract to agree a transfer of heritage. As at June 2018, the mortgage remained outstanding. Only on its being repaid could the deceased have been in breach for a refusal to implement the terms of this contract. The future contingent event upon which performance relied had not occurred. The declarator sought in terms of the 5th crave is not supported by the averments of fact taken at their highest.

[14] It may be that the pursuer seeks to set up a case for anticipatory breach of contract by the deceased. That is not what the crave or the 4th plea in law says.

[15] Looking at any question of anticipatory breach, the pursuer's pleadings in this regard are set out at Art. 7, p. 16, line 5 – p. 17, line 5:

> "[The deceased] made it clear that she did not want to continue to live with the pursuer at Cleuch Avenue or be joint owners. She no longer had any intention of returning the title to joint names. She wanted the pursuer to find somewhere else to live. She wanted to keep the property in her sole name. In response the pursuer asked for her money back. [The deceased] told her not to worry she would get her money back. [The deceased] refused further performance of the 2007 agreement".

[16] But the facts as pled by the pursuer are that the deceased's performance of the contract was reliant upon the mortgage being paid off. The parties had separated. The

relationship was at an end. Regardless of this separation, the deceased was obliged to maintain her obligations to the heritable creditor.

[17] The pursuer may be seeking to set up a claim for anticipatory breach of contract having regard to the ending of the parties' relationship. Anticipatory breach of contract must be clear and unequivocal.[1] It must be clearly intimated to the other party. It cannot amount to "an intention". In the event that the deceased's statement of intention not to transfer the property amounted to a clear and unilateral intention not to implement her part in this contract amounting to a material breach, then she did so consequent upon the ending of the civil partnership of the parties. The pursuer avers in Art. 7, p. 17, lines 16-26 that:

> "At the start of June 2018 the pursuer accepted that they were actually separating, rather than discussing separating. The pursuer did not move out in June 2018. The pursuer had not had the benefit of legal advice in her discussions with [the deceased] at the start of June 2018. Paying the pursuer back was financially more advantageous to [the deceased] than either paying off the mortgage of about £44,000 (which she could have done with the ISA funds) and sharing the £320,000 value of the house with the pursuer or selling the property which would have triggered title being returned to joint names as the loan would have been repaid. Once both parties had legal representatives the payments [the deceased] acknowledged she was due under the agreement were considered as part of a claim for financial provision on termination of a civil partnership".

[18] It was not correct to say that "… selling the property … would have triggered title being returned to joint names as the loan would have been repaid …" as a sale would have meant that title to the property would have transferred to the new owner.

[19] In any event the pursuer accepts that this was not anticipatory breach of contract. The terms of any oral contract between the parties had been frustrated by the ending of their civil partnership. The pursuer's remedy at that time was not a remedy available under contract law but that the averred oral contract between the parties was now no longer

[1] McBryde, paras. 20-23 & 20-27.

capable of implementation, their relationship having ended. Resolution of the financial relationship between the parties required to be undertaken within the scope of financial provision on dissolution of the civil partnership in terms of the 1985 Act. The agreement relied on by the pursuer was not a commercial contract made at arms' length. Instead, the situation fell to be characterised as giving rise to a question of status and to be dealt with as such.

Competency

[20] Once confirmed to the estate: "The executor is *eadem persona cum defunto* (the same person as the deceased)."[2] Consequently, rights under a contract transmit to the executors.[3] But the pursuer cannot have a better claim against the executor than she would have had against the deceased.

[21] In this case, the pursuer seeks a declarator of a right under a contract which she did not have as against the deceased. As the pursuer has averred at Art. 7, p. 17, lines 24-26:

> "… payments … due under the agreement were considered as part of a claim for financial provision on termination of a civil partnership".

[22] Such claims (the same as those on divorce) are regulated wholly within the scope of the 1985 Act. It provides for the court to take into account the alleged contributions of the pursuer to an asset of the deceased: section 9(1)(b). There is no scope within the 1985 Act for a specific claim under contract law and damages for breach of contract or for a claim for unjust enrichment. Such claims would have been incompetent as against the deceased when she was alive; and the civil partnership had ended on her death.

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[2] Gloag & Henderson, para 40.06.

[3] *Tait* v *Arden Coal Company*.

[23] The pursuer having had no competent claim in contract, breach of that and damages *et seperatim* in unjust enrichment as against the deceased, she cannot now seek to declare such contractual rights and consequences *et seperatim* unjust enrichment as against the executors who "stand in the shoes" of the deceased. A claim pled on that basis is incompetent: the claim did not exist as a right by the pursuer against the deceased so cannot now transmit to the executors.

[24] A decree of declarator must assert a declaration of a right that existed at the time it was said to be founded upon. Such a decree of declarator is consequently retrospective in effect:

> "A decree of declarator confers no new right on the pursuer, but merely declares authoritatively that he possesses some status or right previously doubted or denied. It is accordingly retrospective to the date when the status or right commenced or the circumstances first arose giving rise to the question, e.g., to the date of contracting of a "marriage" now declared *null ab initio*. Declarator is accordingly generally inappropriate where it is sought to effect a change of status or acquire a new right of any kind".[4]

[25] The pursuer had no contractual claim or claim for unjustified enrichment against the deceased at the time when they ended their civil partnership. She had a claim for financial provision in terms of the 1985 Act. The declarators sought to declare, then use, these to found upon retrospective rights that assert a contractual relationship between the deceased and the pursuer entitling her to remedies in contract/damages or unjust enrichment/ recompense.

[26] At the cessation of the relationship of civil partnership the pursuer was entitled in her claim for financial provision to assert the existence of the alleged contract, the terms of it and the sums said to have been paid in respect of it. These would all have been factors in

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[4] Walker, p.105

determining any award of financial provision under section 9 of the 1985 Act. In this case these factors as alleged by the pursuer would have been particularly relevant to section 9(1)(b) which may be seen as highly analogous to principles of equity in any unjust enrichment claim.

[27] What the pursuer did not have was a separate right to assert a contractual relationship separate from this which was allegedly breached founding a separate claim in damages for this breach. Accordingly, she cannot seek to assert this right retrospectively as against the executors and seek damages. The pursuer cannot seek to assert retrospective rights against those who stand in the shoes of the deceased that, at the time said rights are said to have arisen, she did not have as against the deceased. These declarators are accordingly incompetent and the claim for damages reliant upon them should be dismissed.

Unjust Enrichment

[28] The pursuer may argue that the death of the deceased left her without any remedy. In the absence of any alternative remedy, she seeks to turn to unjust enrichment to recover her alleged contributions during her partnership with the deceased. The pursuer sets this out in at Art. 9, p. 22, lines 2-10:

> "The pursuer made payment to [the deceased] in furtherance of a purpose which was to live for the foreseeable future in 1 Cleuch Avenue as a joint owner. The purpose of transferring title into joint names failed when the parties separated. [The deceased] was not entitled to keep the pursuer's money or to keep the benefit of the expenditure of the pursuer's money when the purpose failed. She was enriched by the payments. The pursuer has suffered loss. [The deceased] required to pay back the mortgage payments as repetition and the home improvement sums as recompense. The pursuer seeks repayment by the defender from [the deceased's] estate".

[29] The expenditure by the pursuer would have been valid claims under the 1985 Act. The pursuer seeks repetition/recompense of the payments made by her from the executor

administering the estate of the deceased. The obligation of executors is to ingather the estate of the deceased and distribute it for the benefit of the beneficiaries. These beneficiaries benefit from the extent of the estate to be distributed, but they had no connection with it. The executors, although standing in the shoes of the deceased, do not have any entitlement to the benefits of the estate. The alleged enrichment of the deceased confers an incidental gain on the beneficiaries:

> "A person who has expended money for a particular purpose which has been attained cannot appeal to the enrichment principle in support of a claim for payment from a party who has incidentally gained by the expenditure in question. If somebody does something for his own benefit which also incidentally confers a benefit on another, the former probably suffers no relevant loss; the latter's benefit did not cause him any extra expenditure".[5]

[30] The matter of indirect enrichment is further discussed at para 24.05, in a passage quoted and approved in *Pert*:

> "There may be cases of indirect enrichment where A is enriched directly by B (whether by transfer, imposition or interference) but this arises indirectly from the actions of a third party C. Policy considerations against C being able to claim for A's enrichment include the prevention of double liability of A or double recovery by C, and A's loss of defences good against B, as well as the preservation of the parity of the general creditors of B in his bankruptcy and the rule against suing one's debtor's debtor. So, where C performs work or service under a contract, 'his intention is to further his own interests by performance of his contract' with the other party B and, where no guarantor is involved, C will usually rely on the faith or credit of B. Where B does not pay, C's loss is due to B's breach of contract and, if A has the benefit of C's work, C cannot claim compensation from A".

[31] Accordingly, the remedy sought of "unjust enrichment" cannot be relevantly pled against the executors in the estate of the deceased who hold that estate for the benefit of the beneficiaries and are a third party who may have been incidentally enriched (though this is of course not accepted) but who cannot be liable to the pursuer in that regard.

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[5] Gloag & Henderson, at para. 24.04.

[32] In any event, the claim of unjust enrichment is a claim that requires the absence, in general terms, of the existence of an alternative common law remedy.[6] In this case the pursuer alleges that the estate of the deceased "requires to pay back" the sums said to have been expended by the pursuer. If the pursuer considers that the estate of the deceased owes a debt to her then that falls to be constituted against the estate of the deceased *cognitionis causa tantum*.[7] This long-standing common-law remedy is the most obvious alternative common law remedy available to the pursuer in this case: she may seek to establish a debt against the estate of the deceased for which the executors may be liable. The availability of this common law remedy and the pursuer's failure to adopt it prevents the pursuer from seeking a remedy in unjust enrichment.

[33] The law provides a long-standing remedy for spouses and civil partners in cases where the deceased has died leaving a will in terms of the 1964 Act. The deceased cannot defeat the legal rights entitlement of the pursuer by testamentary intent nor can the executors ignore or refuse these legal rights. The pursuer has the absolute entitlement to these. In addition, she has the sums received in consequence of elections under the pensions and life insurance made by the deceased to which the pursuer has an unchallengeable right [and has indeed obtained the significant sums paid to her as a consequence].

[34] The pursuer seeks by this claim for unjust enrichment to set a precedent whereby separated spouse and civil partners can, on death, raise claims against the executors for unjust enrichment in addition to their unshakeable claim of legal rights. In this case, the pursuer seeks to pursue against the executors an unjust enrichment claim analogous to

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[6] *Pert*

[7] *Currie*, paras. 6.97 & 6.98.

section 9(1)(b) of the 1985 Act. Any claim under the 1985 Act ended on the untimely death of her partner. The legal rights claim remains. It is a very dangerous precedent to set that in such circumstances, all surviving spouses and partners may seek claims for unjust enrichment against the estate of the deceased if the unalienable rights granted to them under the 1964 Act are not to their satisfaction. That cannot have been envisioned ever by the legislative intent of the 1964 Act or the 1985 Act.

[35] Further and in any event, the existence of this absolute right of legal rights of a surviving partner conflicts with the absence of alternative remedies required to pursue a claim for unjust enrichment.

Quantum

[36] If the Court considers that the pursuer has a relevant claim in contract and that such a contract was breached by the deceased, entitling the pursuer to damages, the measure of those damages is such sum as would place the parties back in the position they would have been in but for the breach.

[37] The terms of the contract as averred by the pursuer were [in short] that both parties would contribute to the mortgage of the property and on its being repaid the deceased would transfer it into joint names. There was no part of this contract that included payment of improvements to the property. There was no term of the contract as averred that these payments would be included as a condition or that they would be repaid. Looking to Gloag & Henderson:

> "Where a person holding property on a limited title … expends money on improvements, it will generally be assumed that he did so with a view to his own advantage and his representatives will have no claim against the fiar for the amount

> by which the improvements have enriched him … Any claim by a tenant for improvements must rest on express contract or statutory provision".[8]

[38] Therefore, there is no part of the contract that includes the sums said to have been paid for improvements to this property. If such a claim is founded in unjust enrichment, then the measure of damages for these sums is *quantum lucratus*; the amount by which the executors have been enriched.

[39] The pursuer seeks to quantify her damages under the contract in terms of the sums said to have been paid by her towards the mortgage over the property from 2015 onwards.

[40] These are set out in detail at Art. 4, p. 10-11:

> "30/6/15 £19,170.20
> 21/9/15 £7,500
> 29/3/16 £9,500
> 11/4/16 £1,000
> 26/4/16 £19,000
> 7/7/16 £11,000
> 16/8/16 £45,000 (date of death value £49,745.27)
> 11/1/17 £2,800."

[41] The total of these sums amounts to £119,715.47. But, it should be noted firstly that the sum paid by the pursuer on 16 August 2016 of £45,000 was not in fact paid towards the mortgage but paid, on her averments, into an ISA. Such a sum did not accordingly meet the requirements of the contracting arrangement as averred by the pursuer. Any damages recoverable would be measured not by "sums paid" by the pursuer, but "sums paid in pursuit of reducing the mortgage".

[42] The sum total of the damages claim for payments made by the pursuer, as noted above, amounts to £119,715.47. This is because it includes not the £45,000 paid into the ISA in August 2016 but its date of death value in June 2018. This total of £49,745.27 is included

[8] Para. 24.17

in the total figure craved by the Pursuer notwithstanding that this was not the sum paid by her [£45,000]. The increase in value in the ISA was consequent upon the operation of interest. There is no averment of inclusion of interest in the contract said to have been entered into by the parties. In the event of success in this claim, the pursuer would be entitled to interest on any sum awarded. She cannot be awarded interest on interest.

[43] The total sum of £119,715.47 is said to have been sums "paid" by the pursuer. The actual sum paid by the pursuer were in fact £114,970.20. But this sum takes no account of the fact that in terms of the pursuer's averments, the £50,000 that she had been paid out of the property in 2006 required to be repaid, thus at Art. 3, p. 6, lines 21-23:

> "The pursuer's withdrawal of £50,000 of equity from the property would be repaid into the property by the pursuer and beyond that they would contribute to repayments in equal shares".

[44] No account is taken by the pursuer of the deduction of this £50,000 when totalling up the payments said to have been made by her. On the averments of fact by the pursuer, taken at their highest, the sum craved in damages as required to return the pursuer to the position that she would have been in but for this anticipatory breach of contract [which is denied] cannot exceed the sum of £64,970.20. Accordingly the pursuer's averments anent the breach of contract *et separatim* damages due are lacking in specification.

Conclusion

[45] Pleas in law numbers 1 and 6 for the defender should be upheld and the action dismissed. If the court is not with the defender on this, then the pursuer's averments anent the contract and unjust enrichment being lacking in specification, should not be remitted to probation. The defender's pleas in law 3 and 4 should also be upheld.

Submissions for pursuer

Background

[46] The debate concerns two alternative claims that the pursuer makes against the deceased's estate. The first is a claim for damages for breach of contract. This claim is presented on the basis that the deceased was in anticipatory breach of contract when she told the pursuer that she was no longer prepared to transfer half of the house into the pursuer's name when the mortgage had been paid off. The pursuer presents an alternative claim in unjust enrichment, that even if there was no breach of contract involved, the deceased was nonetheless enriched at the pursuer's expense, with there being no legal basis justifying the retention of the payments made over by the pursuer to the deceased in anticipation that the couple would live in the home as joint owners on an ongoing basis.

[47] Before turning to the specific arguments put forward on behalf of the defender, a general point to be noted was that the defender sought to blur the lines between (1) the situation of a couple (either married or in a civil partnership) and (2) a couple who had fallen out; or were legally separated; or who were divorced or whose civil partnership had been dissolved.

[48] Whether a couple were "legally separated" was a question to be determined by the court. But it was clear that there could be a variety of situations prevailing until the matter was determined in an action of divorce or dissolution.

[49] The defender avers "at the time the civil partnership ended" or "at the time of separation". That was an attempt to blur the lines. But there was nothing in the pleadings of the pursuer that could find a basis for saying that the civil partnership had broken down irretrievably; and they had not been separated for a year.

[50] It was accepted that separated couples would normally deal with their affairs using the 1985 Act, but that was largely a matter of timing.

[51] There was nothing to say that parties to a marriage or civil partnership could not enter into a contract. In the present case, because of the deceased's death, matters could not be handled in the way they might normally have been handled under the 1985 Act.

[52] It was necessary to look at matters just prior to the deceased's death. If the deceased was in material breach of contract or had been unjustifiably enriched at that time, the pursuer had a right of action.

[53] The provisions of sections 8 and 9 of the 1986 Act could not now be used by the pursuer to seek a remedy.

Competency

[54] The pursuer seeks remedies that she would have been entitled to pursue against her civil partner. The contracts between them are as enforceable as any contract is. Any question as to whether the pursuer and the deceased had intended to create legal relations was a matter for proof. The same applies to their rights to pursue remedies for unjustified enrichment.

[55] At the time of the death of Margaret Tait, neither party had raised an action for dissolution of civil partnership. The rights in civil partnership property that arise on dissolution of the civil partnership cannot be in issue in this situation, where the partnership was still in existence. The remedies that are or are not available in an action for dissolution of civil partnership have no bearing on the pursuer's position.

[56] The pursuer would have had choices about what steps to take in the face of the breakdown of her relationship. She could have sued the deceased for breach of contract or

in unjustified enrichment, she could have negotiated a financial settlement of their affairs, she could have waited until grounds for dissolution of the civil partnership were available and then raised proceedings, or chosen not to on the basis that the deceased might. In the event, she did embark on negotiating a settlement, but was never able to complete it. So, some of her choices were eliminated – her civil partner has died and she can no longer seek dissolution of the partnership. She cannot raise such an action against the estate. That does not make her rights arising from contract or the principles of unjustified enrichment unenforceable.

Relevant averments of breach of contract

[57] Where one party to a contract intimates to the other that they refuse to perform their part of the contract, that amounts to a breach of contract, even if the intimation is made before performance is due: McBryde, para. 20.23. The principle was applicable in any type of contract. There would not necessarily be any greater clarity in a commercial dispute. There were many cases involving commercial disputes where informal communings had to be interpreted by the court. Lord Hamilton explains this in *Edinburgh Grain Limited (in liquidation)* where he required to analyse the evidence following proof concerning whether the conduct of the pursuer constituted such an intimation:

> "In Scotland there has been limited judicial discussion of what is commonly referred to as 'anticipatory breach' of contract. In *Monklands District Council* v *Ravenstone Securities* Lord Dunpark, in discussing the legal effect of repudiation of an onerous consensual contract, said at 1980 SLT (Notes), p 31:
>
> > 'The concept of such a contract is that the undertaking of a duty (i.e. the promise of performance) by an obligant creates a corresponding right of the obligee to demand performance when that becomes due; but that is not all. In my opinion, the undertaking to perform at the due date binds the obligant not only to perform at the due date, but also to adhere to that undertaking from the conclusion of the contract until performance. Accordingly, if at any

> time during that period the obligant informs the obligee that he will not perform his contractual duty when the time comes, that, in my opinion, is a breach of contract. Indeed, it is so material a breach that the law entitles the obligee to treat that statement as a repudiation by the obligant of his contractual obligations and at once to declare the contract terminated and to claim damages, without waiting for the date when performance is due. The fact that the law allows the obligee this option demonstrates that intimation of refusal or inability to perform given before the due date is per se a breach of contract; if it were not, the obligee would have no rightful claim for damages in advance of non-performance at the due date.' …
>
> What, in my view, is required for repudiation is conduct demonstrative of an intention not to perform fundamental contractual obligations as and when they fall due. That intention may have its origin in a choice by the obligant not to fulfil his contract or in an inability on his part to do so".

[58] The pursuer has relevantly averred a case of anticipatory breach. It does not matter that the future contingent event did not occur. The pursuer offers to prove that the deceased was in breach of contract because she decided not to stick to what had been agreed and intimated this to the pursuer. It is averred at Art. 7 that:

> "The 2007 agreement was terminated by [the deceased] when it had been partially implemented. … On separation at the start of June 2018 [the deceased] made it clear that she did not want to continue to live with the pursuer at Cleuch Avenue or be joint owners. She no longer had any intention of returning the title to joint names. She wanted to the pursuer to find somewhere else to live. She wanted to keep the property in her sole name. … [the deceased] refused performance of the 2007 agreement".

[59] These averments amount to a relevant case of anticipatory breach. The deceased was in breach of contract because she intimated to the pursuer that when the time came for her to perform her obligation under the contract, she would not.

[60] Any suggestion that both parties were in breach was not supported by the averments. Repudiation of the contract was accepted by the pursuer indicating that she "wanted her money back".

[61] Neither party had pleadings concerning the issue of "frustration", so the court did not need to be concerned with it. It did not matter that the contract had been frustrated by the breakup of the couple's relationship.

[62] It was not necessary for the pursuer to have a word "anticipatory" in her pleadings.

Liability of estate for damages for breach of contract

[63] The liability of the defender for the debts of the deceased arises in her capacity as executor only. No personal liability is averred. It is the deceased's estate, not the defender personally, which is liable to pay the debts of the deceased: *Currie,* paras. 1.20-1.24). There are relevant (and admitted) averments as to the defender's role as executor in Art. 1.

[64] The defender's argument about the liability of the estate arises from an argument that the deceased had no liability, which was not correct for the reasons already given.

Quantification of damages

[65] Assessment of damages is:

> "a jury question so that the award will compensate the claimant for all the direct and material consequences of the wrongful act, neither enriching nor impoverishing him beyond the position in which he would have been if the wrongful act had not occurred".[9]

[66] Some measures of damage may be more straightforward to evidence than others. In *Prudential,* a case for breach of a repairing covenant in a lease was held to be relevant for proof where the pursuer measured their loss by the costs of doing the repairs themselves.

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[9] *Prudential Assurance Company Limited,* per Lord MacDonald.

The defenders argued that the only relevant case would have compared the capital value of the property as it ought to have been maintained by the tenant with the actual capital value.

[67] In ruling against this proposition, Lord Macdonald said that:

> "I do not consider that it is incumbent upon the pursuers at this stage to enumerate in their pleadings all the legitimate but not necessarily conclusive measures of damage, to check these against each other and to produce, as matter of averment, a figure reached on this basis. They have produced *prima facie* a figure based upon the readily ascertainable cost of repair and it is for the defenders, if they can, to aver and prove that this is too high".

[68] In cases of wrongful repudiation of contract, the pursuer may choose not to speculate what their profit would have been had the contract been carried into effect, but to claim for wasted costs. In *Anglia Television* v *Reed,* a famous actor with unique qualities who would have carried a drama production pulled out of his contract with the television company. The amount of profit that the production would have made being speculative, the plaintiffs chose to sue for their expenditure in arranging the production. They successfully recovered costs wasted on these arrangements incurred both before and after the contract with the actor had been signed.

[69] Such a choice should not over-compensate the pursuer however. This reliance basis for assessing damages ought not to put them in a better position than the expectation basis based on loss of profit ever could have, and the defender may attempt to prove that it would. The television production, for example, may have been a terrible business model, or planned loss leader, where the costs far exceeded any return that the company could expect. The actor would not have been liable for that.

[70] In this case, the funds tendered by the pursuer to the deceased and expended on her property in this case are not entirely analogous with the wasted costs in cases like *Anglia Television.* The pursuer had performed her part of the contract by making payments to the

deceased, who was also contributing towards paying down the loan. The contract was an ongoing one until the point at which the deceased decided to intimate a refusal to make future performance, and the pursuer decided to accept this repudiation and withhold any future performance. These funds had been expended by the pursuer in the expectation that she would become a co-proprietor of Cleuch Avenue. This applies also to the £50,000 which was to be repaid. These were matters for proof.

[71] The pursuer has chosen a readily ascertainable measure of her loss, based on the sums she has expended on reliance of the contract being carried on to its anticipated end. Averments about what would have happened had the parties stuck to their agreement would be more difficult to make. The pursuer cannot know when the mortgage would have been paid off, not being in a position to predict the pattern of any future overpayments. She cannot know what the value of the property would have been at the time that the deceased was obliged to transfer half of the property to her, both because of the difficulty of knowing when that obligation would arise, and because it is not possible for her to predict the future course of the value of the property on the market.

[72] In these circumstances, the pursuer has made relevant averments about her losses arising from participation in the contract before it was terminated by the deceased. In doing this, the pursuer does assume that, on a broad view, the arrangement was a reasonable one for her to have entered into. If the defender believes this not to be the case, and that the pursuer's ultimate position, had she had the benefit of the transfer of a half share of the house in due course, would have been less than the damages sought, then the defender may offer to prove this.

Exhaustion of other remedies

[73] Recent case law continues to explore the extent to which unjustified enrichment remedies are available where other remedies are open to the pursuer. However, detailed examination of the operation of the principle of subsidiarity is unnecessary in this case, because there is no other relevant remedy open to the pursuer. The principle was expressed in the case of *Varney* v *Lanark Town Council* by Lord Wheatley thus:

> "Recompense is an equitable doctrine. That being so, it becomes a sort of court of last resort, recourse to which can be had only when no other legal remedy is or has been available. If a legal remedy is available at the time when the action which gives rise to the claim for recompense has to be taken, then normally that legal remedy should be pursued to the exclusion of a claim for recompense".

[74] In *Varney*, the pursuer was a developer who maintained that a town council was under a statutory duty to construct sewers to service their housing development. They could have sought a positive order for performance of this duty, but they did not. They built the sewers, and then sought recompense for this work from the council. In his decision, Lord Fraser said that allowing a claim in recompense:

> "…would open the door very wide for any party to short-cut proper procedure, by undertaking a duty which rested upon a local authority and then turning round and claiming reimbursement from the local authority".

[75] These principles about the use of equitable remedies as a "court of last resort" do not exclude a claim by the pursuer against the defender's estate in the circumstances that have arisen. There is no question of the pursuer "short-cutting proper procedure" by failing to bring proceedings for dissolution of her civil partnership. There is no remedy against the estate under sections 8 and 9 of the 1985 Act available to the pursuer. These sections are concerned with orders that a court may make on granting the dissolution of a civil partnership. There will be no application for such a grant in relation to the pursuer's civil partnership. It has ended in death and can no longer be dissolved.

[76] Further, and in any event, there are no averments that suggest that such a remedy was available to the pursuer immediately prior to the deceased's death. The pursuer pleads nothing that could establish that the civil partnership had broken down irretrievably in terms of section 117 of the 2004 Act. The parties had not been separated for a year. Their behaviour was not such that either party could not reasonably be expected to cohabit with the other. There is and was no available remedy available that the pursuer has failed to avail herself of.

[77] A claim for legal rights from the estate is not an alternative remedy. In this context, an alternative remedy needs to be an equivalent remedy. The pursuer's only claim here would be one for legal rights. There would be no prior rights because there was a Will and heritage is thus excluded. If the pursuer's claim was successful it would exceed the available legal rights claim and require intrusion into the value of the heritage.

The relevance of the case pled on the basis of unjustified enrichment

[78] The pursuer accepts that to succeed in an action for unjustified enrichment, she must show that the defender has been enriched at her expense and that there is no legal justification for the enrichment. The pursuer must also succeed in overcoming any issues raised in the case that suggest it would be inequitable to compel the defender to redress the enrichment, although that is not a matter for this debate.

[79] The pursuer offers to prove that the deceased was enriched at her expense. The enrichment took the form of (i) direct payments to the deceased (Art. 4) and (ii) payments for improvements to property owned by the deceased (Art. 5). The pursuer also makes relevant averments about the nature of the payments. She avers the circumstances thus:

i. The pursuer and the deceased were partners who lived together for 29 years;

ii. they had taken title in joint names to a succession of homes, first in Leith and South Queensferry and then at the property at 1 Cleuch Avenue, which was purchased in 2003;

iii. in 2006 they considered separating;

iv. they envisaged the deceased remaining at Cleuch Avenue and the pursuer purchasing alternative accommodation;

v. arrangements were made to transfer the property into the deceased's sole name;

vi. the pursuer received consideration for this transfer, to allow her to purchase a new property, which she did;

vii. they then reconciled and remained living together at Cleuch Avenue;

viii. the pursuer made payments to the deceased to be used for paying off the loan over their home for which the deceased was liable;

ix. she made improvements to the home despite the fact it was not owned by her;

x. she did these things on the understanding that she and the deceased had a common purpose in living together as joint owners of the house for the foreseeable future, and were working together to achieve that purpose;

xi. there was no question of incidental enrichment – it was clear that the payments were not meant to be a gift.

[80] The pursuer's case is that, the averred purpose having failed when the couple separated before the house was transferred into joint names, the deceased was not entitled to retain the benefit of the payments that the pursuer had made. By describing the character of the payments, the pursuer makes sufficient averments that the retention of the funds would be unjustified. It is not necessary to offer to prove the negative by excluding any or all

possible legal justifications. The averments in Art. 9 bring the case within the character of transfers made for a purpose which has failed, exemplified in *Shilliday* v *Smith.*

[81] *Shilliday* concerned money expended by the pursuer in improving property owned by the defender on the basis that it would become their marital home, and in future owned by them both. The marriage not having taken place, the pursuer was entitled to reverse the defender's enrichment. Lord Rodger describes this group of unjust enrichment claims as follows:

> "It is unnecessary in this case to examine all the groups and it is sufficient to note that the term *condictio causa data, causa non secuta* covers situations where A is enriched because B has paid him money or transferred property to him in the expectation of receiving a consideration from A, but A does not provide that consideration. The relevant situations in this group also include cases where B paid the money or transferred the property to A on a particular basis which fails to materialise—for example, in contemplation of a marriage which does not take place".

[82] At page 731, Lord Rodger identifies why the claim is well-founded in unjustified enrichment:

> "The pursuer's case is wholly different. She does not argue that the defender should pay her the sum in the crave simply because she paid money to him and spent money on his house from which she derived benefit. The pursuer points, rather, to a particular factor which makes the defender's enrichment unjust. Where such a relevant factor exists, that factor, rather than the mere fact of expenditure by the pursuer and benefit to the defender, constitutes the ground of action. So, in Newton the pursuer was allowed to recover from his former wife money which he had spent on a house which actually belonged to her, but which he had mistakenly thought belonged to him. The critical factor in the pursuer's ground of action was his mistake about the title: he recovered because his wife was benefiting from sums which he would not have spent if he had been aware of the true position. In the present case also the pursuer does not simply rely on the fact that she paid money to the defender and spent money on the defender's property from which he has benefited. On the contrary, the critical factor in her ground of action is that she acted as she did in contemplation of the parties' marriage, which did not take place. That is why she seeks to be repaid the money which she gave him and to be recompensed for her expenditure".

[83] The pursuer has identified such a factor in this case, the shared understanding of the couple that they would live together in their home as joint owners in the future, as they had done in the past.

Summary

[84] The defender's criticisms of the pursuers' pleadings are without merit. They should be rejected by the Court and a proof before answer allowed. The pursuer moves the court to repel the 1st, 2nd, 3rd, 4th, 6th and 7th pleas-in-law for the defender and to allow a proof before answer.

Reply for defender

[85] It was argued for the pursuer that there was no obligation for the financial affairs between her and the deceased to be regulated in terms of the 1986, but that was contrary to what was averred: Art. 7, page 17.

[86] The pursuer's pleadings were quite limited as to the ISA investment of £45,000 and £50,000 which was to be repaid. Art. 4, page 10 could be contrasted with the averments at page 17 which were that on death the mortgage was £44,000. Therefore it appeared that the ISA was not to pay off the balance and it was not clear it applied to the mortgage.

[87] It was not disputed the parties to a civil partnership can enter into a contract but when such a contract ends, the manner in which financial arrangements are dealt with is in terms of the 1986 Act.

[88] A spouse or civil partner could not raise proceedings for breach of contract.

[89] In this case, the relationship was over. The date of the end of the relationship is critical for determining questions of financial provision. These are calculated from the date of the end of the relationship not from the date of raising proceedings.

Reply for pursuer

[90] It was not accepted that because there were averments about the termination of the relationship, the remedies were restricted.

[91] There had been no conclusion to the negotiations between the pursuer and the deceased prior to the latter's death nor had an action for dissolution been raised.

Grounds of decision

The contract

Time for performance not reached

[92] Ms MacColl made it clear that the pursuer's case was based on anticipatory breach so I need say nothing further about Ms Ennis' argument about the time for performance (the repayment of the loan) not having been reached. It is clear that that never happened and so breach of contract cannot arise in that way.

Form of crave and plea in law

[93] Ms Ennis criticised the form of the 5th crave and the 4th plea in law as not articulating the putative breach as an anticipatory one. While neither specifically refers to an anticipatory breach of contract, in my view that is not necessary. The crave and the plea both make it clear that a breach of contract is being relied on. The factual averments make it

clear that the case being put forward is one of anticipatory breach. As such, no more particular formulation of the crave or plea-in-law is required.

Establishing the anticipatory breach

[94] Ms Ennis submitted that the conduct said by the pursuer to amount to anticipatory breach did not satisfy the requirement for clarity of intimation. Ms MacColl submitted that the averment in Art. 7, page 16 line 5 – page 17, line 5 were apt to entitle her to an enquiry on that issue.

[95] In *Edinburgh Grain Limited,* Lord Hamilton said that the obligant informing the obligee that he will not perform his contractual duty and intimation of refusal or inability to perform may constitute anticipatory breach; and that what was required for repudiation was:

> "… conduct demonstrative of an intention not to perform fundamental contractual obligations as and when they fall due. That intention may have its origin in a choice by the obligant not to fulfil his contract or in an inability on his part to do so".

[96] Whether words or actions satisfy that test is essentially a question of fact to be judged objectively. In my opinion, on the averments, the pursuer is entitled to enquiry on this issue.

[97] Ms Ennis also submitted that even if the deceased's statement amounted to a clear and unilateral intention not to implement her part of the contract amounting to a material breach, then she did so consequent upon the ending of the civil partnership of the parties. I do not see that that is relevant to whether there was an anticipatory breach of contract or not. (It may be relevant to the question of remedy, discussed further below).

Averment about sale of property

[98] Ms Ennis challenged the averment at Art. 7, p. 17, lines 22-23 which said that **"…** selling the property … would have triggered title being returned to joint names as the loan would have been repaid …". It was not correct to say that as a sale would have meant that title to the property would have transferred to the new owner. In my opinion, there is force in this point and that averment will not be admitted to probation.

Frustration of contract

[99] Ms Ennis submitted that what had occurred was not anticipatory breach of contract but rather frustration thereof by the ending of the couple's civil partnership; and that the pursuer did not have a remedy under contract law.

[100] I do not agree with that submission for two reasons. First, as Ms MacColl submitted neither party has any averments about frustration of the contract. This is a debate and primarily concerned with the content of the pursuer's pleadings. There is no reference to frustration therein. No point about the non-implementation of the putative contract due to frustration rather than breach of contract is mentioned in the defender's pleadings nor is there any plea-in-law directed to that issue. Likewise, it is not a matter which is foreshadowed in the defender's r. 22 note (number 20 of process) lodged on 14 December 2020. In these circumstances it is not open to the defender to adopt such a line of attack, without having given notice of doing so.

[101] Second, if there is a live issue to be decided as to whether the contract ended because of frustration thereof, it is one which will require a close examination of the precise sequence of events and is hence one which can only be answered after the evidence is heard and the

facts determined. (I also observe that if frustration were established, that would open the way to an equitable remedy so would not necessarily defeat a claim by the pursuer.)

Mechanism for resolution of couple's finances

[102] Ms Ennis submitted that resolution of the financial relationship between the parties required to be undertaken within the scope of financial provision on dissolution of the civil partnership in terms of the 1985 Act; the agreement relied on by the pursuer was not a commercial contract made at arms' length; and that instead, the situation fell to be characterised as giving rise to a question of status and to be dealt with as such.

[103] The first and third of these points are dealt with more fully below. I do not see that the context of the contract has any bearing on the position. Parties have either entered into contractual (legal) relations or they have not. This is not affected by their personal status relative to one another. Spouses and civil partners are free to contract with one another. Contracts between spouses or civil partners can range from matters closely entwined with their status relative to each other (e.g. pre- or post-nuptial agreements); to matters which are collateral to their relationship (e.g. an MP who employs a spouse in an administrative or secretarial capacity). The question as to what methods can (or must) be used to resolve the finances of parties whose marriage or civil partnership is in the process of coming to an end do not depend on the type of contract they have entered into, but rather the scope and effect of the 1985 Act. This is dealt with below.

Competency

[104] Ms Ennis' proposed that after confirmation the executor takes the place of the deceased; that rights under a contract to which a deceased was a party can transmit to the

executor; and that the pursuer cannot have a better claim against the executor than she would have had against the deceased. These are not controversial points.

[105] But Ms Ennis went on to say that the pursuer seeks a declarator of a right under a contract which she did not have against the deceased, pointing to the averment at Art. 7, p. 17, lines 24-26 that payments due under the putative agreement had been considered as part of the financial provision on termination of the couple's partnership. She submitted that financial provision on dissolution of civil partnership was regulated wholly within the scope of the 1985 Act which provided a mechanism for dealing with the different contributions to the partnership.

[106] Ms MacColl's approach was that the pursuer sought remedies that she would have been entitled to pursue against the deceased as her civil partner. Contracts between civil partners were enforceable as were claims for unjustified enrichment. The existence of an intention to create legal relations was a matter for proof. No action for dissolution of civil partnership had been raised and it was still in existence on the date of the deceased's death. The remedies that may be available in an action for dissolution of civil partnership had no bearing on the position. The financial issues between the parties could have been resolved in a number of ways. No negotiated settlement was completed. No dissolution of the civil partnership could now be achieved.

[107] It is clear – and it was not argued otherwise – that spouses and civil partners can and do enter into contracts with one another. It is not uncommon for spouses or civil partners to be business partners. I have already given the example of MPs employing a spouse or civil partner under a contract of employment. Agreements on financial provision are specifically recognised under section 16 of the 1985 Act.

[108] The extent to which a contract between spouses or civil partners is connected with their relationship will vary from case to case.

[109] There are special rules relating to agreements on financial provision – but these are concerned with what spouses or civil partners have agreed is to happen in the event of divorce or dissolution of the partnership. The putative agreement in this case was not an agreement on financial provision.

[110] Turning to the issue of remedies arising from breach of the putative contract or by reason of unjustified enrichment, I was directed to no part of the 1985 Act which suggested that such remedies were ousted so as to have no application and that all financially related disputes arising out of a contract between two civil partners (or spouses) could only be resolved in terms of the mechanism set out in the 1985 Act.

[111] Unless legislation expressly changes it, the pre-existing common law is assumed to continue. There is no express wording in the 1995 Act qualifying or limiting remedies for breach of contract or unjustified enrichment.

[112] The original introductory text to the 1985 Act provides that it is:

> "An act to make fresh provision in the law of Scotland regarding aliment; regarding financial and other consequences of decrees of divorce and of declaratory of nullity of marriage; regarding property rights and legal capacity of married persons; and for connected purposes".

[113] The Act has now been amended to take account of its application to civil partnerships, but it is significant that it is said to deal with the financial and other consequences of decrees of divorce and declaratory of nullity of marriage, which indicates it is concerned with how these matters are regulated by the court when decree is granted.

[114] Section 8(1) provides that:

> "in an action for divorce, either party to the marriage and in an action for dissolution of a civil partnership, either partner may apply to the court for one or more of the following orders". (Emphasis added).

[115] There is nothing in that or any other section that says that all financial questions arising between the parties must (i.e. can only) be dealt with within the framework of the legislation.

[116] Ms Ennis relied on averments to the effect that payments due under the putative agreement had been considered as part of the financial provision on termination of the couple's partnership. But it must be borne in mind that while the couple's relationship had ended by the time of these negotiations, their civil partnership had not. It ended on the deceased's death, but for that reason, no claims could be made by the pursuer under the mechanism provided in the 1985 Act. So at the time of the negotiations, the claims were prospective ones which had still to be agreed and finalised, but in the event never were.

[117] Ms Ennis also submitted that financial provision on dissolution of civil partnership was regulated wholly within the scope of the 1985 Act which provided a mechanism for dealing with the different contributions to the partnership. That may be correct – but as noted, that was not the situation here because there was no dissolution.

[118] No doubt where there is a breakdown of a civil partnership (or a marriage), as a matter of efficiency and practicality, the parties thereto will often utilise the mechanisms set out in the 1985 Act to resolve all financial questions that arise between them as a result of the breakdown of the relationship. This will often including those arising out of collateral matters, e.g. a separate employment contract or business agreement, where those too have or are to come to an end. But they are not bound to do so, absent express legal provision to that effect: the 1985 Act, section 8(1) provides that in an action for dissolution of a civil

partnership, either partner *may* apply to the court for one or more of the orders specified therein.

[119] Neither does it matter that parties had embarked on resolving matters by reference to the provisions of the 1985 Act; nor even that such resolution would probably have been reached in terms of sections 8 and 9 thereof had the deceased not died. The availability of orders for financial provision as defined therein can only arise in the context of actions for divorce or dissolution of a civil partnership; and only take effect when they are made on the granting of divorce or dissolution. In this case, such a point was never reached and the pre-existing common law remedies remained available to the pursuer.

[120] Therefore, the pursuer's arguments on the question of competency are preferred. She is seeking to bring a claim for damages for breach of contract *et separatim* of recompense for unjustified enrichment. Both these claims would have been competent against the deceased when she was still alive. As such, they are competent claims against the deceased's estate; and may be brought against the executor who stands in the deceased's place.

Unjust enrichment

Indirect enrichment

[121] Ms Ennis submitted that enrichment of the deceased had conferred an incidental gain on the beneficiaries. Under reference to Gloag & Henderson, paras. 24.04 and 24.05, she argued that the remedy of unjust enrichment could not be relevantly pled against the executors in the estate of the deceased who hold that estate for the benefit of the beneficiaries who are a third party who may have been incidentally enriched but who cannot be liable to the pursuer.

[122] In my opinion, this approach proceeds on a false premise. As Ms MacColl pointed out, the pursuer offers to prove the enrichment, namely various transfers of funds to the deceased over a period of years; and that that enrichment became unjustified, when the purpose (paying off the loan, thereby triggering the transfer of Cleuch Avenue into joint names) failed when the couple separated before the house was transferred into joint names. Thus, it is said, the deceased was not entitled to retain the benefit of the payments that the pursuer had made and the pursuer was entitled to redress for it.[10]

[123] *Ex hypothesi*, that right of action arose when the deceased was still alive – and at that stage it was the deceased who had been unjustifiably and directly enriched, not any third party. That right of action survives the death of the deceased and may be brought against the executor who is sued in a representative capacity; and it is the estate which must meet the claim, if successful: *Currie*, 1.20-1.24. The fact of the deceased's death and that the benefit of the enrichment subsequently transfers to the beneficiaries does not alter the position.

[124] Ms Ennis placed reliance on Gloag & Henderson, para. 24.04, but that deals with cases where expense has been incurred for a particular purpose which <u>has</u> been attained, which is the opposite of the pursuer's case here, which is that the purpose (repayment of mortgage and transfer of title into joint names) had not been attained.

[125] I also agree with Ms MacColl's submission that the pursuer's case is of a similar type to that found in *Shilliday* v *Smith*, where recovery of monies expended in contemplation of marriage were held to be recoverable, notwithstanding that the expense was incurred partly for the pursuer's own benefit.

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[10] Gloag & Henderson, para. 24.01.

[126] Ms Ennis also placed reliance on Gloag & Henderson, para 24.05. Again, that appears to me not to be relevant because, using the example there utilised, the pursuer in the present case (person C) has not sought to bring a claim against the beneficiaries in the estate (person A), because of a default in the obligation owed by the deceased (person B) to her. Her claim is against the deceased, brought against the executor who stands in her place, which, if established, is payable out of the estate like any other debt.

Alternative remedies

[127] Ms Ennis submitted that the pursuer's failure to exercise her right to alternative remedies were a bar to her proceeding with a claim for unjustified remedy.

Cognitionis causa tantum

[128] She submitted that the pursuer's claimed debt against the estate of the deceased fell to be constituted against the estate of the deceased utilising this remedy. Failure to do so barred an action based on unjust enrichment.

[129] Unfortunately, I was provided with only very limited submissions on this point, which appear to have been based on a narrow reading of the relevant chapter of *Currie*, reliance being placed on paras. 6.97 & 6.98 and no account being taken of other parts of the text or any of the reported cases. While on a superficial reading of those paragraphs, it may appear that there was a potential alternative remedy available, the following is apparent.

[130] First, confirmation as executor-creditor is different from confirmation in any other capacity, being in fact a special type of diligence: *Currie*, para. 6-71.

[131] Second, where a person dies leaving a debt, the creditor will normally recover the debt from the deceased's executor, and appointment is one of two options available to a creditor if that has not happened: *Currie*, para. 6-80.

[132] Third, a creditor cannot execute diligence by being confirmed executor-creditor where an executor of any kind has already confirmed to the same asset or assets at the same value: *Currie*, para. 6-83.

[133] In the present case, the defender was appointed as executor presumably to the deceased's whole known assets; and the pursuer's claim has been brought against her in that capacity.

[134] Although an unconfirmed executor need not be cited by a creditor and the existence of such an executor is no bar to this diligence, it appears that the existence of a confirmed executor (as in this case) is a bar to this type of diligence. If that is correct, it cannot constitute an alternative remedy.

Rights under 1964 Act and to pensions & life insurance

[135] Ms Ennis submitted that the pursuer had a right as a surviving civil partner where the deceased had died testate which was indefeasible and absolute; and had also received sums from pensions and life insurance elections made by the deceased. It was, it was said, a dangerous precedent to allow claims against the executors for unjust enrichment (analogous to claims under section 9(1)(b) of the 1985 Act which had ended on the untimely death of the deceased) in addition to surviving spouses or civil partner's legal rights claims. The existence of an absolute right to legal rights conflicted with the absence of alternative remedies required to pursue a claim for unjust enrichment.

[136] Ms MacColl submitted that in the present case, no other relevant remedy was open to the pursuer. There could not be a remedy under sections 8 and 9 of the 1985 Act. The rights available to the pursuer under the 1964 Act were limited to legal rights payable out of the moveable estate, which even if paid would fall short of the amount required to redress the unjustified enrichment.

[137] In my opinion, the existence of rights under the 1964 Act do not amount to an alternative remedy available to the pursuer. These rights derive from a quite distinct legal framework arising from a different situation. They are solely attributable to the death of the deceased as the pursuer's civil partner. They are not connected to or overlapping with the arrangements which the couple (it is said) entered into in relation to Cleuch Avenue.

[138] I also observe that the unfortunate sequence of events (separation followed by a sudden and unexpected death) occurring against the backdrop of informal (in the manner in which they were said to have been recorded) financial arrangements between the pursuer and the deceased is relatively unusual and not likely to give rise to a flood of claims based on unjustified enrichment.

[139] Without expressing any concluded view on the matter, it may be that sums paid or payable under the foregoing heads are relevant to quantification of the pursuer's claim for redress of unjustified enrichment, but they are not a bar to pursuit of such a claim.

Quantum

[140] Ms Ennis submitted that the terms of the contract relied on by the pursuer were limited and did not cover the cost of improvements to Cleuch Avenue.

[141] The pursuer quantified her claim for damages under the contract in terms of the sums said to have been paid by her towards the mortgage over the property from 2015 onwards. She had included in the sum claimed of £119,715.47 a sum of £49,745.27.

[142] There were two objections to that sum being included as part of the contractual claim. First, the £45,000 paid by the pursuer on 16 August 2016 was not paid towards the mortgage but instead put into an ISA. So that sum could not form part of her contractual claim. Second, the sum claimed under that element was stated not as the £45,000 paid into the ISA in August 2016 but the date of death value in June 2018, which included interest gained on the investment. There was no averment about a term as to interest in the contract said to have been entered into by the parties. In the event of success in this claim, the pursuer would be entitled to interest on any sum awarded. She could not be awarded interest on interest.

[143] The sum claimed by the pursuer in respect of payments made by her (which, properly stated, was £119,715.47 less interest on the ISA of £4,745.27 = £114,970.20) did not take account of the £50,000 that she received in 2006 and was to be repaid. Thus, the pursuer's claim for damages for the anticipatory breach of contract could not exceed the sum of £64,970.20. Therefore the averments about the breach of contract and damages flowing therefrom were lacking in specification.

[144] In response, Ms MacColl said that assessment of damages was a jury question. It was not necessary to aver a figure based on all measures of damage checked against each other. A readily ascertainable figure was sufficient. In cases of wrongful repudiation of contract, a pursuer may choose to claim wasted costs. The defender may attempt to prove that such a basis for assessing damages would over-compensate the pursuer.

[145] In the present case, the pursuer tendered funds to the deceased and which were expended on Cleuch Avenue. The pursuer had performed her part of the contract by making payments to the deceased. The contract was an ongoing one until the deceased repudiated it by her intimation of a refusal to make future performance, which repudiation was accepted.

[146] The pursuer had chosen a readily ascertainable measure of her loss, based on sums expended on reliance of the contract being carried through. What might have happened had the repudiation not occurred was more uncertain, such as when the mortgage would have been repaid and what the value of Cleuch Avenue would have been at any given date. The pursuer's averments about her losses were relevant.

[147] In my view, the submissions for the pursuer are to be preferred. There is often more than one way to calculate a claim for damages arising from a breach of contract. A claim based on costs incurred is not necessarily irrelevant, not least because it may be the most easily ascertainable. That method of calculation may require a cross-check but that is a matter which the defender can put in issue, thereby making it a matter for proof.

[148] I am not sure that I agree with Ms Ennis' reading of the averments about the payment of the £45,000 which was invested in an ISA. I note at Art. 4, page 10, lines 8-11, the pursuer avers:

> "The £45,000 was not paid directly into the mortgage but held in an ISA in [the deceased]'s name on the advice of the couple's financial adviser as a tax efficient way to keep the cash until the loan repayment point was reached in June 2021 or earlier. The value of the ISA was £49,745.27 on confirmation dated 29 October 2018".

[149] That suggests that although not paid immediately towards reduction of the mortgage, it was earmarked for that purpose and invested in the meantime. If that is correct

(and that will be a matter for proof), then that payment did fall within the terms of the contract contended for by the pursuer.

[150] In any event, while the courts in Scotland have not gone so far as the approach taken in England in *Austin*, there is Scottish authority for allowing recovery of expenses incurred prior to the breach but after the contract has been concluded: McBryde, paras. 22.96-22.97; *Daejan Developments Ltd* v *Armia Ltd*.

[151] If the pursuer's claim for payment of the £45,000 is successful, she will be entitled to interest on that. The date from which interest is to run and the rate thereof will be a matter for the court's discretion, but the amount of interest which the investment did in fact earn is not an irrelevant consideration to that exercise.

[152] As to the £50,000 pounds of equity in Cleuch Avenue which was paid to the pursuer in 2006 and used to purchase Innerwick and which was to be repaid into Cleuch Avenue, the pursuer makes averments about what was done with the Innerwick property and the income derived from it: Art. 3, p. 8. The question as to whether and to what extent that sum would fall to be set off against any part of the pursuer's claim appears to me to be one which can only be answered after proof.

Disposal

[153] I shall sustain the defender's motion 1st plea in law to the extent only of refusing to admit to probation the averments Art. 7, p. 17, lines 22-23 to the effect that "… selling the property … would have triggered title being returned to joint names as the loan would have been repaid …"; thereafter repel the defender's 2nd, 3rd, 4th, 6th and 7th pleas-in-law for the defender; and thereafter allow parties a proof before answer on a date to be afterwards fixed. All questions of expenses are reserved, though given the substantial success which

the pursuer has achieved, I would hope that these could be resolved without a further hearing.