

SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT FALKIRK

[2025] SC FAL 15

FAL-F104/20

JUDGMENT OF SUMMARY SHERIFF CLAIR McLACHLAN

in the cause

LEANNE MCGUNNIGAL

Pursuer

against

DAVID POLLOCK

Defender

**Pursuer: Barbour (Counsel), and Waiss Solicitor, Fraser Shepherd
Defender: Cartwright (Counsel) and Carey, Solicitor; Brophey Carey**

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Falkirk 12 March 2025

The sheriff having resumed consideration of the cause sustains the defender's fourth plea in law, repels the pursuer's fourth plea in law and dismisses the action and finds the pursuer liable to the defender in the expenses of the action.

NOTE

Introduction

[1] This is a family action in terms of Chapter 33 of the Ordinary Cause Rules and arises out of the parties' separation following a lengthy period of cohabitation. The parties separated in March 2019. There are three children of the relationship under the age of 16 years.

[2] This action commenced when it was served upon the defender on 3 April 2020. The pursuer craved orders in terms of section 28(2)(a) and 28(2)(b) of the Family Law (Scotland) Act 2006 (“The Act”) for payment by the defender to her in the sum of £100,000 and £50,000 respectively; and has an alternative crave for payment by the defender to her in the sum of £100,000 by way of recompense.

[3] The date of the parties’ separation was determined by me following a preliminary proof which proceeded on 13 August.

[4] Following determination of the date of separation, the pursuer conceded that craves 1 and 2 were time barred and consented to their dismissal. Counsel for the pursuer confirmed that the pursuer intended to continue with her alternative crave and seek recompense from the defender based on her *esto* case that the defender has been unjustifiably enriched by the “efforts and funds expended by the pursuer”.

[5] In support of her claim in terms of section 28(1)(a) of the Act, the pursuer avers at Article 4 of condescence that she has suffered an economic disadvantage in the interests of the defender and family. She avers that she has curtailed her employment, and reduced her income, and that she had worked for the defender without receiving remuneration. The pursuer further avers that the parties built a house and shed at land which is owned by the defender but funded from joint savings; and that they jointly undertook renovation work at a public house which is owned and operated by the defender. It is averred that in those circumstances, the pursuer is entitled to payment of £100,000 being the sum first craved.

[6] The averments anent unjustified enrichment are set out in Article 6 of the condescence. It is averred that “She seeks to pursue this claim for unjustified enrichment only in the event that it is determined that her claim in terms of the Family Law (Scotland) Act 2006 is time-barred”. In support of her crave for recompense the pursuer refers to her

averments in Article 4. She further avers that the defender has been unjustifiably enriched by her efforts and funds, and that she expended these efforts and funds in the interests of the family in the “mistaken belief that in the event that the parties separated she would be entitled to a fair sharing of the substantial assets accrued”. It is averred that that the pursuer has suffered financial loss; that the sum sued for is a “reasonable estimate of the extent to which the defender has been enriched by the efforts of the pursuer”.

[7] The defender tabled a preliminary plea to the relevance and specification of the pursuer’s remaining crave and averments, and I heard the debate on this plea on 10 February 2025

Submissions

[8] Counsel for each party produced and adopted helpful written submissions which they both elaborated on during the debate.

[9] The defender attacked the relevancy and specification and the competence of the pursuer’s case. There were two, overlapping challenges to the relevancy of the case based on unjustified enrichment. First, it was argued that the pursuer had merely recast her section 28(1)(a) claim as unjustified enrichment and accordingly fell foul of the principle of subsidiarity; and second that the claim is not a properly formulated claim for recompense because no actual loss is averred and what is, in reality, sought is a payment which is compensatory in nature.

[10] In dealing with the principle of subsidiarity, counsel for the defender considered the Five Bench Inner House decision, *Pert v McCaffrey* 2020 SC 259. Counsel submitted that the case recognised the principle of subsidiarity and the general rule that the remedy of recompense is one of last resort where no other common law or statutory remedy is or has

been available. Notably, the court did not overrule previous authority where the courts had refused claims because of the existence of an alternative remedy. It was submitted that properly understood, that decision established that a remedy in terms of section 28 is not an alternative to recompense rather additional thereto and therefore the two can co-exist. It follows that a party's failure to exercise their statutory remedy does not preclude them pursuing an alternative common law remedy, but critically, the latter must form a claim which is distinct from the former. In other words,

“an unjustified enrichment claim pled as and which is in fact a substituted section 28 claim, is not a relevant claim based in equity. This is because use of unjustified enrichment as a substitute section 28 claim would not be a true claim of last resort.”

Counsel further submitted that such an approach is reinforced by the terms of section 28(8) which provides for a time bar for section 28 claims. Reference was made to the case of *Simpson v Downie* 2013 S.L.T. 178. Counsel submitted,

“There would be little purpose in a statutory prohibition or restriction of stale claims if a party, having fallen foul of the time bar provisions could simply pursue the same claim under unjustified enrichment”.

[11] The second strand to the defender's argument on relevancy was that the essential elements of a claim in terms of unjustified enrichment had not been set out. A key requirement in any action of recompense is that the pursuer must demonstrate actual loss. Counsel referred to several authorities to illustrate this point.

Shilliday v Smith 1998 SC 725

Edinburgh & District Tramways Co Ltd v Courtenay 1909 SC 99

Gray v Johnston 1928 SC 659

Exchange Telegraph Co Ltd v Giulianotti 1959 SC 19

Counsel contrasted the nature of a claim for recompense which is predicated on an actual loss suffered, with the section 28 remedy which is of a compensatory nature. The pursuer had failed to aver any specific loss and accordingly cannot succeed in a claim of recompense.

[12] Separately, the defender argued that *esto* there was a relevant case to be made in respect of unjustified enrichment, the pursuer's averments are so lacking in specification that the claim is irrelevant, no fair notice being given. The pursuer has failed to aver any detail about the amount and nature of financial contributions made by her. There are averments relating to the repayment of a loan but no detail about the nature of it, there are no averments which link any alleged financial contributions to any gain on the part of the defender. The averments anent child maintenance arrears have no bearing on a case based on unjustified enrichment.

[13] The defender also challenged the competence of including a crave for recompense in a family action. Rule 33.1 provides an exhaustive list of what constitutes a family action and a claim based on unjustified enrichment is not included in that list. It was argued that, although this might be viewed as a technical argument, it, in fact reinforced the argument that a remedy based on unjustified enrichment was a distinct and separate one, which ought not to form any part of a family dispute.

[14] In responding to the defender's submissions on subsidiarity, counsel for the pursuer agreed that Pert had established that a remedy in terms section 28 of the Act was additional and not an alternative to one based on unjustified enrichment. She argued that Pert was authority for the ability to proceed with a claim under unjustified enrichment where the twelve-month time limit for raising a claim under section 28 had expired. "Put shortly, the court's decision was that unjustified enrichment is not subsidiary to a claim under section 28". Counsel referred to the sheriff court decision of *Malak v Inglis* FamLR 47 as

supportive of the submission that there is no absolute rule that a claim for recompense in an action to reverse unjustified enrichment would not progress unless the pursuer had no other remedy. Counsel for the pursuer disagreed with the proposition that in pursuing this claim for unjustified enrichment, the pursuer was effectively attempting to circumvent the statutory time bar.

[15] On the relevancy of the case, counsel for the pursuer argued that the essential elements of a case based on unjustified enrichment had been plead. The defender has been enriched by amassing “pieces of heritable property” and the pleading specify five pieces of property in the UK and one in Spain. The pursuer had suffered a loss, and reference was made to the averments that she had undertaken work for the defender without remuneration, that she had contributed to repayment of a loan over the public house, and had made financial contributions to the purchases of a piece of land and the public house. I was taken to the averment in Article 6 that “The pursuer did not intend to donate or gift her time to the defender”; and that “She did so in the mistaken belief that in the event the parties separated she would be entitled to a fair sharing of the substantial assets accrued.” It was submitted that these averments set out the basis upon which the enrichment was unjustified. The essential elements of the case having been averred, the pursuer is entitled to a proof and it is a matter for the defender to establish that in the circumstances of the case it was not equitable for any enrichment to be reversed.

[16] On the issue of specification, the pursuer argued that sufficient had been pled to establish that the pursuer had sustained a loss. That the role of loss is primarily to identify a right to recover (*Gloag and Henderson: Law of Scotland*, paragraph 24.03). There was a concession on the part of the pursuer that there were no detailed averments as to the value

of the defender's enrichment but that was because the defender had refused to provide the relevant information to quantify the enrichment.

[17] Lastly, in response to the argument that the crave for recompense was incompetent, counsel for the pursuer argued that this should not be fatal to the claim proceeding and now that the section 28 claim had been found to be time barred, this action could be remitted to the ordinary court and proceed under those rules.

Decision

[18] In relation to the competency argument, while Rule 33.1 defines a "family action" by reference to a list of actions or applications, including an application under section 28 or 29 of the 2006 Act, that does not preclude a party from also seeking remedies which do not appear on that list. It follows, in my opinion, that a party can competently crave a remedy in a family action which is additional to those listed in the rule.

[19] Turning to the substantial case, both counsel, quite properly, referred to the case of *Pert v McCaffrey* and the import of that decision on the interaction between the statutory remedy available to former cohabitants and common law remedies based on unjustified enrichment. As the debate progressed, it became clear that there was little in dispute about the legal starting point, namely that a failure on the part of a litigant to make an application in terms of section 28 of the Family Law (Scotland) Act 2006 does not bar that litigant from relying on an available common law remedy, such as recompense. The Inner House in *Pert v McCaffrey* is quite clear on this point. In coming to that view, the court observed that the statutory remedy set out in section 28 was one at the discretion of the court and thus was not in any way an alternative to a common law claim of unjustified enrichment. At paragraph 24, it is stated:

“Seen in that light, sec 28 is not a remedy which is alternative to an action for recompense but one which is additional to any common law remedy otherwise available. The failure to exercise the right to make an application under sec 28 timeously does not bar the use of such remedies.”

The statutory remedy contained in section 28 is one which is additional, not alternative, to any available common law remedy. In other words, these remedies are distinct from one another, and it follows that failure to pursue one does not preclude reliance upon the other.

[20] The issue of subsidiarity was considered by the Inner House in the *Pert* case and has since been the subject of much legal debate and academic discussion. The issue was addressed during this debate. The pursuer submitted that the decision in *Pert* established that a claim based on unjustified enrichment is not subsidiary to a claim under section 28. The defender’s position was that the case did not overrule previous authorities where the court had refused cases because of the existence of an alternative remedy but rather, all the Inner House had determined was that both remedies could co-exist. It was submitted by the pursuer that there had been no determination that a failure to exercise a remedy under section 28 was of no consequence to the reliance upon a remedy based on unjustified enrichment. In my opinion, the pursuer has somewhat oversimplified the issue. The Inner House in *Pert* specifically endorsed the approach in *Transco plc v Glasgow City Council* summarised by Lord Hodge:

“The redefinition of the law of unjustified enrichment has not superseded the old rules relating to the law of recompense such as the general rule that the remedy is not available where a pursuer has a legal remedy whether under the common law or under statute and has chosen not to exercise it.” (Paragraph 21)

In my view, *Pert* does not overrule the long-established principle that recompense, being an equitable remedy is, normally, one to which recourse can be had only where no other is available. Applying that principle to a cohabitant’s claim, I consider that where there is a relevant statutory claim, a party is precluded from pursuing an unjustified enrichment claim

on the same basis. Put another way, a claim based on unjustified enrichment cannot be relied upon as a direct alternative to a time barred section 28 claim. That is not to say that a party cannot avail themselves of the remedy of recompense where they also have or have had an available statutory remedy but the two are distinct and proceed on different considerations.

[21] What I consider can be taken from the decision in *Pert v McCaffrey* for the purposes of this case, is that the pursuer is not precluded from seeking recompense based on unjustified enrichment provided she can establish a relevant claim which is distinct from and additional to her time barred section 28 claim. The question then becomes whether she has pled such claim.

[22] In dealing with claims based on unjustified enrichment, the court is concerned with reversing the defender's enrichment rather than compensating the pursuer for loss. In contrast, a claim in terms of section 28 is compensatory in nature and at the discretion of the court. The defender submits that, although the pursuer's crave for recompense is based on unjustified enrichment, what is pled is a claim that is compensatory in nature and almost identical to the acknowledged time barred section 28 claim. It is argued that the pursuer relies on a claim of unjustified enrichment in order to circumvent the statutory time bar and that no distinct claim has been relevantly averred. There are a number of averments within Article 6 of the condescence which support that proposition. The case of unjustified enrichment is pled as an *esto* case in the event of the section 28 claim being time barred. There is a specific averment that the pursuer "seeks to pursue this claim for unjustified enrichment only in the event that it is determined that the claim in terms of the Family Law (Scotland) Act 2006 is time-barred". It seems clear that the pursuer seeks recompense as a direct alternative to a section 28 claim. Further, it is averred that "It would be equitable for

the Pursuer to receive reimbursement from the Defender". Reference is made by the pursuer to her being the primary carer for the parties' children and thus being unable to pursue a career for her own benefit. Although there is an averment that "the sum sued for is a reasonable estimate of the extent to which the Defender has been enriched by the efforts of the Pursuer", there are no supporting averments which would entitle the pursuer to lead evidence to establish that. The sum sought is £100,000, which is the same amount that was craved in terms of section 28(2)(a). Reading Article 6 as a whole, the pursuer appears to be asking the court to make a discretionary award in her favour based on the efforts she expended in the interests of the family. Such an award falls squarely within the ambit of a section 28 claim, rather than a reversal of a quantifiable enrichment conferred upon the defender. For these reasons, I do not consider that the pursuer has pled a relevant case in unjustified enrichment which is distinct and separate from her time-barred section 28 claim.

[23] If I am wrong in the assessment that pursuer's claim for unjustified enrichment is indistinguishable from her section 28 claim, consideration needs to be given to whether the essential elements have been properly pled. Following on from the decision in *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90, it is well established that the three essential elements to establish in a case based on unjustified enrichment are, 1) the enrichment of the defender, 2) that the enrichment was at the pursuer's expense, and 3) that there is no legal justification for the enrichment. There are general averments that the defender has "amassed a number of different pieces of heritable property", and that he has established a food business. Nothing, however, is pled about the value of these assets. There are averments that the pursuer has suffered financial loss, that she made financial contributions to the purchases of two pieces of land, that she contributed to a loan over the public house and that she undertook work without receiving payment. The pursuer submits

that there are sufficient averments to demonstrate a loss and that, in the context of a lengthy relationship, that loss has been to the defender's benefit.

[24] Two of the authorities referred to by the pursuer are helpful in determining this issue. In *Exchange Telegraph Co Ltd v Guilianotti*, the Lord Ordinary stated:

“Moreover, in general the party putting forward a claim for recompense must show that he has suffered loss. Recompense is a remedial obligation well known to the law, but that obligation is founded on the consideration that the party making the demand has been put to some expense or disadvantage and by reason of that expense or disadvantage there has been a benefit created to the party from whom he makes the demand which cannot be undone”.

One of the reasons the Inner House in *Gray v Johnson* refused the pursuer's claim was that the loss averred by him was based solely on hypothetical calculations and not on actual outlay. The averments in this case are, at best, speculative. There are no supporting averments setting out the value of any actual loss, and there are no averments specifying the value of any benefit conferred by reason of that loss to the pursuer. In awarding recompense, the court is concerned with reversing a quantifiable enrichment. It follows that in arriving at such an award, the court must be able to identify the value of the defender's enrichment, and how the pursuer contributed to that enrichment to her actual cost, there is nothing pled that would enable the court to do that.

[25] For the foregoing reasons, I find that the pursuer's averments are irrelevant and lacking in specification and accordingly the defender's preliminary plea, number 4 is sustained.