



OUTER HOUSE, COURT OF SESSION

[2018] CSOH 49

A354/16

OPINION OF LORD PENTLAND

In the cause

CATHERINE THOMSON COX

Pursuer

against

PETER COX AND KAREN COX

Defenders

**Pursuer: Malcolm; Beveridge & Kellas SSC
Defenders: Edward; Thorley Stephenson SSC**

18 May 2018

Introduction

[1] By this action, which came before me for a proof before answer, the pursuer, Mrs Catherine Thomson Cox, has brought proceedings against her son, Peter Cox and his wife, Mrs Karen Cox. The case has arisen from a dispute in the Cox family over the sale of the former family home.

[2] The first ground on which the pursuer's action proceeds is that the defenders acted in breach of the fiduciary duty they allegedly owed to the pursuer as her agents by procuring the transfer from her to them of the net free proceeds from the sale of the former family home. The property, which was owned in common by the pursuer and her late

husband and on his death by the pursuer, is at 21 Easter Drylaw Bank, Edinburgh. I shall refer to this property as "Easter Drylaw". The net free proceeds of the sale amounted to £122,640.20. The pursuer claims that the defenders in effect misappropriated these funds for their own benefit. In particular, she maintains that they used most of the money (£105,000) to purchase a house at 1 Almondside, Kirkliston, title to which they took in their own names. I shall refer to this property as "Almondside". The pursuer alleges also that the defenders wrongfully retained for their own use the balance of the net free proceeds of Easter Drylaw, amounting to £17,640.20.

[3] The pursuer's case on her first ground of action is that she is the true or beneficial owner of Almondside, it having been intended by all concerned that title to the property should be taken in her name rather than in the defenders' names; the pursuer's position is that the defenders hold the property in trust for her benefit as their principal, and that they are accordingly bound to transfer the title of that property to her. The pursuer asks the court to pronounce declarator to that effect; and she seeks decree ordaining the defenders to grant and deliver to her a disposition of that property. In addition, the pursuer concludes for decree for payment by the defenders to her of the balance of the net free proceeds, namely the sum of £17,640.20. She claims that these funds are also held in trust for her by the defenders.

[4] The pursuer's second and alternative ground of action is based on unjustified enrichment. Here the pursuer says that the defenders have been unjustifiably enriched at her expense by the transfer of the net free proceeds of sale to them; she claims that this was done in error and that the defenders are accordingly now obliged to repay the net free proceeds to her after account has been taken of mortgage payments made by the defenders over the years.

The evidence at the proof

[5] At the proof the pursuer gave evidence in support of her case. She called as witnesses her two daughters: Mrs Catherine Cox or Mitchell and Mrs Caroline Cox or Jones. Both defenders gave evidence. In addition, they called Mr Robert Fife and Mr Richard Loudon, both solicitors from Messrs Clyde & Co. (formerly Messrs Simpson & Marwick) and a police officer, Sergeant Richard Homewood.

[6] The backdrop to the present action may be summarised as follows. Most of this was not in dispute at the proof.

[7] For many years the pursuer, who is now 82 years old, and her late husband lived in the house at Easter Drylaw; they rented the property from the local authority. The first defender gave unchallenged evidence that in or around 2000 his late father suggested to him that it would be a good idea to look into the possibility of buying the house under the Right to Buy Scheme as an investment for the defenders in the future. This would be achieved by the pursuer and her late husband exercising their right to buy the house at a discounted price and taking out a mortgage over it, which the defenders would repay. Mr and Mrs Cox senior would be entitled to live in the house rent-free until their deaths, whereupon the defenders would inherit the property. The first defender said that the whole family was in agreement about the scheme. I did not understand any of the other witnesses to disagree with that, at least in the sense that everyone in the family was aware of the arrangements and had accepted them.

[8] In furtherance of this plan, in or around 2002 the pursuer and her husband purchased Easter Drylaw from the local authority. The property was valued at that time at £53,000. The discount available under the Right to Buy Scheme was £31,800. The pursuer and her husband borrowed the balance of the purchase price, namely the sum of £21,200

from Halifax PLC by way of a loan secured over the property. All payments towards the loan were made by monthly direct debits from the defenders' joint bank account. In November 2008 the defenders repaid the outstanding balance on the loan in full by way of a single lump sum payment of £12,600. The second defender explained in her evidence that she and her husband took out a bank loan secured over their home in order to fund the discharge of the mortgage over Easter Drylaw.

[9] The pursuer's husband died in 2009. After his death she continued to live in the property at Easter Drylaw. At some point following her husband's death the pursuer made a will in which she left Easter Drylaw to the defenders.

[10] The pursuer gave evidence that she and her husband made cash payments to the defenders towards the mortgage. I did not find her evidence on this point convincing. She was vague as to the amounts and frequency of such payments and as to how they were funded. The pursuer was not able to suggest any credible reason why she and her husband would have chosen to make mortgage payments by such a circuitous and inconvenient route; she accepted that they could have been made by direct debit from her own bank account. Mrs Mitchell spoke to witnessing two payments, but beyond that was not in a position to lend support to the pursuer's account. The defenders strongly denied that any such payments were made. I have little difficulty in preferring the defenders' account on this point. No satisfactory reason was suggested as to why a system involving the making of cash payments in the manner and for the purpose described should have been adopted. In the circumstances, I reject the pursuer's evidence on this point.

[11] By about 2015 the pursuer was finding it increasingly difficult to manage in the house at Easter Drylaw on her own; she was no longer able to use the stairs. She discussed the problem with the first defender and it was agreed that she would move to a more

suitable property. In due course the property at Almondside was identified. The defenders took the pursuer to see the property and she was very happy with it; it had a walk-in shower and was in a good neighbourhood. It was close to where the defenders lived. The defenders agreed to assist the pursuer with the practical aspects of selling Easter Drylaw and moving to Almondside. This assistance extended to the second defender getting in touch with Mr Loudon, for whose family she had previously worked, to make arrangements for the marketing and sale of Easter Drylaw by Simpson & Marwick. The second defender said (and I accept her evidence on the point) that she and her husband wanted the move to be as stress-free for the pursuer as they could make it. The second defender impressed me as a moderate and balanced witness. She was clear in her evidence that, whilst she and the first defender were keen to help the pursuer, they understood that any decisions regarding the sale of Easter Drylaw were for the pursuer to make.

[12] The pursuer's evidence was that she expected to become the owner of Almondside following the sale of Easter Drylaw. She said that she was happy to leave the arrangements for the sale and purchase in the defenders' hands. She claimed that she had not understood that the funds from the sale of Easter Drylaw would be used principally to purchase Almondside in the defenders' names. She thought that she would become the owner of Almondside and that the money left over from the sale proceeds of Easter Drylaw would be paid to the defenders in the expectation that it would be used to furnish her new property and to take her on holiday. She described the latter aspect of matters as a gesture of goodwill on her part in recognition of the contribution the defenders had made towards the purchase of Easter Drylaw.

[13] The pursuer maintained that she had not understood the meaning, effect and consequences of a mandate she signed in the offices of Simpson & Marwick authorising the

free proceeds from the sale of Easter Drylaw to be transferred to the defenders to enable them to purchase Almondside and to retain the balance after payment of the purchase price, fees and outlays. She claimed to have had only limited contact with and advice from the solicitors instructed to deal with the sale and purchase transactions. According to the pursuer, it was only after she had taken up occupancy of Almondside and received a council tax notice showing the defenders to be the owners of the property that she appreciated what had happened. Following that, her relationship with the defenders broke down. At a later stage they took steps to evict her from the property. Eventually, she moved out of her own accord and found accommodation elsewhere.

[14] The pursuer's daughter, Mrs Catherine Mitchell, gave evidence that the pursuer trusted the defenders and was content to leave matters regarding the move to them. Her understanding, based on what her mother told her, was that the pursuer would be buying a new house for herself at Almondside with the sale proceeds of Easter Drylaw; there would be some money left over. Mrs Mitchell said that in the face of repeated attempts by the defenders to persuade the pursuer to sign over Easter Drylaw to them she had urged her mother not to do so. She said that she was concerned that if the pursuer were to do that she might be left with nowhere to live.

[15] At the time of the sale and purchase Mrs Mitchell's impression was that the pursuer seemed to be coping fairly well with the proposed move from her home. Mrs Mitchell did not try to talk her out of the idea. When the council tax notice arrived, Mrs Mitchell thought that there must have been a mistake. Mrs Mitchell said that the pursuer had then spoken to the first defender about it; he told her that she had known that the title to Almondside was to be taken in the defenders' names. In response the pursuer said that this had not been her understanding. Mrs Mitchell testified that it had always been in the back of the pursuer's

mind that she could move back to Easter Drylaw or to the same area if things did not work out at Almondside; that would only be possible if she was in a position to sell Almondside as the owner of that property.

[16] Mrs Caroline Jones, the pursuer's other daughter, was not directly involved at the time of the sale and purchase transactions. She said in evidence that her understanding was that after the sale of Easter Drylaw, her mother would become the owner of Almondside. Easter Drylaw had been the pursuer's house; she was selling it in order that she could acquire ownership of a property that was more suitable for her needs.

[17] The defenders' position in evidence was that the pursuer agreed to sell Easter Drylaw and that the proceeds of sale would be transferred from her to them so that Almondside could be purchased in their names; they would be entitled to retain the money left over from the sale. The pursuer would be entitled to live rent-free in Almondside for the remainder of her life. The first defender said that the pursuer had wanted to put the title to Almondside into the defenders' names because, in the pursuer's words, that would save any trouble later on. According to the first defender, everyone in the family had been aware of the proposed arrangements.

[18] The estate agency and conveyancing work for the sale of Easter Drylaw and the conveyancing for the purchase of Almondside were handled by Messrs Simpson & Marwick. The second defender had previously worked for the parents and brother of Mr Loudon, the partner in charge of conveyancing at that firm. He explained that there was a longstanding relationship between his family and the second defender. Mr Loudon was in no doubt that it was the pursuer who was the client of his firm in respect of the transaction for the sale of Easter Drylaw as she was the owner of the property. In support of this understanding I note that there are documents and entries on the firm's files making the

position clear – for example, a letter of engagement addressed and sent to the pursuer dated 7 May 2015. As the pursuer did not have an email address the second defender agreed that Simpson & Marwick could use her email address (and in her absence her son's) as one means of contacting the pursuer. Notwithstanding this, the files clearly show that there was a substantial level of direct contact between Simpson & Marwick and the pursuer in connection with the sale of Easter Drylaw. For example, by letter dated 14 May 2015 Ms Emma Combe, a property assistant at Simpson & Marwick, wrote to the pursuer enclosing a draft sales brochure and a draft home report; she asked if the pursuer would like any amendments to be made to the brochure. The property was put on the market at offers over £115,000. The solicitors contacted the pursuer directly in connection with the arrangements for viewings of the property. There were a number of potential purchasers; and eventually an acceptable offer of £125,000 was received.

[19] Mr Loudon delegated the conveyancing work to a senior associate in the firm, Mr Robert Fife. Mr Fife is a solicitor with substantial experience of residential conveyancing. He was an impressive and convincing witness, who clearly had an excellent recollection of the transactions. I accept his evidence, almost all of which went unchallenged.

[20] Mr Fife explained that the background to the transactions was provided to him by Mr Loudon in the course of a discussion which took place on 16 June 2015. Mr Loudon explained to Mr Fife that the defenders had funded the purchase of the former council house at Easter Drylaw. The pursuer was now proposing to sell Easter Drylaw. The pursuer was to transfer the proceeds of the sale to the defenders so that they could purchase Almondside where the pursuer would henceforth live. Mr Fife's clear understanding was that his firm's client for the sale of Easter Drylaw was to be the pursuer.

[21] The next day (17 June 2015) Mr Fife wrote to the pursuer advising her that he would be handling the legal aspects of the sale of her property. He enclosed a copy of the offer which had been received. He asked the pursuer to telephone him to go over the offer and to let him have her instructions so that he could prepare a qualified acceptance.

[22] In the course of his evidence Mr Fife referred to a note he had prepared of a telephone call he had with the pursuer on 24 June 2015. He had a clear and specific recollection of the call. I accept his evidence about what was discussed between him and the pursuer on the telephone. During the telephone call Mr Fife went through with the pursuer the terms of the offer that had been received for the purchase of Easter Drylaw. He did this under reference to a checklist, in line with his usual practice. He confirmed with the pursuer that she had the offer in front of her as they were speaking. Mr Fife explained that it was his invariable practice to go through matters methodically with the client. In particular, he would always cover specifically what was to happen with the money received for the sale of a property. During his discussion with the pursuer on the telephone Mr Fife stated that his understanding (based on his discussion with Mr Loudon) was that the money from the sale of Easter Drylaw was to go to the defenders to allow them to purchase Almondside in their own names. He explained to the pursuer that she would have to sign a mandate authorising the transfer of the free proceeds for this purpose from her client account with the firm to the defenders' client account. The checklist contains a note made by Mr Fife in red ink during the call in the following terms: "Money going to Peter and Karen for their purchase - need mandate". Mr Fife's clear evidence, which I accept, was that the pursuer gave her instructions that this was what she wanted to happen. Mr Fife said that the telephone call lasted about 30 minutes.

[23] On 25 June 2015 Mr Fife wrote to the pursuer following up on the previous day's telephone call. He enclosed a copy of the qualified acceptance he had prepared on the basis of her instructions.

[24] Thereafter the conveyancing progressed normally; missives were concluded, and other routine matters of conveyancing and administration were efficiently attended to.

[25] By letter dated 23 July 2015 Mr Fife wrote to the pursuer confirming a telephone discussion he had had with her the previous day in which she had said that she would be willing to sign an affidavit certifying that a non-load bearing wall had been removed more than 20 years previously. Mr Fife explained that he would prepare the affidavit so that the pursuer could come in and sign it the following week along with the disposition and the mandate for the transfer of the funds.

[26] On 29 July 2015, the day before settlement of the sale transaction, the pursuer attended at Simpson and Marwick's office in Albany Street, Edinburgh in the late afternoon. Mr Fife recalled that the first defender accompanied her. The purpose of the meeting was so that the pursuer could sign the documents necessary to give effect to the sale of Easter Drylaw; these included the disposition and the affidavit. Mr Fife had also prepared a mandate to reflect the instructions he had received from the pursuer on the telephone in regard to the transfer of the sale proceeds to the defenders. He explained that he went through the terms of the mandate with the pursuer in the course of the meeting. Mr Fife said that he was in no doubt that the pursuer understood what the mandate meant and what its effect was. He pointed out in his evidence that it was written in straightforward terms. I agree. The mandate provided as follows:

"I, CATHERINE COX, authorise and instruct you to transfer the whole free proceeds from the sale of 21 EASTER DRYLAW BANK, EDINBURGH, EH4 2QL to the joint matter file of C0382.00006 in the name of Peter and Karen Cox whereupon the funds

will be used for Peter and Karen Cox's purchase of 1 Almondside, Kirkliston. I authorise you to pay to Peter and Karen Cox the balance of funds left over once the purchase price and associated fees and outlays have been paid.

Yours faithfully

[The pursuer's signature appears here]"

[27] Mr Fife gave evidence that just before she signed the mandate the pursuer said, almost under her breath, "should I sign this?" Mr Fife thought that she was questioning herself. He did not understand her remark to be a direct question to him. His impression was that the pursuer seemed to be hesitating before signing the mandate. Mr Fife then explained to the pursuer that she was under no obligation to sign the document. He was surprised by the hesitation since this was the afternoon before the settlement was due to take place. Mr Fife's reaction was to make it clear to the pursuer that she was not obliged to sign. He said that the pursuer then looked at the first defender. The first defender said to her: "it's up to you mum". Mr Fife said that he was quite clear that there was no undue influence. After that the pursuer signed the document straight away. Completion of the sale took place, as planned, the following day. The net free proceeds were transferred to the defenders' client account with Simpson & Marwick as envisaged in the mandate; they were used to purchase the property at Almondside in the defenders' names; the balance left over was transferred to the defenders.

[28] The pursuer duly moved to live at Almondside. In August 2015 she received the council tax notice, to which I have already referred, showing the defenders to be the owners of the property. She sent a change of circumstances form to the council intimating that she was the owner. Thereafter relations between the pursuer and the defenders deteriorated. On 10 March 2016 the pursuer and Mrs Mitchell had a meeting with Mr Loudon to discuss the instructions he had received for the sale of Easter Drylaw. Mr Loudon gave evidence

that at the meeting the pursuer expressed concern about her security of tenure in the property. Mr Loudon told her that he would approach the second defender to inquire whether the pursuer could be granted a lifelong lease. In the file note of the meeting he prepared on 11 March 2016 Mr Loudon recorded that the pursuer confirmed at the meeting that she had met with Mr Fife and that she had given him instructions that she was content for the sale funds to be paid into the defenders' account. On 18 March 2016 Mr Loudon wrote to the pursuer. The letter was in the following terms:

"Dear Mrs Cox

Sale of 21 Easter Drylaw Bank

Thank you for coming in to see me last week with your daughter Catherine.

I have now had a chance to recover our file from storage and also discuss the matter with Bobby Fife our Senior Associate who carried out the legal work and met with you.

Bobby Fife has confirmed to me that he did discuss the sale of the property with you on the telephone when taking instructions on the offer and also explained to you prior to you signing the sale disposition as to payment of the proceeds of the sale. We do have clear written instructions (copy attached) from you that the full proceeds of the sale were to be paid into the account of Peter and Karen Cox to be used for the purchase of 1 Almondside. Furthermore there are copies of numerous letters on file throughout the transaction which were posted to you at your 21 Easter Drylaw Bank address.

I understand from my meeting with you that your move to 1 Almondside has caused you some anxiety and you asked me to speak to Karen Cox in order to ask whether she and her husband would be willing to enter into a formal lease giving you security of occupation in the property. I am happy to do this but understand that Karen Cox has been ill this week and felt it inappropriate to discuss the matter with her. I will do so once I have ascertained that she has recovered sufficiently to have the appropriate discussion.

I hope this helps clarify the position. I will be back in touch again once I have spoken to Karen Cox.

Yours sincerely

[Signature]

Richard Loudon
Property Partner"

[29] On 22 March 2016 the pursuer telephoned Mr Loudon. A file note he prepared of that call states that the pursuer said that she was content with the terms of his letter. She asked if the defenders would give her a lease of Almondside. Mr Loudon said that he would inquire about this once the second defender had recovered from her illness.

[30] Thereafter there was a further meeting at Simpson & Marwick attended by Mrs Mitchell and her husband, by Mr Loudon and by his senior partner, Mr Gordon Keyden. During his evidence Mr Loudon referred to a file note he prepared of that meeting. It stated that Mr Mitchell said that all the family knew that the house at Easter Drylaw was in the pursuer's will to go to the defenders on her death because they had originally paid for the house and the family were accepting of that. Mrs Mitchell did not have a recollection of her husband making such a statement at the meeting, but in view of Mr Loudon's note I find that he did.

[31] Thereafter the pursuer instructed her present solicitors and a complaint was made against Simpson & Marwick to the Scottish Legal Complaints Commission. This led to payment of the sum of £20,000 to the pursuer without admission of liability.

[32] Over the summer of 2016, relations between the pursuer and the defenders got worse. There is no need for me to go into the details for the purposes of this judgment. Suffice to say that an incident took place at Almondside on 9 July 2016 resulting in the second defender being charged with assaulting the pursuer and Mrs Jones. In brief, the incident arose from a disagreement over a suggestion made by the second defender that the pursuer might consider paying some rent for her occupancy of Almondside. The second defender explained that she had been unable to return to work after a period of serious ill-

health. She said that she was only looking for a modest rent of £200 per month. As well as the issue over possible payment of rent, the defenders formed the view at the time (probably mistakenly) that Mrs Jones was living at Almondside along with the pursuer. Mrs Jones denied this. She said that she was merely a regular visitor. The outcome of the criminal proceedings was that the second defender was found not guilty of the charge of assault after trial in the Sheriff Court. Thereafter the defenders took legal steps to have the pursuer removed from the property. She moved out of the property in January 2017, having raised the present proceedings in October 2016.

[33] What is of some interest for the purposes of the present action is that the pursuer gave a statement to Sergeant Richard Homewood at South Queensferry Police Station on 10 July 2016. Asked about this in evidence, the pursuer suggested that she had been confused when she gave the statement. She accepted that the statement was read over to her and that she signed it. Sergeant Homewood testified that the statement was an accurate record of what the pursuer told him. I accept the evidence of the police officer on that point; he was a careful and responsible witness. I reject the suggestion by the pursuer that the contents of the statement were not accurate.

[34] The importance of the statement for present purposes is that it contains the following passage:

“In about 2001 Peter and Karen bought my house I used to stay in with my husband in Drylaw. They offered to do this. Since then they let me stay there rent free. They suggested that I move closer to them. After my husband died I was happy to do this. They sold the house in Drylaw and bought the house at 1 Almondside. I love it there. It is lovely and all on one floor. They said it would be good as they live only 10 minutes away and they could help me with shopping and so on.

From the start this did not work out as planned. The first time I called my son to help with my shopping he told me to ‘get my ... coat on and get the bus’. In the first 6 months I was there I saw Peter only rarely but I never saw Karen at all.

Before what happened yesterday the last time I saw Peter was in January. They have never mentioned rent to me before yesterday.”

Conclusions

[35] In view of the clear and compelling evidence given by Mr Fife and Mr Loudon, I am left in no doubt that the pursuer fully understood the meaning, effect, and consequences of the mandate to which she put her signature. All members of her family agreed that the pursuer is a strong-minded individual. Mrs Mitchell described her mother as an intelligent woman of sound mind; she was, Mrs Mitchell acknowledged, someone who would not do something that she did not want to do. That very much fits with my own impression of the pursuer. She struck me throughout her evidence as an intelligent and capable person, whose faculties appeared to be largely undiminished by age; she spoke with fluency and was able to convey her views in court clearly. Although at times there were hints of a complaint of undue influence aimed at the defenders, it is important to recall that the pursuer makes no such allegation in her pleadings and her counsel made it plain that she was not advancing any line of argument to this effect. Indeed, it is a notable feature of the case that the pursuer does not seek reduction of the mandate. There were also, in the course of the proof, some veiled criticisms of the adequacy and sufficiency of the advice given by Simpson & Marwick to the pursuer. Again, the pursuer has no such claim in her pleaded case. In any event, on the basis of the evidence that I heard, any such criticism would not be justified. I am satisfied that the pursuer was properly advised by her solicitors as to all relevant aspects of the transaction for the sale of Easter Drylaw.

[36] In my opinion, the mandate accurately reflected the pursuer’s intentions at the time she signed it and constitutes reliable (and perhaps the best) evidence of what her intentions truly were at that time. That was the clear import of Mr Fife’s evidence, which I accept in its

entirety. It is also notable that at the meeting on 10 March 2016 the pursuer told Mr Loudon (whose evidence on the point I accept) that she had given Mr Fife instructions that she was content for the sale proceeds of Easter Drylaw to be paid into the defenders' account.

Subsequently the pursuer confirmed to Mr Loudon that she was content with what was stated in his letter to her of 18 March 2016. The letter, it will be recalled, made it clear that Simpson & Marwick had clear written instructions from the pursuer that the full proceeds of the sale were to be paid into the account of the defenders to be used for the purchase of Almondside. It is of interest also to note that in her statement to the police the pursuer said that it was the defenders who bought the house at Almondside. The police statement also confirms that it was the defenders (and not the pursuer and her late husband) who had purchased Easter Drylaw. The statement contains no suggestion that the pursuer and her late husband made any payments towards the mortgage. In my view, the pursuer's police statement lends important support to the defenders' case and undermines the pursuer's account of events.

[37] In my opinion, the evidence shows that the defenders were not acting as agents of the pursuer in relation to the sale of Easter Drylaw or in regard to the purchase of Almondside. On the contrary, she represented her own interests throughout the sale transaction and did not act through the agency of the defenders. I find that the pursuer, acting on her own behalf, willingly agreed to the free proceeds being transferred to the defenders so that they could use them to purchase Almondside in their names. The evidence of Mr Fife is strongly to that effect; Mr Loudon corroborates it. I conclude that the pursuer trusted the defenders at the time of the sale and purchase transactions and was satisfied that they would allow her to continue to live in Almondside rent-free for the remainder of her life; if for some unexpected reason the move to Almondside did not work

out, the pursuer would have relied on the defenders to help her to find a solution, in accordance with the trust that she reposed in them. Unfortunately, the relationship of trust later foundered. This may have caused the pursuer, with the no doubt well-intentioned support of Mrs Mitchell and Mrs Jones, to think better of what she had agreed to do. But the difficulty remains the strong evidence that she fully understood what she was doing when she agreed to the transfer of the free proceeds of the sale of Easter Drylaw to the defenders. That cannot be unstitched because the pursuer has had second thoughts or changed her mind in the light of the way in which events ultimately played out. In my judgment, it is also clear that the pursuer willingly agreed that the defenders should be entitled to retain the balance of the free proceeds that would be left over after the defenders' purchase of Almondside.

[38] I acknowledge that a relationship of agent and principal is capable of being implied or inferred from facts and circumstances – agency is a question of fact (Gloag on *Contract* (2nd ed), p 126; *Eastern Marine Services (and Supplies) Ltd v Dickson Motors Ltd* 1981 SC 355; *Royal Bank of Scotland v Shanks* 1998 SLT 355). In the present case, however, the evidence does not yield any such inference. The evidence goes no further than showing that the defenders offered to assist the pursuer with some of the practical aspects of moving home, for example by putting her in touch with solicitors and by acting as a point of contact by email. In my view, the evidence falls well short of entitling the court to draw the inference that a relationship of agency was constituted. Importantly, when it came to the sale of Easter Drylaw there was strong evidence that the pursuer, advised by her solicitors, was acting in her own interests and not through the medium of agents; she was the firm's client in a direct sense, and it was to her that Mr Fife looked for instructions; and from her that he received them. It is clear from the evidence that the defenders did not play the part of

agents in that process. Mr Loudon approached matters on the same footing as Mr Fife.

Looking at the evidence as a whole, the circumstances of the case are not supportive of an inference that the defenders were acting as the pursuer's agents. I conclude that there was no relationship of agency between the pursuer and the defenders in regard to the sale of Easter Drylaw (or in relation to the purchase of Almondside). It follows that the pursuer's case, insofar as founded on the existence of an agency relationship, must fail.

[39] As to the pursuer's case based on unjustified enrichment, I can deal with this somewhat more briefly. It depends essentially on the proposition that the transfer by the pursuer of the free proceeds of the sale of Easter Drylaw to the defenders was made in error. I reject that proposition on the facts of the case. For the reasons I have already set out, I find as a fact that the pursuer was fully aware of what she was doing when she signed the mandate and thereby instructed her solicitors to transfer the free proceeds of the sale to the defenders; she was not under any misapprehension as to the meaning, effect, and consequences of the mandate. That interpretation of the evidence is, as it seems to me, consistent with the fundamental basis underlying the original arrangements, which extended to the ultimate devolution of Easter Drylaw to the defenders. When, contrary to the expectation of the parties, it became clear that Easter Drylaw would have to be sold and the defenders would no longer be able to inherit the property, it made complete practical sense for the sale proceeds to be transferred to the defenders instead – in effect what had been intended to happen on the pursuer's death was simply being brought forward due to a material change in circumstances. In line with the idea behind the original scheme, the new arrangements would enable the defenders to purchase (instead of Easter Drylaw) a more suitable property where the pursuer would be allowed to live rent-free for the rest of her life, as it had been intended that she would have done had it been possible for her to

continue living in Easter Drylaw. I find that this is what the pursuer intended to happen at the time of the sale; it explains why she was willing to sign the mandate. It is also what the defenders intended should happen at that time. The unfortunate fact that the relationship between the pursuer and the defenders later broke down and the pursuer did not continue to live in Almondside as had been envisaged does not undermine the validity of this analysis. Accordingly, since there was in fact no error on the part of the pursuer in relation to the transfer of the free proceeds of Easter Drylaw to the defenders, there is no basis on which the law of unjustified enrichment can step in to reverse the transfer of the sale proceeds. It follows that on this branch of the case the pursuer's claim must also fail.

[40] In the result I shall sustain the defenders' second and third pleas-in-law, repel the pursuers' pleas, and grant decree of absolvitor. I shall reserve meantime all questions of expenses.