FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 5
XA44/19

Lord President
Lord Justice Clerk
Lady Paton
Lord Menzies
Lord Brodie

OPINION OF LORD CARLOWAY, the LORD PRESIDENT

in the appeal by

CHRISTINE PERT (AP)

Pursuer and Appellant

against

JOHN McCAFFREY

Defender and Respondent

Pursuer and Appellant: CHS MacNeill QC, Malcolm; Ledingham Chalmers LLP (for Mellicks, Glasgow)
Defender and Respondent: Dewar QC, M Hughes; TC Young LLP (for Hunter & Robertson, Paisley)

29 January 2020

Introduction

[1] This is an appeal against an interlocutor of the Sheriff of North Strathclyde at Paisley dated 14 June 2018. The interlocutor sustained the defender's plea to the relevancy and dismissed the pursuer's action for recompense based upon a plea of unjustified enrichment. The cause was remitted by the Sheriff Appeal Court to the Court of Session (Courts Reform

(Scotland) Act 2014, s 112). The issue is whether and to what extent the principle, that recompense can normally only be pursued once all ordinary remedies have been exhausted, applies to claims for redress based upon unjust enrichment when a pursuer has not made an application for financial provision from the defender, a former cohabitee, under section 28 of the Family Law (Scotland) Act 2006. An issue also arises as to when, on the pursuer's averments and for the purposes of prescription, the unjustified enrichment arose.

Background

[2] The pursuer and the defender began a relationship of cohabitation in 2004. At that time, the pursuer owned the flat which she occupied in Mosspark Boulevard, Glasgow. On 3 November 2005, the defender sold the flat which he had owned in Canal Street, Paisley, realising net proceeds of £21,206. He had used some of these proceeds to construct a workshop at the Mosspark Boulevard flat. According to the pursuer, the defender stopped working in July 2004. The pursuer denies that the defender otherwise contributed any income or capital to the household. The pursuer had remained in employment until 2007. The defender maintains that the proceeds from the sale of his flat, and his own time and effort, were applied to the benefit of the pursuer in terms of: paying £5,000 towards the pursuer's Council Tax arrears in order to avoid her sequestration; and extensively renovating and upgrading the flat, with the effect that its value increased by £40,000.

[3] In February 2008, the parties bought a house in Trident Way, Renfrew, from the defender's mother. The price of £125,000 was funded entirely from the proceeds of sale of the Mosspark Boulevard flat, which had realised over £137,500. The pursuer avers, in somewhat loose language and repetitively, that she:

> "received legal advice regarding in whose name title to the property was to be taken given that the purchase price was to be funded solely by her. Consequently, the parties discussed in whose name title to the property should be taken. They agreed title would be taken in joint names because (1) the parties were in an ongoing relationship which was anticipated to continue and (2) the Defender undertook that in the event the relationship ended he would walk away with nothing in view of the source of funds that facilitated the purchase of the property. The purchase transaction proceeded on this basis. Title to the property was duly taken in joint names because of (1) the ongoing nature of the parties relationship which was anticipated to continue and (2) the Defender's undertaking that he would not claim any value from the property should the relationship end."

The parties lived in the house as cohabitants. The defender avers that his contribution to the household expenditure continued. A joint loan of £15,000, which was secured over the property, was taken out in April 2009. The defender maintains that he paid the monthly instalments. The pursuer avers that £11,000 of the loan was used to repay the defender's gambling debts.

[4] In April 2012, the parties' relationship ended and the defender left the house. On 1 April 2015, the pursuer was sequestrated. In January 2017, the pursuer's trustee in bankruptcy sold the house and realised £85,590 net. He used one half of that sum to pay the pursuer's creditors. He paid the other half to the defender. The pursuer avers that the defender's receipt of that sum was "contrary to the undertaking he gave to the Pursuer" at the time of the purchase. The pursuer sues for this sum on the basis of unjustified enrichment. She maintains that her ability to do so only arose when the defender failed to act in accordance with his undertaking on receipt of the sum from the pursuer's trustee in January 2017.

[5] The pursuer did not apply for financial provision in the form of a capital sum, under section 28 of Family Law (Scotland) Act 2006, on the basis that the defender had derived some economic advantage from the pursuer's contributions or that the pursuer had suffered

economic disadvantage in the interests of the defender. She could have done so only within 12 months from the date on which the parties separated (2006 Act s 28(8); *Simpson* v *Downie* 2013 SLT 178). The pursuer avers that she did not do so because she had no reason to believe, either when the parties separated or when the flat was sold, that the defender would not honour his undertaking.

[6] The defender maintains that there was no unjustified enrichment and, in a somewhat curious plea-in-law, that:

> "… the action being time barred it should be dismissed, and the Defender assoilzied".

The Sheriff's Decision

[7] Before the sheriff, the defender submitted that the pursuer's only remedy had been under section 28 of the 2006 Act, but it was now time barred. The pursuer could not succeed in an action for unjustified enrichment, having elected not to pursue an alternative statutory remedy (*Courtney's Exrs* v *Campbell* 2017 SCLR 387; *Varney (Scotland)* v *Lanark Town Council* 1974 SC 245; *Transco* v *Glasgow City Council* 2005 SLT 958). If an action based upon unjustified enrichment was available, it had prescribed (Prescription and Limitation (Scotland) Act 1973, s 6). Any enrichment had occurred either in 2008, when the pursuer elected to put the house into joint names (*Thomson* v *Mooney* [2014] Fam LR 15), or in April 2012, when the parties separated. The action had been warranted for service only on 1 June 2017.

[8] The pursuer accepted that she could have raised an action under section 28 of the 2006 Act, but maintained that this was not fatal to an action for unjustified enrichment. *Courtney's Exrs* v *Campbell* (*supra*) had been based upon *Varney (Scotland)* v *Lanark Town Council* (*supra*), but *Varney (Scotland)* had been superseded by a trilogy of cases in the 1990s

(*Morgan Guaranty Trust Co of New York* v *Lothian Regional Council* 1995 SC 151; *Shilliday* v *Smith* 1998 SC 725; and *Dollar Land (Cumbernauld)* v *CIN Properties* 1998 SC (HL) 90), which had fundamentally changed the approach to unjustified enrichment (Jones: *Unjustified Enrichment*, Vol I, paras 1.97 and 1.98; and Gloag & Henderson: *The Law of Scotland* (14th ed), para 24.19). If the principle in *Varney (Scotland)* was applicable, this was only when the enrichment had been imposed (Whitty, *Transco plc* v *Glasgow City Council* (2006) 10 Edin LR 113; Gloag & Henderson (*supra*), para 24.16). There was an exception in special circumstances. The pursuer maintained that the prescriptive period only ran from the date when the defender had failed to account for the monies paid to him in January 2017. Enrichment would only have become unjustified when the defender failed to account to the pursuer (*Thomson* v *Mooney* [2013] CSIH 115 at para [11]). The pursuer sought a proof before answer on prescription.

[9] The sheriff followed *Courtney's Exrs* v *Campbell* (*supra*) and *Transco* v *Glasgow City Council* (*supra*). *Varney (Scotland)* v *Lanark Town Council (supra)* had not been overruled. An action for unjustified enrichment was an equitable remedy which could not be enforced if the pursuer had elected not to exercise her statutory right (*Varney (Scotland)* at 252 and 253, cf 259 and 260). The sheriff rejected the argument that the principle only applied when the enrichment had been imposed on the defender (*Courtney's Exrs* v *Campbell* (*supra*)). There were no special or exceptional circumstances.

[10] The sheriff did not determine the issue of prescription.

Submissions

Pursuer

[11] The pursuer's principal submission was that which she had advanced to the sheriff

viz.: *Varney (Scotland)* had been superseded by *Morgan Guaranty Trust Co of New York* v *Lothian Regional Council* (*supra*), *Shilliday* v *Smith* (*supra*), and *Dollar Land (Cumbernauld)* v *CIN Properties* (*supra*). The principle had been that any claim in equity could normally only proceed when all other legal remedies had been exhausted. The exhaustion of other remedies no longer featured in the test for any of the three available remedies (repetition, restitution and recompense) that compensated for unjust enrichment. The test was now in four parts: (1) the defender had to be enriched; (2) the enrichment had to be at the pursuer's expense; (3) there had to be an absence of legal justification for the enrichment; and (4) it had to be equitable for the court to compel the redress of that enrichment (equity being more of a defence). An action based on unjustified enrichment could give rise to more than one of the remedies (*Shilliday* v *Smith* (*supra*), at 727 - 728).

[12] The concessions in *Property Selection and Investment Trust* v *United Friendly Insurance* 1999 SLT 975 and *Transco* v *Glasgow City Council* 2005 SLT 958, that the principle still applied, were made under reference to *Varney (Scotland)* and previous editions of Gloag & Henderson (10th ed, para 29.13; 11th ed, para 28.13). *Courtney's Exrs* v *Campbell* (*supra*) was wrong. Lord Fraser's approach in *Varney (Scotland)* had been approved in *Dollar Land (Cumbernauld)* v *CIN Properties* (*supra*). That approach did not support the proposition that, in all cases of unjustified enrichment, or even those where the remedy was recompense, a failure to pursue an alternative remedy barred a claim. The final part of the test that applied now, namely, equitability (*Dollar Land* at 98), was not a required element. Rather, the demonstration of inequity was a defence (Gloag & Henderson (*supra*) (14th ed), para 24.01). A failure to pursue an alternative legal remedy was simply a factor to be balanced in assessing the equities. If there was a principle which required the pursuit of an alternative remedy, it applied only when the enrichment had been imposed on the defender or in other

defined circumstances. In *Varney (Scotland)* and *Transco* v *Glasgow City Council* (*supra*), the enrichment had been imposed. A limitation may be appropriate in these very limited circumstances, where there would have been no loss to the pursuers, if they had sought redress through other remedies (Gloag & Henderson (14th ed), paras 24.16-24.19).

[13] The consequences for applications under section 28 of the 2006 Act militated against the application of the principle. It would result in a cohabitant losing any form of remedy after 12 months (*Simpson* v *Downie* 2013 SLT 178); effectively excluding an otherwise available common law remedy. The 2006 Act did not provide for such a limitation on former cohabitants' common law rights. Section 28 was an entirely different creature, which was not intended to operate in a harsh manner. Parliament was presumed not to have changed the common law, unless that arose as its clear intention, either expressly or by necessary implication (Bennion, *Statutory Interpretation* (7th ed), at 25.6). A failure to apply under section 28 ought not to be relevant to the availability of the common law remedy.

[14] In relation to prescription, the obligation only arose at the point when the pursuer demanded the money from the defender.

Defender

[15] The defender maintained that the sheriff correctly upheld the defender's relevancy plea, which had been based on an accurate analysis of the alternative remedy principle. The principle operated in a wider context than cohabitation. There were exceptions to the principle (*Varney (Scotland)* v *Lanark Town Council* (*supra*); *City of Glasgow District Council* v *Morrison McChlery & Co* 1985 SC 52; *Lawrence Building Co* v *Lanark County Council* 1978 SC 30). Strong and special circumstances had to be averred in order to justify a departure from the principle. This pursuer had not done so. The reason for any failure to pursue the other

remedy was irrelevant. *Morgan Guaranty Trust Co of New York* v *Lothian Regional Council* (*supra*), *Shilliday* v *Smith* (*supra*), and *Dollar Land (Cumbernauld)* v *CIN Properties* (*supra*) had not addressed the principle. It continued to apply (*Property Selection Investment Trust* v *United Friendly Insurance* 1999 SLT 975) in the absence of special circumstances (*Glasgow District Council* v *Morrison McChlery* 1985 SC 52). The enrichment averred had been imposed.

[16] The pursuer's claim for recompense had prescribed in terms of the short negative period in the 1973 Act.

Decision

Recompense

[17] Bell's *Dictionary and Digest* (7th ed) provides a succinct, and instructive, statement of the place of "Equity" within the law as follows:

> "Equity, in its more enlarged acceptation, has been correctly termed the soul and spirit of all law – positive law being construed by it, and rational law made by it. But in a more limited sense, and (although somewhat incorrectly) as contrasted with law, equity is defined to be the correction of that wherein the law, by reason of its universality, is deficient. In the latter sense, it is said to be the province of equity to extend the words of the law to cases similar in principle, although not within the letter of the law, or to qualify the rigour of the law, where a literal construction of it might lead to unforeseen and inequitable consequences. But although, generally speaking, a distinction such as this has been, to a certain extent, recognised between pure law and equity, nothing can be more erroneous than the idea, sometimes entertained, that equity is administered at the discretion of the judge, according to the particular circumstances of each case, without regard to rules or precedents. On the contrary, wherever the dispensation of justice has made any progress, equity, whether it be administered in a court specially constituted for the purpose, or dispensed, along with law, in the supreme civil court, must, in order to attain the ends of justice, be governed in its application by an inflexible regard to legal principle, as well as to judicial precedents; otherwise, as has been justly observed, "it would be above all law, either common or statute, and be a most arbitrary legislator in every particular case."

[18] It is upon this basis that a general principle exists whereby a person is normally bound to adopt the ordinary legal remedies open to him to resolve his or her difficulty before resorting to what are sometimes described as equitable remedies. If the former are open, there ought to be no need to resort to the latter. The principle is best stated by Lord Fraser in Va*rney (Scotland)* v *Lanark Town Council* 1974 SC 245 in which he said (at 259-260), under reference to Kames: *Principles of Equity* (4th ed) 104:

> "I do not know that it is absolutely essential to the success of an action for recompense that the pursuer should not have, and should never have had, any possibility of raising an action under the ordinary law, but … it would at least require special and strong circumstances to justify an action of recompense where there was, or had been, an alternative remedy open to the pursuer".

Lord Kissen (at 257) was to the same effect; stressing that a party cannot ignore the existence of a legal remedy and seek recompense on the basis of some general equitable consideration. The Lord Justice Clerk (Wheatley) said this (at 252-3):

> "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."

Thus the pursuers, who were developers, could not succeed in a claim against a town council for recompense for building sewers, which they had constructed at their own expense, when they could have sought an order requiring the town council to build the sewers in the first place.

[19] *Morgan Guaranty Trust Co of New York* v *Lothian Regional Council* 1995 SC 151 involved repetition of sums paid under a void contract. The question was whether sums paid under an error of law were repayable. There was no alternative remedy. The problem was that there had ceased to be a contract which would otherwise have regulated the parties'

relationship. In these circumstances, the pursuers could utilise the *condictio indebiti*. *Shilliday* v *Smith* 1998 SC 725 was again a case in which the pursuer had no ordinary remedy in law, having paid for improvements to the defender's property. The absence of a contract was significant. The sums had been paid in contemplation of marriage and the pursuer was able to invoke the *condictio causa data causa non secuta*.

[20] *Dollar Land (Cumbernauld)* v *CIN Properties* 1998 SC (HL) 90 was a case in which the parties' relationship was governed by a lease, notably an irritancy clause. The pursuers had advanced the proposition that they were entitled to recompense for unjustified enrichment when their lease had been validly terminated by operation of the irritancy. Since the situation had been brought about by operation of the parties' contract, it could not be said that any enrichment of the defenders was unjust (see Lord Jauncey at 93). As Lord Hope said (at 98):

> "… the obligation to redress the enrichment arises not from contract, but from a separate duty which arises in law from the absence of a legal ground to justify its retention".

Varney (Scotland) v *Lanark Town Council* (*supra*) was not criticised in this context (see Lord Hope at 99). The argument that the defenders in *Dollar Land (Cumbernauld)* should be subjected to a claim in recompense failed because the parties' relationship was governed by contract (Lord Hope at 99-100). Although none of these cases was directly concerned with the existence of an alternative remedy, the approach taken in each of them is entirely consistent with that taken in *Varney (Scotland).*

[21] In all of this, the court endorses the approach in *Transco* v *Glasgow City Council* 2005 SLT 958 in which Lord Hodge stated clearly (at para 13) that:

> "…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 had chosen not to exercise it".

A similar approach is to be found in the earlier *obiter dicta* of Lord Macfadyen in *Property Selection & Investment Trust* v *United Friendly Insurance* 1999 SLT 975 at 985.

[22] The question then becomes one of whether, since no special or strong circumstances have been averred which would take the claim outwith the ambit of the normal principle, the pursuer had an alternative remedy.

Alternative Remedy

[23] Section 28 of the Family Law (Scotland) 2006 empowers the court to award, *inter alia*, a capital sum to a former cohabitant having regard to whether: the defender has derived economic advantage from contributions made by the pursuer; or the pursuer has suffered economic disadvantage in the interests of the defender. The court must have regard to the extent to which any economic advantage, which the defender has derived, is offset by any economic disadvantage suffered by the defender in the interests of the pursuer and the extent to which any economic disadvantage, which had been suffered by the pursuer, has been offset by any economic advantage derived from contributions made by the defender.

[24] The power of the court is one of weighing up the various economic advantages and disadvantages and making a judgment, essentially of a discretionary nature, on whether a capital sum ought to be awarded. In making that assessment, it must be assumed that the ordinary legal remedies open to the parties, such as to secure particular property which is owned by them, have been, or can be, exercised. Put another way, the court must presuppose that the pursuer cannot obtain payment from the defender other than by utilising the statutory provisions of the 2006 Act. Seen in that light, section 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 section 28 timeously does not bar the use of such remedies. In this respect the court must disagree with *Courtney's Exrs* v *Campbell* 2017 SCLR 387 (at para [70]).

[25] That is not, however, an end of the matter. The fundamental problem for the pursuer is not the existence of a remedy under the 2006 Act, but the availability of what is (or rather was) an alternative remedy at common law. The pursuer avers that the parties "agreed that title would be taken in joint names because… (2) the Defender undertook that in the event the relationship ended he would walk away with nothing". As commented above, this is loose phraseology, if it is intended to be an averment of an agreement reached by the parties. It is followed by a slightly different formulation whereby the defender's undertaking was that "he would not claim any value from the property should the relationship end". Since the property was already in joint names, this must be taken to mean that the parties had agreed that, in the event of the breakdown of the relationship, the defender would convey his share to the pursuer. On the basis of these averments (ie assuming that they can be proved), the pursuer's most obvious remedy, albeit not one which forms a basis for the action, was to seek specific implement of the agreement or, given that the house had been sold by her trustee, to seek damages as a consequence of the defender's breach of the agreement. It may be that the pursuer would have run into difficulties of proof (Requirements of Writing (Scotland) Act 1995, s 1(2)), but that was not advanced as a reason for not pursuing that remedy. It is this alternative remedy that is fatal to the pursuer's claim upon the basis of the principle set out in *Varney (Scotland)* v *Lanark Town Council* (*supra*).

Prescription

[26] Whether the pursuer's remedy is one for a breach of her agreement with the defender or recompense, her claim has prescribed in terms of section 6(1) of the Prescription and Limitation (Scotland) Act 1973 (see sch 1 paras 1(b) and (g)). The prescriptive period did not start to run only when the pursuer elected to ask the defender to account to her for the sum, which he had been paid by her trustee, or when the defender was paid that sum, but when the pursuer was entitled to enforce her right against the defender either to a conveyance or to recompense (1973 Act ss 6(3) and 11(1)). That was when the parties separated in April 2012. At that point, the defender had left the relationship along with a half share in the house, which he was then contractually bound (on the pursuer's averments) to convey to the pursuer or at least to account for its value. Since the action was not served until June 2017, any claim has prescribed. There are no relevant averments which might justify any extension to the five year prescriptive period under the 1973 Act (eg s 11(3)).

[27] The deficiencies in the defender's plea-in-law (which refers instead to "time bar") have already been noticed. However, the argument which was presented to the sheriff, without objection, was based on prescription. Proceeding on the basis that it was the latter which was intended, the appropriate course of action is to sustain that (third) plea-in-law and to grant decree of absolvitor, rather than dismissal on the basis of relevancy. Subject to that alteration of the sheriff's interlocutor of 14 June 2018, the appeal should be refused.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 5
XA44/19

Lord President
Lord Justice Clerk
Lady Paton
Lord Menzies
Lord Brodie

OPINION OF LADY DORRIAN, the LORD JUSTICE CLERK

in the appeal by

CHRISTINE PERT (AP)

Pursuer and Appellant

against

JOHN McCAFFREY

Defender and Respondent

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Pursuer and Appellant: CHS MacNeill QC, Malcolm; Ledingham Chalmers LLP (for Mellicks, Glasgow)
Defender and Respondent: Dewar QC, M Hughes; TC Young LLP (for Hunter & Robertson, Paisley)

29 January 2020

[28] I agree, for the reasons given by your Lordship in the chair, that the appeal should be refused. I have nothing further to add.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 5
XA44/19

Lord President
Lord Justice Clerk
Lady Paton
Lord Menzies
Lord Brodie

OPINION OF LADY PATON

in the appeal by

CHRISTINE PERT (AP)

Pursuer and Appellant

against

JOHN McCAFFREY

Defender and Respondent

_____

Pursuer and Appellant: CHS MacNeill QC, Malcolm; Ledingham Chalmers LLP (for Mellicks, Glasgow)
Defender and Respondent: Dewar QC, M Hughes; TC Young LLP (for Hunter & Robertson, Paisley)

29 January 2020

[29] I agree with your Lordship in the chair, and have nothing to add.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 5
XA44/19

Lord President
Lord Justice Clerk
Lady Paton
Lord Menzies
Lord Brodie

OPINION OF LORD MENZIES

in the appeal by

CHRISTINE PERT (AP)

Pursuer and Appellant

against

JOHN McCAFFREY

Defender and Respondent

_____

Pursuer and Appellant: CHS MacNeill QC, Malcolm; Ledingham Chalmers LLP (for Mellicks, Glasgow)
Defender and Respondent: Dewar QC, M Hughes; TC Young LLP (for Hunter & Robertson, Paisley)

29 January 2020

[30] I am in complete agreement with the reasoning of your Lordship in the chair, and with the disposal which you propose. I have nothing further to add.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 5
XA44/19

Lord President
Lord Justice Clerk
Lady Paton
Lord Menzies
Lord Brodie

OPINION OF LORD BRODIE

in the appeal by

CHRISTINE PERT (AP)

Pursuer and Appellant

against

JOHN McCAFFREY

Defender and Respondent

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Pursuer and Appellant: CHS MacNeill QC, Malcolm; Ledingham Chalmers LLP (for Mellicks, Glasgow)
Defender and Respondent: Dewar QC, M Hughes; TC Young LLP (for Hunter & Robertson, Paisley)

29 January 2020

[31] As your Lordship in the chair has explained, the defender's third plea-in-law is inept, but properly recast as a plea of prescription it is unanswerable. On the pursuer's averments any claim that she may have had by reason of the unjustified enrichment of the defender arising from the taking of title to the property in joint names in the expectation that she and he would cohabit there, came into existence at the date when the cohabitation ceased, in

April 2012. It therefore prescribed prior to the raising of the action in June 2017: Prescription and Limitation (Scotland) Act 1973, section 6(1), schedule 1 para 1 (b).

[32] However, agreeing with your Lordship in the chair, irrespective of prescription, I do not consider that the pursuer has pled a relevant case such as to entitle her to claim recompense on the basis of the unjustified enrichment of the defender at her expense. Your Lordship has quoted the critical averments made on the pursuer's behalf. It is her position that the parties had agreed that title would be taken in joint names but the defender had undertaken that "in the event the relationship ended he would walk away with nothing". On these averments the parties' respective rights and obligations in relation to the property in the event that their cohabitation came to end were regulated by contract. The effect of that contract, as I would see it, was that no unjustified enrichment arose in the case. The agreement between the parties provided the justification for taking title jointly with the pursuer and retaining his interest in the property during the period of the parties' cohabitation. Once that cohabitation ended he was no longer enriched because while he may have retained his one half interest in the property, that was exactly balanced by his obligation "to walk away with nothing" or, to put the matter more formally, to convey the half share to the pursuer, an obligation which could be enforced within the prescriptive period by an action for specific implement, which failing damages.

[33] I further agree that were it the case that the pursuer was able to plead a relevant case of unjustified enrichment on the basis of her agreeing to the taking of title to the property in joint names in the expectation of parties cohabiting there and continuing to do so, but being disappointed in that expectation (Professor MacQueen explains that such a claim is an example of either the *condictio causa data causa non secuta* or the *condictio ob causam finitam*, see *Cohabitants, unjustified enrichment and law reform, part 1*, Greens Family Law Bulletin July

2019) and that that case had not prescribed, the availability of a claim in terms of section 28 of the Family Law (Scotland) Act 2006 is nothing to point. Assuming it to be the law that a claim in respect of unjustified enrichment is necessarily only available where no other equivalent remedy is available, this limitation does not apply in the present case by reason of section 28. For the reasons given by your Lordship, a claim under section 28 of the 2006 Act is not equivalent to a claim to have conveyed a half share of a specific property, which failing the value of that share. The claims are different and there is no reason why one should necessarily supersede the other and certainly no reason why the possibility of making a section 28 claim should supersede a potentially more extensive claim in respect of unjustified enrichment.

[34] I therefore have no doubt that the respondent's motion to refuse the appeal must be acceded to and I respectfully agree with the disposal indicated by your Lordship in the chair. I am however a little more hesitant when it comes to endorsing everything that was said by counsel for the respondent in support of that motion. In particular, I am hesitant about affirming that, in the absence of special circumstances, because of the equitable nature of claims to reverse unjustified enrichment, they are only available when no other conceivable remedy is available. I have to accept that counsel for the respondent's submissions in very large part reflected what appears in the opinions of the judges of the Second Division in *Varney (Scotland) Ltd* v *Lanark Town Council* 1974 SC 245. *Varney* must be taken authoritatively to state the law as it relates to the remedy of recompense in cases of unjustified enrichment arising from what the academic commentators have come to refer to as enrichment by imposition (see eg Gloag & Henderson *The Law of Scotland* (14th edit) paras 24.02, 24.07 and 24.16 *et seq*). However, this is not a case where it is averred that there has been unjustified enrichment by reason of imposition; it is a case where what is said to have

been unjustified enrichment arose by virtue of deliberate transfer. The law of unjustified enrichment generally has been significantly reanalysed, indeed reordered, since *Varney* by the decisions in *Morgan Guaranty Trust Company of New York* v *Lothian Regional Council* 1995 SC 151, *Shilliday* v *Smith* 1998 SC 725 at 727B and *Dollar Land Ltd CIN Properties Ltd* 1998 SC (HL) 90. My concern is to avoid unnecessarily placing any impediment in the way of further development of the law by appearing to accept counsel's unnecessarily general submissions on what the Sheriff Appeal Court described as "the principle of subsidiarity".

[35] The Sheriff Appeal Court saw the appeal as raising two issues of importance: (1) whether the principle of subsidiarity still applies in all circumstances regardless of the way in which the enrichment arose; and (2) whether an action based on unjustified enrichment cannot be relevant or cannot be pursued where the pursuer has not availed herself of or exhausted all other available remedies, such as an application under section 28 of the Family Law (Scotland) Act 2006. Whether these are in fact two issues or whether they are two ways of expressing what is one issue, they are stated in very general terms. They do not discriminate among the different circumstances in which claims to reverse unjustified enrichment may be made nor do they discriminate among the different sorts of alternative remedy that may be available. Counsel for the respondent's submissions reflected a similarly general approach. It was encapsulated in the propositions, stated in the respondent's supplementary note of argument: that the principle of subsidiarity is a general albeit not absolute rule applicable to all claims in respect of unjustified enrichment; and that departure from the general rule requires special and strong circumstances to permit recourse to redress of unjustified enrichment. This, counsel for the respondent argued, was a consequence of unjustified enrichment being an equitable doctrine. He quoted from Lord Justice Clerk Wheatley's opinion in *Varney*, at 252:

> "Recompense is an equitable doctrine. That being so, it becomes a sort of court of last resort, recourse to which can only be had when no other legal remedy is or has been available."

[36] As is evident from the reading list with which the court was provided by parties, the academic literature over the last thirty years on the subject of unjustified enrichment is very extensive. Lords Hope and Rodger have acknowledged that the earlier work in that period significantly influenced their thinking on the subject (see *Morgan Guaranty supra* at 155D and 157D, *Shilliday supra* at 727B, and *Dollar Land supra* at 98D). Among the subjects of discussion among academic commentators has been the extent to which claims for reversal of unjustified enrichment are conditional on the absence of any alternative remedy (the principle of subsidiarity). It is clear from the literature that it is at least arguable that subsidiarity is not or should not be a general concept running through the whole of enrichment law (see Gloag & Henderson para 24.19 fn 139; but also Whitty, *Transco plc* v *Glasgow City Council: Developing Enrichment Law after Shilliday* Edin LR 10 (2006) 113; Evans-Jones *Unjustified Enrichment vol 1 Enrichment by Deliberate Conferral* paras 1.97 to 1.101; MacQueen *supra* pp 5 to 8; Johnston *Prescription and Limitation* para 4.91; and Stair Encyclopaedia vol 15 para 71).

[37] It was however the contention of counsel for the respondent, founding on *Varney*, that where what was sought was an equitable remedy, it was necessarily "of last resort".

[38] There are too many references by eminent judges to the equitable nature of the Scots law of unjustified enrichment to allow the point to be questioned, but your Lordship in the chair's quotation from Bell's *Dictionary* provides a useful reminder that "equity" and its associated expressions have a number of meanings (see also Evans-Jones *supra* at paras 2.20 to 2.39) . A rule of law can be regarded as having a foundation in equity where its historical

origin or rationale is based on essentially moral principles concerning what is just or reasonable. That can be said of many common law rules. As Kames put it in his *Principles of Equity* (4th edit, 1800, at p24):

> "…many actions, founded originally on equity, have by long practice obtained an establishment so firm as to be reckoned branches of the common law. This is the case of the *actio negotiorum gestorum,* of recompence, and many others…".

A rule may however be equitable in what Bell describes as a more limited sense where it has been introduced or applied in order to correct or mitigate the potential harshness or unfairness of the consequences of another rule or rules of law. Additionally, a rule which provides for judicial discretion may depend for its application on the court's assessment of "the equities" of the case. It is true that all these features are present in the rule of entitlement to reversal of unjustified enrichment which is identified by Lord Rodger in *Shilliday* (see *supra* 727G) and relied on by the pursuer and appellant in the present case. However, neither Lord Rodger in *Shilliday* nor Lord Hope in *Dollar Land* at 99E, agreeing with the way that Lord Rodger had stated the matter, suggested that reversal of unjustified enrichment was conditional on no other remedy being available. Rather, the requisites of such a claim to reverse enrichment were stated as being fourfold: (1) that the defender has been enriched, (2) at the pursuer's expense, (3) without legal justification for the enrichment, and (4) that it would be not be inequitable to compel the defender to redress the enrichment (see *Dollar Land supra* at 99E read with *Morgan Guaranty*, as explained in *Compagnie Commerciale Andre* v *Artibell Shipping* 2001 SC 653 at paras [19] and [23]). Whitty *supra* describes this as the "four-point Dollar Land test" which he argues has superseded the five-point test in *Varney* which included, as its fifth point, that except in special circumstances the pursuer must have no other legal remedy. That, Whitty contends, is not a general

requirement for reversal of unjustified enrichment in the sense that it applies to every possible case in which the concept is invoked. Whitty does not say that the availability of an alternative remedy will never be relevant but:

> "[the] blanket characterisation of recompense or enrichment claims as 'equitable' gap-fillers subject to subsidiarity is too undiscriminating. A doctrine of subsidiarity cannot be general throughout enrichment law but must be justified in particular contexts by pertinent evaluations of policy and principle" (see *supra* p130).

[39] It is to be borne in mind that for all the emphasis on its equitable character, an action seeking reversal of unjustified enrichment is not an application by way of petition to the *nobile officium* (where absence of alternative remedy clearly is of the essence); the action is raised in vindication of what Lords Rodger and Hope describe as a right or an entitlement in respect of which the defender has a corresponding duty to reverse the enrichment (see *Morgan* at 166B, and *Shilliday* at 727D and 729G-730A under reference to Stair, *Institutions* I vii 7 and *Cantiere San Rocco SA* v *Clyde Shipbuilding and Engineering Co Ltd* 1923 SC (HL) 105). On the four point test, the right to reversal and the correlative duty to reverse arise once the pursuer has satisfied the court that points (1) to (3) apply. Then, and only then, at point (4), as a possible defence, is there any explicit reference to equity. Generally speaking, and leaving aside recompense in respect of imposition, whatever their historical origins, claims for reversal of unjustified enrichment could be said to be common law remedies subject to an equitable defence. In a given case that equitable defence might, where it was material, be to the effect that an alternative remedy was available but not resorted to, but that is different from saying that no claim for reversal of unjustified enrichment can ever be made if there is or if there was an alternative way of proceeding.

[40] For there to be a case for reversal of unjustified enrichment there must of course be enrichment and it must be unjustified. I accept, as I have accepted on the facts of this case,

that where parties' rights and obligations can be worked out satisfactorily by reference to some other legal framework (here contract), unjustified enrichment will usually not arise. However, if it be the case that the concept of unjustified enrichment is such that it can only arise in circumstances where one of the parties has no other way open to him to achieve a reasonable or fair outcome, superimposing the subsidiarity principle on the requirements for an action of reversal of unjustified enrichment would seem to be redundant.

[41] As your Lordship in the chair has demonstrated, in order to decide this appeal it is unnecessary to come to a conclusion as to whether, as a general rule subject to exception, reversal of unjustified enrichment is only available in the absence of an alternative remedy (whatever precisely might be meant by an alternative remedy); in other words whether there is indeed a generally applicable principle of subsidiarity. That being so and the matter not having been as fully argued as it might have been had the point been truly material, I would reserve my opinion on the question.