SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES & GALLOWAY
AT HAMILTON

[2019] SC HAM 100

A191/19

NOTE BY SHERIFF DANIEL KELLY QC

in the cause

WISSAM MALAK

Pursuer

against

DAWN INGLIS

Defender

Pursuer: Rooney; Rooney Family Law, Uddingston
Defender: Gildea; John Jackson & Dick, Hamilton

Hamilton, 13 December 2019

Issue

[1] Where a party has not sought financial provision on divorce, is that party thereby unable to rely upon an equitable justification in seeking to have the proceeds in an action of division and sale of a house which had been matrimonial property distributed in any manner other than in terms of the disposition?

Litigation

[2] On 29 October 2014 a house in Ladywell Road, Motherwell, was purchased equally between the parties. They accept that the house was matrimonial property. The parties separated on 4 November 2016 and the defender has continued to live in the house while the

pursuer has resided in London. On 11 January 2019 a divorce was granted in Port Talbot Family Court on the pursuer's application. No financial provision was sought in that action. On 17 September 2019 an order was made remitting various aspects of the proposed sale to a reporter to examine and report thereon.

[3] Parties are at issue as to whether an order should be made for equal division of the proceeds or whether a proof on their division will be required. The pursuer seeks sale of the house and the equal division of the proceeds. The defender claims in a plea-in-law that all of the free proceeds of sale should be awarded to her. She avers that the property valued on acquisition at around £190,000 and now at £225,000 had previously belonged to her father. It is averred that a joint mortgage was taken out for £84,000 and that £75,000 was paid to the defender's father, with the pursuer making no contribution to the acquisition. The defender, therefore, claims that £115,000 of the purchase price was a gift to her from him. Since separation the defender has paid the mortgage of about £7,000 per year.

Submissions

[4] The pursuer contends that, since the defender failed to resolve any financial claims by seeking a remedy in the divorce proceedings, she is now barred from relying upon unjustified enrichment. Maintaining that failure to avail herself of the primary remedy of financial provision on divorce meant that the defender was not entitled to rely upon unjustified enrichment in this action, the pursuer relied upon *Varney (Scotland) Ltd* v *Lanark Town Council* 1974 S.C. 245. There, since recompense was an equitable remedy, it was seen that recourse to it could only be made when no other legal remedy is or had been available, in the absence of special and strong circumstances. Such an approach had been followed in *Courtney's Executors* v *Campbell* 2017 SCLR 387. There, an action of unjustified enrichment

was dismissed where a cohabitation claim had not been brought under section 28 of the Family Law (Scotland) Act 2006 at a time when it had been open to do so and there had not been special and strong circumstances justifying an equitable remedy. Support was further drawn from *Transco plc* v *Glasgow City Council* 2005 SCLR 733 where it was decided that the remedy of recompense was not available where the pursuer had a legal remedy and had chosen not to exercise it and there were no special and strong circumstances on which to found.

[5] The defender seeks to have the gift to her by her father and the mortgage payments paid by her since separation taken into account in the division of the proceeds of sale. She maintained that she was not seeking to rely upon unjustified enrichment but that an equitable breakdown was an inherent aspect of division and sale. *Johnston* v *Robson* 1995 SLT (Sh Ct) 26 was advanced as an example of a case where a party had sought to recover money which had been paid in the purchase of the property, which was equiparated with the present case.

Decision

[6] The line of authority, as expressed by the Inner House in *Varney (Scotland) Ltd* v *Burgh of Lanark,* that a claim for recompense in an action to reverse unjustified enrichment would not as a rule progress unless the pursuer had no other remedy has continued to feature in subsequent cases: *Property Selection & Investment Trust Ltd* v *United Friendly Insurance plc* 1999 SLT 975, per Lord Macfadyen at p 985; *Transco plc* v *Glasgow City Council*, per Lord Hodge at paras 14 - 19; *Courtney's Executors* v *Campbell.* However, it was not stated as an absolute rule. Lord Fraser observed in *Varney (Scotland) Ltd* v *Burgh of Lanark* at pp 259-60:

> "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 in my opinion 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."

In certain of the cases the reason has been clear as to why it would not be equitable for a claim for recompense to proceed in the place of a main remedy. In *Varney (Scotland) Ltd* v *Burgh of Lanark* the court repelled a demand from housing developers who had constructed mains and sewers for houses and had then claimed recompense from the local authority, rather than requiring them to perform the works if they considered them duty bound to do so. Lord Wheatley pointed out (at p 253):

> "It seems to me that it would militate against the concept of recompense if a person under no error of fact could ignore his legal remedy at the appropriate time and commit himself to work and consequential expense which he was under no legal obligation to incur, but which he could have obliged the other party to undertake, and then turn round and say that a new legal remedy of recompense of his own creation had arisen which he could pursue to the exclusion of the appropriate remedy at the appropriate time…
>
> "In the context of the present case the practical repercussions of allowing such unilateral action to supersede the duty imposed by statute on a local authority to secure a planned and efficient system of sewerage within the burgh need only be stated for their dangers to be manifest."

This was similarly the case with *Transco plc* v *Glasgow City Council,* where the pursuers carried out work on a bridge that carried two major gas pipelines at a cost of £737,340 and then claimed payment from the local authority which had built a new bridge nearby so that the original bridge was no longer used by traffic. Even more forcibly, Lord Hodge said (at para 18):

> "it is inconceivable that the defenders as a public authority with limited resources would spend the sums claimed on a bridge which was rendered unnecessary for their purposes by the construction of the new bridge and which was stopped up in 2000."

[7] While there is considerable authority in Scots law that claims of recompense are subsidiary, it has been maintained that there seems no reason why, as a matter of principle, this should be the case in all circumstances (Evans-Jones, *Unjustified Enrichment* (2003) para 1.98). In the light of *Shilliday* v *Smith* 1998 SC 725, Evans-Jones points out that recompense does not represent distinct causes of action but is only a remedy and that the remedy can arise in a whole range of actions concluding (*ibid*) that:

> "Scots law can, therefore, no longer assert unequivocally that "recompense" is a "subsidiary" claim."

[8] The authors of *Gloag & Henderson* give due place to the development of unjustified enrichment in *Shilliday* v *Smith* 1998 SC 725 and *Dollar Land (Cumbernauld) Ltd* v *CIN Properties Ltd* 1998 SC (HL) 90. They go on to suggest that recent judicial dicta which following earlier authority – *Varney (Scotland) Ltd* v *Burgh of Lanark* – continue to found on recompense as if it were still a cause of action with distinct requirements of liability – including *Property Selection & Investment Trust Ltd* v *United Friendly Insurance plc* and *Transco plc* v *Glasgow City Council* – are inconsistent with this new approach and must to that extent be treated as per incuriam. (13th edition, para 24-01). However, it cannot be taken that in deciding these subsequent cases the revised approach would have been overlooked.

[9] While much of the submissions revolved around unjustified enrichment, the particular context is its relevance to an action of division and sale. The claim in *Johnston* v *Robson* did proceed upon the basis of a combination of two actions, with the principal action being one of division and sale and the equitable claim in respect of the sums expended being by way of counterclaim. An action of division and sale has been treated as itself having an equitable element. In dealing with remedy Lord Rutherford said in *Brock* v *Hamilton* in 1852, (reported (1857) 19 D 701):

> "The Lord Ordinary, therefore,… thinks the Court has full equitable jurisdiction in the matter. He does, not, however, think the pursuer bound to shew equity for division, or, where division is impossible, for sale. He considers the pursuer's right, in that respect, to be clear. But circumstances may easily exist in which the defender may shew, in equity, a good defence against the demand for division or sale."

Stressing the absolute nature of the right to seek a division and sale of the property, Lord Hope explained in *Upper Crathes Fishings Ltd* v *Bailey's Exrs* 1991 SC 30 at p 38:

> "On closer examination, however, it is I think reasonably clear that Lord Rutherfurd's references to the equitable powers of the court are directed to the working out of the remedy and not to the fundamental right of the co-proprietor to insist on an action of division or sale.
>
> "That jurisdiction, it seems to me, was in respect of the working out of the alternative remedies of sale and division of the price, and not the primary remedy which is to insist in an action of division of the property."

It has been said, therefore, that equity applies in working out the division, though there may be limited restrictions on the right, such as by contract or personal bar: Gordon & Wortley, *Scottish Land Law*, 2009, para 15-29.

[10] The averments pled might be found after proof to be the type of circumstances which would amount to being special and strong ones and thereby to justify a claim for recompense. Moreover equitable considerations might be seen to have a place in working out the division of the price in an action of division and sale. I, therefore, propose to allow the averments to continue to proof in order that it may be determined whether such equitable factors can be considered to be such special and strong circumstances as would permit reliance to be placed upon them. The Record has no counterclaim as such and therefore no crave for the defender. However, parties were agreed that, were proof to be allowed, the pursuer would amend by adding, as part of the crave relating to distribution of the proceeds, wording such as "or in equitable proportions" to the phrase "and the free

proceeds divided equally between the parties", thereby avoiding the need for a counterclaim.