SHERIFFDOM OF NORTH STRATHCLYDE AT KILMARNOCK

[2022] SC KIL 43

KIL-A28-20

JUDGMENT OF SHERIFF GEORGE JAMIESON

in the cause

ANGELA KING

Pursuer

against

YVONNE ALEXANDRA ADAM

Defender

Pursuer: Gibson, Advocate
Defender: Burr, Advocate

Kilmarnock, 27 September 2022

The sheriff, having resumed consideration of the cause, Repels the pursuer's plea in law 4 anent prescription in respect of the principal action; Repels the pursuer's plea in law 2 anent prescription in respect of the defender's counterclaim; Sustains in part the pursuer's plea in law 3 in respect of the principal action and the pursuer's plea in law 1 in respect of the defender's counterclaim at this stage, therefore:

Excludes from probation the following averments in answer 2 of condescendence on the following pages of the closed record number 19 of process:

1. Page 7, from "However," on line 19 to "£12,822.78" on line 32;
2. Page 8, from "Therefore" on line 2 to "£92,127.76" on line 7;
3. Page 8, from "During" on line 7 to "Platform Home Loans" on line 10;

Excludes from probation the following averments in answer 2 to condescendence on the following pages of the closed record number 19 of process as not insisted upon by the defender:

1. Page 6, the words "had also" on line 6;
2. Page 6, from "approximately" on line 6 to " together with" on line 8;
3. Page 6, from "and in order" on line 31 to "bridging loan" on line 34;
4. Page 7, from "was redeemed" on line 1 to "March 2007" on line 2;
5. Page 7, line 34, the words "This reduction";
6. Page 8, lines 1 – 6;
7. Page 8, the words "(£1,768.33), is £92,127.76" on line 7;
8. Page 8, from "The Defender considers" on line 22 to "86.96%" on line 28;

Quoad ultra, before answer, allows parties a proof of their respective averments on a date to be hereafter assigned by the sheriff clerk; Directs the sheriff clerk to fix a proof management hearing in accordance with rule 29.17A of the Ordinary Cause Rules 1993 in advance of fixing any diet of proof before answer; Reserves consideration of the expenses of the diet of debate on 29 August 2022 to that proof management hearing.

Sheriff George Jamieson

NOTE

Introduction

[1] This action involves consideration of whether the *condictio ob causam finitam* is part of the law of Scotland and, if it is, its relevance to the law of prescription of an obligation to redress unjustified enrichment.

Context

[2] The question arises in the context of an action of division and sale. The parties, who were friends, were joint proprietors of the subjects at 4 Hillmoss, Kilmaurs, Kilmarnock, KA3 2RS. Title to the subjects was held by the parties equally between them. The subjects were sold on 25 May 2021 by Scott Gow, solicitor, on behalf of the court in terms of the interlocutor dated 14 September 2020. Mr Gow consigned the net free proceeds of sale in the court, pending determination of the defender's counterclaim for unjustified enrichment.

Debate

[3] I heard parties' counsel in debate on 29 August 2022 in respect of the pursuer's preliminary pleas as to: (1) **chapter 1** - the relevancy and specification of the defender's pleadings in support of her counterclaim for unjustified enrichment; and (2) **chapter 2** - whether that claim has prescribed.

[4] I had the benefit of detailed written submissions from both parties' counsel, including a set of speaking notes from the defender's counsel, replying to various criticisms of the defender's pleadings. Both parties' counsel adopted their written submissions as part of their oral submissions to the court.

[5] I have taken all of their written and oral submissions into consideration in arriving at this judgment, though I have not found it necessary to repeat them in their entirety in this judgment.

Concessions by defender's counsel

[6] Defender's counsel conceded that the defender's pleadings in support of her counterclaim had been poorly drafted; though his ultimate position was that they did contain relevant and sufficient averments in support of that counterclaim.

[7] However, he accepted that certain of the defender's averments should be excluded from probation: I have attempted to record these as accurately as possible in the foregoing interlocutor.

References to the defender's pleadings

[8] References in this Note to the defender's pleadings are to those pleadings as set out in the closed record number 19 of process.

Joint contribution to 27 Martin Avenue, Irvine

[9] The pursuer's counsel criticised the defender's averments set out at page 6 of the closed record, from "The parties" on lines 19 and 20 to "its construction" on lines 23 and 24 in relation to the parties contributing jointly to the £24,000 cost of a single story extension at 27 Martin Avenue, Irvine, a property owned by the defender, as no account was made of the pursuer's contribution to this improvement in the defender's calculation of the sum claimed by the defender from the pursuer in respect of her case based on unjustified enrichment. The suggestion was that any sum due to the defender from the pursuer should be reduced by one half this sum (paragraph 46 of the pursuer's written submissions).

[10] On a strict view this averment may be irrelevant for these reasons, but I have allowed this averment to be admitted to probation: the defender may choose to lead evidence in relation to this matter and it may become significant in determining any amount

that may be due by the pursuer to the defender as a set off against sums due in respect of her unjustified enrichment claim.

Chapter 1: relevancy and specification

The defender's pleadings – the series of property transactions

[11] The defender's pleadings ***aver*** anent a series of property transactions during the time the parties lived together as friends which can be put in the following chronological order:

1. The parties were friends living in neighbouring houses in Martin Avenue, Irvine.

2. Around May or June 2005, the pursuer sold her property at 29 Martin Avenue, Irvine.

3. On doing so, the pursuer loaned the defender £28,500 to redeem the defender's loan secured over the defender's property at 27 Martin Avenue, Irvine.

4. The pursuer moved in to live with the defender at 27 Martin Avenue, Irvine.

5. In or around March 2007, the parties jointly purchased 6 Station Road, Dunlop, for £225,000.

6. The defender subsequently sold her property at 27 Martin Avenue, Irvine and applied proceeds from the sale of that property to the parties' joint purchase of 6 Station Road, Dunlop.

7. The pursuer subsequently took out a loan from Swift Advances to repay her liability to HMRC. This loan was secured over the parties' property at 6 Station Road, Dunlop and redeemed on the sale of that property.

8. In or around August 2014, the parties sold the property at 6 Station Road, Dunlop and jointly purchased the subjects at 4 Hillmoss, Kilmaurs.

9. The defender alone paid for the conveyancing work for both the sale of 6 Station Road, Dunlop and for the purchase of the subjects at 4 Hillmoss, Kilmaurs.

10. The pursuer "removed herself" from the subjects at 4 Hillmoss, Kilmaurs on or around 29 August 2019.

11. The subjects at 4 Hillmoss, Kilmaurs were sold by Mr Gow on 25 May 2021.

[12] These pleadings about the series of property transactions appear in answer 2 to the condescendence and are also incorporated in statement 1 of the defender's counterclaim. They do not set matters out in this chronological order, but this is the best way to make sense of them.

[13] The pursuer has a general denial of all of the defender's averments not specifically admitted by her in article 2 of condescendence, albeit most of the defender's averments on the foregoing chronology must be within the pursuer's direct knowledge and ought to have been admitted by her.

[14] The pursuer's only specific denials in relation to the chronology are:

1. That the defender made a contribution to the purchase of 6 Station Road, Dunlop from the sale of 27 Martin Avenue, Irvine. However, that denial appears to be contradicted by the pursuer's subsequent averment that the defender's willingness to pay the contribution was not done in consequence of any promise or agreement that the pursuer would perform any specific obligation; and

2. That the defender alone paid for the conveyancing work for the purchase of 6 Station Road, Dunlop.

The defender's pleadings - the gift of £11,000 from the defender's uncle

[15] The defender avers in answer 2 to the condescendence at lines 19 to 32 of page 7 of the closed record that in October 2019 her uncle gifted her £11,000, which she used to convert a garage at 6 Station Road, Dunlop into a separate living space for use by the pursuer.

[16] She avers this expenditure increased the value of 6 Station Road, Dunlop and she seeks the full sum of £11,000 as part of her claim for unjustified enrichment.

[17] The pursuer specifically denies the defender used the £11,000 gifted to her by her uncle for the purpose of converting the garage at 6 Station Road, Dunlop into a separate living space for use by the pursuer.

The defender's pleadings - payment of monthly instalments

[18] Answer 2 to the condescendence also contains an averment at lines 7- 10 of page 8 of the closed record that while the parties lived together at 6 Station Road, Dunlop, it was the defender who was:

> "Solely responsible for the contractual monthly instalments associated with the standard security held by Platform Loans".

[19] This averment is specifically denied by the pursuer.

Discussion on the relevancy of the defender's pleadings

Obligation to redress unjustified enrichment

[20] The starting point for considering the law of unjustified enrichment is the trilogy of cases decided in the 1990s - *Morgan Guaranty Trust Co of New York* v *Lothian Regional Council* 1995 S.C. 151, *Shilliday v Smith* 1998 S.C. 725 and *Dollar Land (Cumbernauld) Ltd* v *CIN*

Properties Ltd 1998 S.C. (H.L.) 90, - establishing that there is now a "general enrichment principle", described by Lord President Rodger in *Shilliday* v *Smith* 1998 S.C. 725 at page 727D as follows:

> "A person may be said to be unjustly enriched at another's expense when he has obtained a benefit from the other's actings or expenditure, without there being a legal ground which would justify him in retaining that benefit. The significance of one person being unjustly enriched at the expense of another is that in general terms it constitutes an event which triggers a right in that other person to have the enrichment reversed."

[21] Lord Hope set out what is required for a successful enrichment claim in *Dollar Land (Cumbernauld) Ltd* v *CIN Properties Ltd* 1998 S.C. (H.L.) 90 at p. 99E:

> "[The claimant] must show that the [the other party has] been enriched at [the claimant's expense], that there is no legal justification for the enrichment and that it would be equitable to compel the [other party] to redress the enrichment."

[22] Accordingly, to succeed in a claim for unjustified enrichment, a claimant must establish four things:

1. The enrichment of the other party;
2. At the claimant's expense;
3. No legal justification for the enrichment; and
4. It would be equitable to compel the other party to redress the enrichment.

[23] As a result of this trilogy of cases, a claimant no longer *requires* to base a claim for unjustified enrichment on one of the "*condictiones*" of Roman law. Lord Rodger comments on this in *Shilliday* v *Smith* 1998 S.C. 725 at page 727E - G:

> "[The] law …has identified… situations where persons are to be regarded as having been unjustly enriched at another's expense… [Some] of these situations fall into recognisable groups or categories. Since these situations correspond, if only somewhat loosely, to situations where remedies were granted in Roman law, in referring to the relevant categories our law tends to use the terminology which is found in the Digest and Code. The terms include condictio indebiti; condictio causa data, causa non secuta and - to a lesser extent - condictio sine causa…[The] term condictio causa data, causa non secuta covers situations where A is enriched because

> B has paid him money or transferred property to him in the expectation of receiving a consideration from A, but A does not provide that consideration. The relevant situations in this group also include cases where B paid the money or transferred the property to A on a particular basis which fails to materialise - for example, in contemplation of a marriage which does not take place."

[24] A claimant does not therefore require to base a claim for unjustified enrichment on one of the Roman law *condictiones*, though the *condictiones* remain relevant to considering categories of cases in which an obligation to redress unjustified enrichment may arise.

[25] Nor need the claimant, given the nature of the remedy, *aver* any promise, agreement or "mutual understanding" between the parties in order to succeed in a claim for unjustified enrichment (*Satchwell* v *McIntosh* 2006 S.L.T. (Sh. Ct.) 117).

[26] A claim for unjustified enrichment based on the *condictio causa data causa non secuta* may, however, cover situations, such as frustration of a contract, where the other party is enriched because the claimant has paid money or transferred property to the other party in the expectation of receiving a consideration from the other party, but the other party does not provide that consideration. The frustrated contract is relevant to the existence of the claim, but the claim for redressing the unjustified enrichment *condictio causa data causa non secuta* does not depend on any contractual obligation being in existence between the parties.

The condictio ob causam finitam

[27] It is unnecessary for me to decide in this case if the *condictio ob causam finitam* is a sub-species of the *condictio sine causa* as submitted by the defender's counsel. This may not necessarily be the case. The most commonly cited example (recognised in the *Digest*, 12.7.2 (Ulpian)) is that of a laundry which loses a customer's clothes and is compelled by order of a judge to pay damages to the customer.

[28] Later the clothes are discovered and restored undamaged to the customer. The customer is required to repay the money paid to the customer in terms of the decree by the laundry. Such payment by the laundry to the customer was not necessarily *sine causa*, the cause being the obligation to pay constituted by the decree (Zimmermann, *The Law of Obligations*, Juta & Co, Ltd, Cape Town, 1990, page 855).

[29] The basis for repayment in such a case is the *condictio ob causam finitam.*

[30] The *condictio ob causam finitam* therefore requires a valid basis for payment or transfer which has subsequently ceased to exist; in other words, there must have been an existing state of affairs which provides the reason for the transfer, but that reason has subsequently come to an end (McQueen *et al* editors, *Gloag and Henderson, The Law of Scotland*; 14th edn; w Green (2017) para. 24.08, fn. 48; McQueen *et al*, editors, *Gloag and Henderson, The Law of Scotland*; 15th edn; W Green (2022), para. 24.08, fn. 48).

Is the condictio ob causam finitam recognised in Scots law?

[31] There may be reason to doubt the *condictio ob causam finitam* is recognised in Scots law, as did the pursuer's counsel in his submissions to me. For example, Lord Rodger refers only to the three *condictiones* most commonly encountered in Scots law in *Shilliday* v *Smith* 1998 S.C. 725 at page 727F – the *condictio indebiti;* the *condictio causa data causa non secuta* and the *condictio sine causa*. And the footnote number 48 to paragraph 48 of *Gloag and Henderson* found in the most recent editions of that book (the 14th edition was cited during the debate, but the subsequent 15th edition states the same thing) comments "there are early references to the *condictio ob causam finitam (Craig, Jus Feudale, III, v, 23; Stair, I, 7, 7),* albeit these <u>*have not yet been*</u> taken up in the modern law" (emphasis added).

[32] Professor Whitty (*Stair Memorial Encyclopaedia: Unjustified Enrichment* (*Reissue*: 2021) argues strongly for recognition of the *condictio ob causam finitam* in Scots law. He gives some *possible* examples where the *condictio ob causam finitam* may apply with claims based on cessation of cohabitation being a *possible* sub-category of those possibilities (paragraph 340(4)).

[33] I see no reason in principle to hold that the *condictio ob causam finitam* should not be recognised in Scots law. There is no authority that holds it has been rejected as part of Scots law.

[34] Professor Whitty argues convincingly for its recognition in the *Stair Memorial Encyclopaedia: Unjustified Enrichment Reissue*.

[35] It would be entirely superfluous for me to repeat Professor Whitty's arguments in favour of the *condictio ob causam finitam* now definitively being recognised as part of the law of Scotland.

[36] Professor Whitty specifically points out however that the *condictio* was recognised by Stair, albeit not by name, which may account for its low profile in Scots law until recent times (Stair, *Institutions of the Law of Scotland*, 2nd edn 1693, 1,7,7) (*Stair Memorial Encyclopaedia: Unjustified Enrichment Reissue*, paragraph 337).

[37] *Gloag and Henderson*, in the aforementioned footnote 48, refer to the *condictio* as *not yet* having been taken up in the modern law.

[38] *Stair* is sufficient authority to persuade me that the *condictio ob causam finitam* is recognised in Scots law; the persuasive arguments of highly respected writers who back this up, such as the editors of chapter 24 of *Gloag and Henderson*, and Professor Whitty as the author of the *Stair Memorial Encyclopaedia: Unjustified Enrichment Reissue*, are not lightly to be rejected by the court.

[39] The reason Professor Whitty refers to the *condictio ob causam finitam* as *possibly* being recognised in Scots law in situations where cohabitation ceases, is that later, in paragraph 343 of the *Reissue*, he refers to *Satchwell v McIntosh* 2006 S.L.T. (Sh. Ct.) 117 as involving an approach which seems "very near the requirements of a *condictio ob causam finitam*."

[40] In that case, the pursuer transferred property to the defender on the condition the parties would continue to cohabit together for life. Professor Whitty comments that on cessation of cohabitation the original *causa* for the transfer fell away.

[41] At that point, the defender was obliged to redress the enrichment by repaying the money, "although here the boundaries with the *condictio causa data causa non secuta* can at times be rather indistinct."

[42] In my opinion, the doubt is therefore not so much as to the *application* of a remedy for unjustified enrichment on cessation of cohabitation, but whether the remedy comes under the description of the *condictio causa data causa non secuta* or the description of the *condictio ob causam finitam*.

[43] There is, to my knowledge, no decided case in which the remedy for unjustified enrichment has been considered in the context of a situation where two friends lived together.

[44] However, I consider that the defender was correct to argue for the present case to be understood as an example of the *condictio ob causam finitam* and not the *condictio causa data causa non secuta*.

[45] There was, in this case, only a friendship between the parties. They were not engaged to be married, nor had they agreed to a lifelong cohabiting relationship with each other. The transfers of money by the defender for the benefit of the pursuer in this case were

therefore not based on any underlying condition, such as a promise of marriage or (as in *Satchwell* v *McIntosh*) cohabitation for life. The transfers were for the cause of the parties economically benefiting from living in the same house together. As soon as that state of affairs ceased to exist, so did the reason for the transfers of the money.

[46] The defender accordingly submitted that in these circumstances the pursuer had been enriched at the defender's expense, there was no legal basis for that enrichment (the pursuer does not argue donation, or gift, or contract), and that it would be equitable to compel the pursuer to redress the enrichment.

[47] That being so, this case is one in which the defender has relevantly pled that she is entitled to have the unjustified enrichment redressed; also, that the circumstances of the case correspond to the *condictio ob causam finitam* and do not correspond to the *condictio causa data causa non secuta*.

Has the defender relevantly averred the application of the condictio ob causam finitam to her claim?

[48] The pursuer criticised the basis upon which the defender sought to bring the present case within the description of the *condictio ob causam finitam*. This was because the *causa* which was averred to have fallen away when the parties stopped living together as friends in the same house in August 2019 was their joint decision in 2005 to "[reside] together and [pool] their resources" or to "[pool] their resources" (lines 13 and 14 of answer 2 of condescendence on page 6 of the closed record; and lines 16 – 26 of answer 2 of condescendence on page 9 of the closed record).

[49] The pursuer's criticism was aimed at the phrase "pool their resources": if the parties intended to "pool resources" then that was sufficient explanation why the defender made contributions to the parties living arrangements. The case of *Satchwell* v *McIntosh* 2006 S.L.T.

(Sh. Ct.) 117 was not binding on me; but, in any event, agreements were not irrelevant to questions of unjustified enrichment: what mattered here was the parties' intention to pool resources. This demonstrated that the defender's state of mind at the time the parties began living together was that she was intending to confer gratuitous benefit on the pursuer, ruling out any question of *unjustified* enrichment on the part of the pursuer.

[50] I think there is substantial force in this criticism of the defender's pleadings. The phrase "pool resources" can indeed, on one view, be interpreted precisely in that manner. However, I also think the phrase is of uncertain meaning.

[51] The phrase could, on another view, be interpreted in a more neutral fashion. Moreover, the law presumes against donation and the defender's pleadings must be read as a whole. Accordingly, I am of the opinion that this unfortunate phrase should not be taken in isolation to render the defender's whole case irrelevant.

[52] Indeed, the defender's pleadings at least impliedly aver that she did not intend to confer a gratuitous benefit on the pursuer by making the contributions she did to the acquisition of the property at 6 Station Road, Dunlop and the subjects at 4 Hillmoss, Kilmaurs as she claims the conferral of this benefit on the pursuer would be inequitable and unjust (lines 11, 13, 14 and 28 of answer 2 of condescendence on page 9 of the closed record) and that would be inconsistent with the interpretation of "pooling resources" advanced by the pursuer.

[53] In my opinion, the *causa* involved for the transfers by the defender, and which appears to have been intended by the defender's pleadings, was more accurately the cause of the parties economically benefiting from living in the same house together.

[54] As the defender's case is not necessarily bound to fail on this pleading point, I do not uphold the pursuer's preliminary plea to the relevancy of the action at this stage; the proper

course, in my opinion, is to allow parties, before answer, a proof of their respective averments.

Discussion on the specification of the defender's pleadings in relation to the series of property transactions

Introduction

[55] The defender's pleadings in answer 2 of condescendence anent the series of property transactions take up most of pages 5 - 8 of the closed record. Reference to the date when the parties ceased living together (part 10 of the chronology) appears however at lines 18 – 23 on page 9 of the closed record.

[56] These averments are not organised in a concise, clear, or strictly chronological manner, thus making it very difficult to discern the exact nature of the defender's counterclaim in relation to the series of property transactions. An examination of the defender's pleadings for specification of these matters is therefore not an easy task because of the poorly organised nature of these pleadings.

[57] Nonetheless, I accept the defender's submission that this task can, albeit with significant difficulty and expenditure of time, be carried out. The chronology set out at paragraph [11] above may in particular be derived from the defender's pleadings.

Part 1 of the chronology

[58] The fact that the parties were friends living in neighbouring houses in Irvine appears at lines 9 - 12 on page 6 of the closed record. There was no exception taken to the specification of this averment by the pursuer *per se*.

Part 2 of the chronology

[59] The fact that in around May or June 2005 the pursuer sold her home at 29 Martin Avenue, Irvine appears at line 17 on page 6 of the closed record. There was no exception taken to the specification of this averment by the pursuer *per se*.

Part 3 of the chronology

[60] The fact the pursuer loaned the defender £28,500 to redeem the defender's loan secured over 27 Martin Avenue, Irvine appears at line 18 on page 6 of the closed record. There was no exception taken to the specification of this averment by the pursuer *per se*, only a submission that the amount of this loan should be deducted from any sum due to the defender by way of any unjustified enrichment claim, a proposition conceded by the defender.

Part 4 of the chronology

[61] The fact the pursuer moved in to live with the defender at 27 Martin Avenue, Irvine is agreed on the record.

[62] However, the pleadings are unsatisfactory in relation to the date the pursuer moved into 27 Martin Avenue Irvine. The defender avers at lines 16 and 17 on page 6 of the closed record that the pursuer moved in with her after the pursuer sold her property at 29 Martin Avenue, Irvine in around May or June 2005.

[63] The pursuer however "admits" at lines 5 and 6 on page 4 of the closed record that the parties lived together after the defender's divorce in February 2007. This in not inconsistent with the parties having moved in together in May or June 2005 as they would still have been living together when and after the defender was divorced in February 2007.

[64] The most likely scenario is that the parties began living together in around May or June 2005 as that is when the pursuer is averred to have sold her property at 29 Martin Avenue, Irvine.

[65] However, the pursuer ought clearly to have admitted these facts in article 2 of condescendence. She has a general denial and therefore no specific admission of these uncontroversial facts within her knowledge.

Part 5 of the chronology

[66] The fact that in or around March 2007 the parties jointly purchased 6 Station Road, Dunlop for £225,000 appears at lines 25 – 27 on page 6 of the closed record. There was no exception taken to the specification of this averment by the pursuer *per se*.

Part 6 of the chronology

[67] The fact that the defender subsequently sold her property at 27 Martin Avenue, Irvine and applied certain proceeds of that sale towards the parties' joint purchase of 6 Station Road, Dunlop is set out at lines 27 – 34 on page 6 and lines 1 – 8 on page 7 of the closed record.

[68] These averments were criticised by the pursuer as being very confused.

[69] Her counsel submitted that the defender had not clearly averred the foregoing facts with reference to the exact amount the defender contributed to the purchase of 6 Station Road, Dunlop from the proceeds of sale of 27 Martin Avenue, Irvine, and how precisely that calculation had been carried out.

[70] Instead, the defender averred she had paid a "deposit" of £79,955 on the purchase of 6 Station Road, Dunlop; but the amount of this "deposit" conflicted with the amount of the

bridging loan of £80,000 which the defender secured over 27 Martin Avenue, Irvine as the sale of 27 Martin Avenue did not conclude until after the purchase of the property at 6 Station Road, Dunlop.

[71] The defender's counsel explained in reply to these criticisms at debate that the bridging loan was in fact for £79,955 and this amount was in fact the sum that fell to be credited to defender for the purchase of the property at 6 Station Road, Dunlop.

[72] Although these pleadings are far from satisfactory, I have nonetheless allowed these averments to proceed to proof before answer. The expression "deposit" is unhelpful, but in my view may be sufficient to allow the defender to lead evidence confirming the exact amount she contributed to the purchase of 6 Station Road, Dunlop from the subsequent sale of her property at 27 Martin Avenue, Irvine.

Part 7 of the chronology

[73] The fact that the pursuer subsequently took out a loan from Swift Advances to repay her liability to HMRC which was redeemed on the sale of the property at 6 Station Road, Dunlop appears at lines 12 – 20 on page 8 of the closed record.

[74] The pursuer criticised these averments on the basis that the defender had not averred who met the monthly instalments for this loan, or the source of funds to repay the loan.

[75] In my opinion, neither of these criticisms are justified as the defender's case is there was an outstanding balance secured over 6 Station Road, Dunlop which was redeemed on the sale of that property. The implication is the defender effectively paid one half of whatever liability was outstanding on the pursuer's loan as at that date.

Part 8 of the chronology

[76] The fact that in or around August 2014 the parties sold the property at 6 Station Road, Dunlop and jointly purchased the subjects at 4 Hillmoss, Kilmaurs appears at lines 19-26 of answer 2 to the condescendence on page 5 of the closed record. There was no exception taken to the specification of this averment by the pursuer *per se*.

Part 9 of the chronology

[77] The fact that the defender paid for the conveyancing for both the sale of 6 Station Road, Dunlop and the purchase of the subjects at 4 Hillmoss, Kilmaurs is averred at line 14 on page 7 of the closed record and lines 5 and 16 on page 7 of the closed record respectively.

[78] These pleadings refer to the "profit" on these transactions being subject to deductions associated with the sale and purchase costs which, from what follows thereafter, carries the clear implication the defender paid both of these costs.

[79] Reference is made to a "gross profit" and a "net profit" from the sale of 6 Station Road, Dunlop which makes it clear the pleader had in mind these costs were borne by the defender as the deductions are the difference between the "gross" and "net" profits.

[80] The pleadings state more specifically from lines 25 to 34 on page 6 of the closed record and from lines 1 to 6 on page 7 of the closed record that the defender was "entirely responsible" for the costs associated with the purchase of 6 Station Road, Dunlop, albeit this makes for some convoluted reading.

[81] The pursuer criticised the defender's use in her pleadings of the expression "conveyancing formalities" to describe these costs, but these pleadings also refer to solicitors acting in those formalities and refer to the costs being inclusive of outlays.

[82] I have allowed these averments to proceed to proof before answer. There is much wrong with them. They fail the test that they should be clear and terse. It is highly unsatisfactory the averments have to be picked out from a dense and unclear mass of words.

[83] Nonetheless, these averments do appear, or can be clearly inferred from the pleadings, and give sufficiently fair notice to the pursuer of the case to be answered in relation to this part of the counterclaim.

Part 10 of the chronology

[84] The fact the pursuer "removed herself" from the subjects at 4 Hillmoss, Kilmaurs on or around 29 August 2019 appears at lines 18 – 23 on page 9 of the closed record. There was no exception taken to the specification of this averment by the pursuer *per se*.

[85] I observe only that the defender ought to have used more direct and less ambiguous language to describe the fact of the parties' ceasing to live together at the subjects at 4 Hillmoss, Kilmaurs on a specific date; further, the instance of the closed record appears not to have been amended to reflect the defender's current address since those subjects were sold on 25 May 2021.

Part 11 of the chronology

[86] The fact the subjects at 4 Hillmoss, Kilmaurs were sold by Mr Gow on 25 May 2021 is not controversial, and is a matter of judicial knowledge derived from Mr Gow's report to the court dated 26 May 2021.

Calculating the sum sued for in the counterclaim so far as relating to the property transactions

[87] The crave in the counterclaim is for declarator that the net proceeds of sale of the subjects at 4 Hillmoss, Kilmaurs (which are currently consigned with the court) "should be divided between the pursuer and the defender to the extent of 13.04% to the pursuer and 86.96% to the defender, or in such other manner as to the court seems justified and reasonable".

[88] The pursuer made extensive criticisms of the manner in which the defender attempted to calculate the sums she claimed from her on the basis of the defender's claim for unjustified enrichment.

[89] These criticisms are entirely justified as the calculations are confusing, and in some respects erroneous, leading to an incorrect statement of the percentages that might be due to the parties from the consigned free proceeds of sale of the subjects at 4 Hillmoss, Kilmaurs.

[90] The use of the word "should" in connection with the proposed court order for division of the sale proceeds, rather than, for example "shall be", is poor drafting and infelicitous as it does not convey the idea of compulsion required by a court order.

[91] Were it not for the fact that an action of division and sale is an equitable remedy in respect of the division of the sale proceeds and the defender had the good sense to invite the court to divide the consigned sum "in such other manner as to the court seems justified and reasonable", I would have held these defects fatal to the relevancy of the counterclaim.

[92] However, the defender's claim in relation to the series of property transactions can be discerned (albeit, as previously remarked, with considerable difficulty) from the defender's pleadings as follows (subject to the clarification offered by the defender's counsel about the "deposit" for the purchase of the property at 6 Station Road, Dunlop):

1. £79,955, being the defender's contribution to the purchase of 6 Station Road, Dunlop.

2. £8,347.99, being one half of the pursuer's loan from Swift Advances redeemed on its sale.

3. £3,677.22, being one half of the conveyancing costs referred to as part 9 of the chronology.

[93] This totals £91,980.21 from which the pursuer's loan of £28,500 to the defender falls to be deducted, giving a balance of £63,480.21. A further £12,000 may also fall to be deducted as representing the pursuer's one half contribution to the £24,000 cost of the single story extension at 27 Martin Avenue, Irvine: but as this was not debated in any greater detail before me, I refrain from further comment on this point at this time.

Discussion on the specification of the defender's pleadings in relation to the gift of £11,000 from the defender's uncle

[94] The defender avers at lines 19 - 32 of answer 2 of condescendence on page 7 of the closed record and at lines 2 - 7 of answer 2 on page 8 of the closed record that she used a gift of £11,000 from her uncle to covert a garage within 6 Station Road, Dunlop into a separate living space for use of the pursuer. She claims this increased the value of that property and she seeks reimbursement of the whole of this sum from the pursuer.

[95] The defender does not aver what the increase in value actually was; nor does she explain why all of the £11,000 should be paid by the pursuer to her on the basis of an obligation to redress unjustified enrichment.

[96] The inference from the defender's pleadings seems to be that as the pursuer got the sole use of the converted living space, then she should reimburse the defender the full

£11,000. This, on one view, is inconsistent with the defender's averment the parties were "pooling resources".

[97] The defender accepted at debate she could, at most, recover only one half of this sum from the pursuer: the legal basis for that recovery remained unclear to me. I agree with the pursuer that these averments are entirely lacking in specification: I have therefore directed that these averments are excluded from probation.

Discussion on the specification of the defender's pleadings in relation to payment of monthly instalments

[98] The defender avers at lines 7 - 10 of answer 2 of condescendence on page 8 of the closed record that she was "solely responsible" for the contractual monthly instalments associated with the standard security held by Platform Home Loans during the period the parties resided at 6 Station Road, Dunlop.

[99] There is no averment of how much the defender paid over this period. Indeed, she does not use the word "paid", preferring the vaguer expression "was responsible" for these instalments. I agree with the pursuer that these averments are entirely lacking in specification: I have therefore directed that these averments are excluded from probation.

Chapter 2: Prescription

[100] There was common ground between the parties that any obligation on the part of the pursuer to redress unjustified enrichment was extinguished if no "relevant claim" were made by the defender within five years after the obligation became enforceable: Prescription and Limitation (Scotland) Act 1973, sections 6(1) and (3); schedule 1, paragraph 1(b).

[101] The question for my decision is when did the obligation become enforceable in this case?

[102] The pursuer submitted this was the date of purchase of the subjects at 4 Hillmoss, Kilmaurs, namely August 2014, and therefore the counterclaim, lodged in process in this case on 26 February 2020, was too late and had prescribed.

[103] The defender submitted the date the obligation became enforceable was the date on which the pursuer left the subjects at 4 Hillmoss, Kilmaurs, namely August 2019, and therefore the counterclaim, lodged in process in this case on 26 February 2020, was not too late and had not prescribed.

[104] They both agreed on the relevant authorities to be considered by the court; but also that none of these were directly binding on me in the context of deciding whether any obligation on the part of the pursuer to redress unjustified enrichment on her part had prescribed.

[105] In general terms, such an obligation becomes enforceable "when all the facts necessary to establish it [have] occurred": *NV Devos Gebroeder* v*Sunderland Sportswear Ltd* 1990 S.C. 291 at page 301, per Lord President Hope.

[106] In *Virdee* v *Stewart* [2011] CSOH 50, the pursuer sued her brother, the defender, for £170,000 as recompense for a house she had built on his croft in 1994. He had allowed her to make use of the house for various purposes until 2009. She raised her action against him, based on unjustified enrichment, in 2010.

[107] Lady Smith sustained a plea that the action had prescribed on the basis that, as a matter of law, the defender was enriched as soon as the house was completed; and it was open to the pursuer to have made a relevant claim against the defender at any time in the five-year period beginning in August 1994 (paragraphs [24] and [26]).

[108] In *Thomson* v *Mooney* 2014 Fam. L. R. 15, the parties became engaged in 2005 when they bought a house together, with the pursuer contributing £70,000 to the purchase price. They separated in 2007. The pursuer raised proceedings in April 2011.

[109] The Lord Ordinary held the pursuer's claim for payment of £35,000 had prescribed as the date of enforcement of the obligation to redress the unjustified enrichment was when the house had been purchased.

[110] The Inner House reversed this decision on appeal, holding that the defender's obligation to make repayment became enforceable when the parties separated.

[111] They analysed the claim as one based on the *condictio causa data causa non secuta* and observed at paragraph [8] of their Opinion that:

> "For so long as the cause in contemplation of which the enrichment was conferred is still in contemplation or still to be provided, and its accomplishment has not yet failed, the enrichment cannot be said to be sine causa and thus cannot be said to be unjustified."

[112] Professor Hogg wrote an influential article criticising the decision of Lady Smith in *Virdee* v *Stewart* and of the Lord Ordinary (Lord Drummond Young) in *Thomson* v *Mooney*.

[113] See Martin Hogg: *Unjustified Enrichment Claims: When Does the Prescriptive Clock Begin to Run?* Edin. L. R. 2013, 17(3), 405 – 410.

[114] This was to the effect Lady Smith's decision was "misguided" as she had not categorised the claim with reference to the *condictio ob causam finitam*; had she done so, she ought *not* to have held that prescription extinguished the pursuer's claim in 1999; the proper focus of the enquiry was the point at which the defender's justification for the enrichment had ceased to operate. It was not until the parties' relationship broke down in 2009 that the pursuer became enriched.

[115] Professor Hogg criticised the decision of the Lord Ordinary in *Thomson* v *Mooney* on a number of grounds, including the Lord Ordinary's misapprehension as to the nature of the *condictio causa data causa non secuta*: the Lord Ordinary ought therefore to have held the enrichment only became unjustified when the parties' engagement was called off; only at that point did the *causa* under which the transfer was made fail to follow (i.e. was *non secuta*).

[116] In the conclusion to his article, Professor Hogg referred to the difficulty which courts were experiencing in understanding the true nature of the reasons (the *causa*) in respect of which enrichments may be transferred.

[117] He pointed out that such reasons may be conditional, giving rise to cases where a recipient of an enrichment will originally have an entitlement to retain or make use of an enrichment, but will cease to be so entitled when a continuing reason for the transfer ceases (*ob causam finitam*) or when an expected reason fails to materialise (*causa data causa non secuta*). In such cases, it is only when entitlement ceases that retention of the enrichment becomes unjustified and prescription begins to run on unjustified enrichment claims.

[118] Professor Hogg's article was judicially noticed by the Inner House (paragraph [13]) in *Thomson* v *Mooney*:

> "We would add that, as has been remarked by Dr Martin Hogg [as he then was] in his article in the Edinburgh Law Review Unjustified Enrichment Claims: When Does the Prescriptive Clock Begin to Run? Edin. L.R. Vol. 17, p.405 - which also comments critically on the Lord ordinary's decision in the present case - no argument was advanced to Lady Smith that the condictio ob causam finitam was open, or might have been open, to Mrs Virdee."

[119] In my opinion, Lady Smith's decision in *Virdee* v *Stewart* in relation to the running of prescription in unjustified enrichment claims is conclusively undermined by the convincing

arguments put forward by Professor Hogg in the above article, and the decision of the Inner House in *Thomson* v *Mooney* in relation to the *condictio causa data causa non secuta*.

[120] No distinction falls to be drawn between prescription of an unjustified enrichment claim based on the *condictio ob causam finitam* and one based on the *condictio causa data causa non secuta* for the reasons given by Professor Hogg in his article.

[121] In addition, I note that Professor Whitty in his discussion of the *condictio ob causam finitam* in relation to cohabitation claims in the *Stair Memorial Encyclopaedia: Unjustified Enrichment Reissue* comments that the original *causa* for the transfer falls away on *cessation of cohabitation*.

[122] *At that point*, the defender becomes obliged to redress the enrichment by repaying the money (paragraph 343).

[123] I am accordingly of the opinion prescription runs in relation to unjustified enrichment claims based on the *condictio ob causam finitam* when the cause for the continuing enrichment ceases, not when the enrichment is conferred.

[124] That being so, prescription began to run in this case in relation to the series of property transactions when the parties ceased living together in the same house in August 2019. The claim was made in 2020, well within the prescriptive period, and has accordingly not prescribed.

Conclusion

[125] My decision is that the defender's claim for unjustified enrichment may proceeded to proof before answer in relation to the series of property transactions, but not in relation to the defender's claims based on the defender contributing £11,000 to convert a garage at

6 Station Road, Dunlop or solely paying the monthly instalment on the secured loan while the parties lived there.

[126] As I have previously observed in this judgment, there can be discerned from the defender's pleadings claims by the defender based on the *condictio ob causam finitam* for:

1. £79,955, being the defender's contribution to the purchase of 6 Station Road, Dunlop.

2. £8,347.99, being one half of the pursuer's loan from Swift Advances redeemed on its sale.

3. £3,677.22, being one half of the conveyancing costs referred to as part 9 of the chronology.

[127] This totals £91,980.21 from which the pursuer's loan of £28,500 to the defender falls to be deducted, giving a balance of £63,480.21.

[128] However, as in *Thomson* v *Mooney*, I ask whether the first of these claims should be for one half the value, as title to 6 Station Road, Dunlop was taken in equal shares by the parties and one half of the defender's contribution of £79,955 would have benefited her, rather than enriching the pursuer. There is also the additional question discussed at the beginning of this Note as to whether any further deduction requires to be made for the pursuer's contribution to the £24,000 cost of a single story extension at the defender's property at 27 Martin Avenue, Irvine.

Further procedure and expenses of the diet of debate

[129] I shall ask the sheriff clerk to fix a proof management hearing to allow me to consider the management of the proof before answer in discussion with parties' solicitors or counsel.

[130] I will hear submissions on the expenses of the diet of debate at that hearing.