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# Analysis

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## The Alleged Incapacities of Mr Sheridan

On 26 January 2011 the former Scottish Socialist Party MSP Tommy Sheridan was sentenced to three years' imprisonment for perjury.<sup>1</sup> As a consequence was Mr Sheridan disqualified from membership of Parliament by virtue of his conviction, or by virtue of his imprisonment? Or neither? If disqualified, for how long? And from which Parliament? Was there any prospect of his being a candidate in the 2011 Scottish Parliament elections, due to take place a matter of months after sentencing? In attempting to answer such questions the BBC reported that as a consequence of his conviction Sheridan "won't be able to stand for the Scottish Parliament again"<sup>2</sup> whilst *The Guardian* claimed that "Sheridan's conviction means that he will be unable to stand again for parliament".<sup>3</sup> Neither statement is correct and after (though not necessarily because of) emails from this author, the BBC withdrew the claim from subsequent broadcasts and *The Guardian* website's "article history" shows that a similar modification was made to their story. What then are the relevant rules of electoral law, how do they apply to Mr Sheridan's circumstances and why are they so poorly understood?

### A. THE RULES

Assuming no incapacity based on age or nationality,<sup>4</sup> the starting point for determining whether an individual lacks capacity to stand as a candidate at an election is the House of Commons Disqualification Act 1975. As is well known, this provides for the disqualification of certain serving public officials – judges, civil servants, members of the police and armed forces, etc<sup>5</sup> – from membership of the Commons and, by virtue of the Scotland Act 1998, the Scottish Parliament.<sup>6</sup> Clearly

1 For the sentencing statement of Lord Bracadale, presiding, see <http://www.scotland-judiciary.org.uk/8/709/HMA-v-THOMAS-SHERIDAN>.

2 BBC Radio 4, *The World At One*, 26 Jan 2011.

3 "Tommy Sheridan sentenced to three years in prison", *The Guardian* 26 Jan 2011.

4 Electoral Administration Act 2006 Part 5.

5 The "disqualifying offices" listed in Schedule 1 of the Act are regularly amended by Order in Council.

6 "A person is disqualified from being a member of the [Scottish] Parliament if . . . he is disqualified . . . from being a member of the House of Commons or from sitting and voting in it." Scotland Act 1998 s 15(1)(b).

however, none of these disqualifications would apply to Mr Sheridan. We must look elsewhere to determine his alleged incapacity.

Further light may be thrown on the matter by reference to the great consolidating measure of UK electoral law, the Representation of the People Act 1983.<sup>7</sup> In reproducing the electoral offences first introduced by the Corrupt and Illegal Practices Act 1883, it provides for a further category of the disqualified – those convicted of “corrupt or illegal practices”. Corrupt practices are intentional crimes such as personation,<sup>8</sup> bribery,<sup>9</sup> treating<sup>10</sup> and unduly influencing others in the manner of their voting<sup>11</sup> whilst illegal practices do not require *mens rea* and include voting illegally,<sup>12</sup> false statements as to candidates,<sup>13</sup> disrupting election meetings<sup>14</sup> and illegal practices in relation to election expenses.<sup>15</sup> As arcane and diverse as this list may be, it does not include the offence of perjury. The plain and ordinary meaning of “corrupt or illegal practices” is trumped by the statute’s use of it as a term of art. As such Mr Sheridan suffers no incapacity under the 1983 Act, though were he so to do it would extend up to ten years.<sup>16</sup>

Oddly, it is neither the general law pertaining to MPs or elections that determines in the first instance whether Mr Sheridan has capacity to stand in the forthcoming Scottish Parliament elections. Instead one of the more *ad hoc* and *ad hominem* of statutes determines his near-term fate – the Representation of the People Act 1981. The briefest of Acts, this was the UK state’s response to the successful election of the Irish Republican prisoner, Bobby Sands, to the seat of Fermanagh and South Tyrone at a by-election in 1981 on an extraordinary turnout of 86.9%. An outraged Westminster Parliament legislated with great speed to the effect that a “person found guilty of one or more offences . . . and sentenced or ordered to be imprisoned or detained indefinitely or for more than one year, shall be disqualified for membership of the House of Commons while detained anywhere in the British Islands”.<sup>17</sup>

7 “The Representation of the People Act 1983 consolidates the Representation of the People Act 1949 and various enactments amending it. That Act of 1949 was itself a consolidation of earlier legislation. A consolidation cannot alter the substance of the earlier law. Accordingly much of the 1983 Act derives from legislation enacted in the nineteenth century.” R J Clayton (ed), *Parker’s Law and Conduct of Elections*, 2<sup>nd</sup> edn (1996) volume 1, paragraph 1.2.

8 Representation of the People Act 1983 s 60.

9 s 113.

10 s 114. Treating consists of providing “any meat, drink [or] entertainment” to others for the purpose of influencing their vote.

11 s 115.

12 s 61.

13 s 106. For a recent and rare determination of an election being void following in breach of this provision, see *Watkins v Woolas* [2010] EWHC 2702 (QB).

14 s 92.

15 s 73(6).

16 s 159. The Election Court in *Watkins v Woolas* disqualified Mr Woolas for three years, a decision upheld on appeal: [2010] EWHC 3169 (Admin).

17 Representation of the People Act 1981 s 1. See also the discussion in B Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (2010) 308-309.

This then is a basis on which Sheridan will likely be excluded from standing in the Scottish Parliament elections of 2011. Having been sentenced for three years imprisonment and even taking account of the possibility of early release, Mr Sheridan will be disqualified from standing for parliamentary election (Holyrood included)<sup>18</sup> until release. This does not of course guarantee Sheridan's exclusion from the Fourth Scottish Parliament—a by-election after his release could provide the necessary opportunity—but at present, the effect of disqualification would be to void any nomination of him as a member of the House whilst imprisoned.<sup>19</sup>

There remains though a further ground for incapacity that, at the time of writing, very much hangs above Sheridan's head—that relating to bankruptcy. The Sheridan trial was prompted by the *News of the World* newspaper alleging certain details about Mr Sheridan's private life. This led him to raise an action for defamation against the newspaper which, whilst initially successful, is at present being appealed. If successful, the *News of the World* will seek to recover its expenses. It is unclear whether Mr Sheridan would have the funds to meet what is certain to be a six figure claim, a likely consequence of which would be his sequestration. In that event a shift to electoral law's interstice with the law of insolvency is necessary. The Enterprise Act 2002 amended the Insolvency Act 1986 such that “[w]here a court in . . . Scotland awards sequestration of an individual's estate, the individual is disqualified . . . for being elected to, or sitting or voting in, the House of Commons”.<sup>20</sup> As this provision has parallel effect for the Scottish Parliament,<sup>21</sup> there is the very real possibility of Mr Sheridan being disqualified in the event of an adverse expenses order arising from the initial defamation action leading to his sequestration. The irony of the law of capitalism determining the law of democracy would not be one lost on Mr Sheridan. Any such disqualification would commence at the date of sequestration and expire at its discharge, which in the ordinary run of affairs would be after one year.<sup>22</sup> The exact timing of that sequence is at present unclear as Mr Sheridan's appeal against the perjury conviction has sisted the *News of the World's* own appeal against the original defamation decision, thereby delaying any sequestration for an indeterminate period.

## B. CONCLUSION

This brief tour of the highways and byways of electoral law leads to the obvious point that this is a highly fragmented body of law. That may be a matter of little concern to that discrete and expert community of electoral lawyers and officials but the obscurity

18 (n.6).

19 Representation of the People Act 1981 s 2. In the original case, the 1981 Act had the effect of barring Sands' fellow 'dirty protesters' from standing in the by-election that followed his hunger-strike-induced death twenty six days after his own election to the Commons.

20 Insolvency Act 1986 s 427.

21 (n.6).

22 Section 1 of the Bankruptcy and Diligence etc (Scotland) Act 2007 amends s 54(1) of the Bankruptcy (Scotland) Act 1985 by reducing the period of automatic discharge of the debtor from three years to one.

of the regime has implications for the media's and therefore the electorate's ability to comprehend a body of law that is *eo ipso* of central public concern. Current electoral law resembles the state of its cousin, party finance law, prior its modernisation and systematisation in the form of the Political Parties Elections and Referendums Act 2000. Whatever that measure's other substantive merits it has lent a degree of coherence and clarity to the law of party funding. Increased media and perhaps even popular understanding of the general principles has followed. Would that the same could be said of electoral law. It is not an insignificant paradox that the law governing the electorate's choice of its representatives is almost entirely unknown to it, and practically unknowable.

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*(The author thanks the blogger, Lallands Peat Worrier – <http://lallandspeatworrier.blogspot.com/> – for the enquiry that prompted this note.)*

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## The Compatibility of Jury Verdicts with Article 6: *Taxquet v Belgium*

Ever since the European Convention of Human Rights was given domestic effect in the United Kingdom, there has been speculation that the fact that the criminal jury does not give reasons for its decision might be construed as a breach of the accused's right under article 6 to a fair trial.<sup>1</sup> Indeed, this issue was considered very recently by the High Court in *Beggs v HM Advocate*<sup>2</sup> which, after a review of the jurisprudence of the European Court of Human Rights, concluded that the Scottish practice, whereby the jury simply states its verdict without giving reasons, was compatible with Article 6 because of the "framework" within which that decision is given.<sup>3</sup> The judgement of the European Court (Second Section) in *Taxquet* figured heavily in the High Court's deliberations but at that time the decision of the Grand Chamber was still awaited. It has since been issued and, in brief, confirms that Article 6 does not require a jury to give a reasoned verdict, subject to certain safeguards which, in my view are provided to an adequate degree by trial practice in Scotland as long as the judge and counsel competently fulfil their respective tasks.<sup>4</sup> Thus, the decision in *Beggs* still

1 See e.g. *Review of the Criminal Courts of England and Wales* (2001) at paras 88-98.

2 *Beggs v HM Advocate* [2010] HCJAC 27, 2010 SCCR 681 at paras 196-209.

3 Para 207.

4 App No 962/05 *Taxquet v Belgium*, 16 Nov 2010.

represents the law of Scotland, and its rationale is very similar to that found in the Grand Chamber's decision and the previous European jurisprudence.

#### A. THE UNREASONED VERDICT

In practical terms, the most important aspect of the judgement of the Grand Chamber in *Taxquet* lies in the clear assertion that "the Convention does not require jurors to give reasons for their decision and that article 6 does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict".<sup>5</sup> This means, in essence, that jury trial in Scotland will survive for the foreseeable future. In more theoretical terms, what is also significant is the considerable degree of respect given to the institution of trial by jury by the bench in *Tarquet* and the fact that the decision was unanimous. Before rendering its judgement, the European Court reviewed the "many different models of lay adjudication" in operation across its member states, concluding that ten of these have opted for a "traditional jury system".<sup>6</sup> To legal practitioners and scholars from the UK, who associate the jury solely with the adversarial procedures adopted in common law jurisdictions, it might come as a surprise to find that trial by jury exists in *inter alia* Austria, Belgium, Georgia, Norway, Russia and Spain. Further, in such countries, the "general rule" is that, as in Scotland, reasons are not given for verdicts,<sup>7</sup> although as we shall see various mechanisms exist to ensure that the accused can understand the rationale underlying the jury's decision.

In this context, it is interesting to note that three governments, namely those of France, Ireland and the UK, sought and were granted permission to intervene in the proceedings in the Grand Chamber and subsequently filed written observations supporting trial by jury and, in particular, the unreasoned verdict.<sup>8</sup> The Belgian government, of course, adopted the same position.<sup>9</sup> The Irish government noted that jury trial "was the unanimous choice of accused persons and human-rights advocates" and was seen as a "cornerstone" of the Irish criminal justice system. It further observed that this system "inspired confidence" among Irish citizens who were "very attached" to the jury "for historical and other reasons".<sup>10</sup> The Irish government also "wondered", rhetorically, how a system that had been used "for centuries and long predated the Convention" could now be considered to breach article 6.<sup>11</sup> The French government made a similar point, arguing that the European Court should not "extend its powers to harmonising" domestic systems and emphasising that "only with the utmost caution and a heightened sense of moderation could the Court take

5 Para 90.

6 Paras 43 and 47.

7 Para 56.

8 Paras 71-82.

9 Para 67-70.

10 Para 76.

11 Para 78.

the place of the democratic system in altering legal systems that were rooted in individual States' history and culture".<sup>12</sup>

The European Court proved sensitive to these concerns, opening its assessment of the issue with the observation that the various states which used the jury were "guided by the legitimate desire to involve citizens in the administration of justice".<sup>13</sup> It proceeded to note that "[t]he jury exists in a variety of forms in different States, reflecting each State's history, tradition and legal culture".<sup>14</sup> The Court then acknowledged that its function is not to "standardise" European legal systems and that a State's choice of a particular criminal justice system was "in principle" outwith the remit of the Court.<sup>15</sup> Its task was simply to determine whether in the circumstances of a given case, the procedures adopted had led to a breach of Article 6. After reviewing its own case law, the European Court concluded, as we saw above, that the Convention does not forbid trial by jury even where no reasons are given for the verdict. Nevertheless, for the "requirements of a fair trial to be satisfied, the accused... must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness".<sup>16</sup> The question for the European Court then logically became whether in the case before it "sufficient safeguards" had existed to "avoid any risk of arbitrariness and enable the accused to understand the reasons for his conviction".<sup>17</sup> It is to this issue that I now turn.

## B. THE FRAMEWORK SUPPORTING THE DECISION

The European Court cited a number of "procedural safeguards" supporting trial by jury: judicial directions to the jury on the legal issues or the evidence heard; precise questions put by the judge to the jury to be answered as part of its verdict; and the availability of a substantive appeal against the jury verdict.<sup>18</sup> In the court's view, the first two mechanisms clearly give the accused a reasonably good idea of the evidence against him and, if convicted, the reasons for that conviction. The existence of an appeal on the facts is obviously a further safeguard against an arbitrary or perverse jury verdict. It seems also that some weight will be given by the European Court to the nature of the indictment (i.e. the extent to which it specifies the facts and/or evidence) and the existence of both opening and closing statements by the prosecution and the defence.<sup>19</sup> All of these can serve to clarify to the accused the reasons for a guilty verdict.

<sup>12</sup> Para 82.

<sup>13</sup> Para 83.

<sup>14</sup> Para 83.

<sup>15</sup> Para 83.

<sup>16</sup> Para 90.

<sup>17</sup> Para 92.

<sup>18</sup> Para 92.

<sup>19</sup> Para 95. The European Court implies, entirely logically, that a closing statement by the prosecution is probably the most helpful. It will be based on the evidence that was actually adduced at trial rather than the, perhaps slightly optimistic, submissions made by the prosecution, or defence, at the outset of the case in some jurisdictions.

The most common safeguard is a procedure whereby the jury is presented with a list of specific questions before it retires.<sup>20</sup> In Austria, for instance, the jury's verdict is reached "on the basis of a detailed questionnaire" which requires "yes" or "no" answers.<sup>21</sup> An interesting practical example emerges from a previous decision by the European Court which reveals that in a French case the jury had answered an astonishing 768 questions put to it by the judge. Unsurprisingly, the European Court had found that this provided an adequate guide to the jury's reasoning and there was no breach of article 6 in the circumstances.<sup>22</sup> This mechanism does not exist in Scotland, of course, so little more need be said about it here. However, it is worth noting that in *Taxquet*, which involved eight defendants charged with one murder and one attempted murder, the European Court found that there had been a breach of article 6 because the "questions, which were succinctly worded and were identical for all the defendants, did not refer to any precise and significant circumstances that could enable the applicant to understand why he was found guilty".<sup>23</sup> Only four questions concerned the defendant and these were, as regards each of the two offences, essentially: "Is he guilty of the crime?" (the legal definition having been given) and "Was it premeditated?"

This did not allow the accused to work out why different verdicts were reached as regards some of his co-accused and upon which items of evidence the jury had relied. The indictment was of no great help because it contained "many contradictory statements" made by his co-accused and it seems also that Belgian criminal procedure does not involve closing statements by the prosecution or defence.<sup>24</sup> It is hard to disagree with the European Court's decision because it is entirely clear that the four questions (which were answered positively by the jury) were so general as to provide absolutely no indication of the jury's reasoning.

In its review of European jury systems, the European Court placed a great deal of emphasis upon the judge's summing up in both Ireland and in England and Wales (it did not refer to Scotland), observing that this includes reminding the jury of the evidence, directing them about the "proper approach" to take towards certain evidence, explaining the applicable legal rules and setting out the elements of the offence, all of which "sets out the chain of reasoning" that the jury should follow.<sup>25</sup> In *Beggs*, the High Court stated that the "framework" for the jury's verdict is provided by the closing speeches for Crown and defence and the judge's directions to the jury, concluding that these aspects of the trial process mean that "the basis of the conviction is discernible".<sup>26</sup> Hence, in the High Court's view, the fact that the jury does not give

20 Para 49.

21 Para 52.

22 App No 54210/00 *Papon v France*, 25 Jul 2002, which is recounted in para 86 of the European Court's judgement in *Taxquet*. See also *Taxquet* at para 65.

23 Para 96.

24 Paras 95 and 26-27. While the defence may make an opening statement to challenge the indictment, the European Court thought this would have "only limited effect" because it precedes the jury actually hearing the evidence upon which they are going to base their verdict.

25 Para 50. This simply echoed the submissions by the UK government defending the "British" system of jury trial (para 74).

26 *Beggs* at para 207.



reasons for its verdict is not a breach of article 6. I suspect that this conclusion is still tenable following the decision of the Grand Chamber in *Taxquet* but would enter three caveats.

First, the judgement in *Taxquet* is concerned with the “safeguard” of “precise, unequivocal” questions put to the jury by the judge, rather than directions issued to the jury by the judge to provide a “framework on which the verdict is based or sufficiently offsetting” the fact that the jury gives no reasons.<sup>27</sup> Thus, there is no definitive statement that the judge’s summing up or directions, combined with closing statements by both parties, is sufficient, although that is the clear implication of various of the court’s observations.<sup>28</sup> Second, it might be that the minimalist approach to directing the jury favoured by some Scottish judges would lead to difficulties under article 6. As explained above, the European Court stated that it would not review a system of trial by jury in the abstract but would confine itself to the circumstances of the individual case before it.<sup>29</sup> Thus, it is possible that if a judge failed adequately to summarise the evidence and applicable rules in a particular case, the European Court might hold that this was a breach of article 6 if the accused could not reasonably be expected to understand the thinking underlying the jury’s verdict. Third, the European Court clearly placed some weight on the availability of an appeal against a clearly erroneous verdict by the jury<sup>30</sup> and observed that while Belgium allows an appeal based on a “substantive error” by the jury, this had only been used on three occasions.<sup>31</sup> Obviously, the High Court’s notorious reluctance to grant appeals under s 106(3)(b) of the Criminal Procedure (Scotland) Act 1995 on the basis of an “unreasonable” jury verdict<sup>32</sup> would hinder the claim that the Scottish system of trial by jury is compatible with article 6.

### C. CONCLUSION

Contrary to what some commentators anticipated, the Grand Chamber of the European Court has held in *Taxquet* that the fact that a criminal jury gives no reasons for its decisions is not incompatible with article 6 of the Convention. Neither does it seem that it is necessary for the judge to issue the jury with a list of specific questions to which the latter must provide answers in delivering its verdict. It would seem to be sufficient if the judge’s directions to the jury provide enough information about the crucial elements of the case for the accused to be able to understand what reasons must have led the jury to reach its verdict. Thus, the recent High Court decision in *Beggs* stands. Nevertheless, I have suggested that in order to ensure the continued existence of trial by jury in Scotland, the judiciary will need to ensure that their directions to the jury are relatively full and that it might help were the High Court to

<sup>27</sup> *Taxquet* at para 92.

<sup>28</sup> See e.g. paras 50, 90-92 and 95-97.

<sup>29</sup> Paras 83-84.

<sup>30</sup> Paras 59, 92 and 99.

<sup>31</sup> Paras 31 and 39.

<sup>32</sup> Cf *E v HM Advocate* 2002 JC 215.

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be more willing to uphold appeals against “perverse” jury verdicts. It might also assist were counsel to give opening statements.

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## Upsetting the Apple-Cart: Standard Securities before the Supreme Court

*Royal Bank of Scotland v Wilson*:<sup>1</sup> another case where the Supreme Court has upset the apple-cart. Though supreme courts should not fear to upset apple-carts, apple-cart-upsetting is no small thing. The reason why the decision has been controversial is that the technical issue at stake was not just any old technical issue, but a vital one: an issue that had been subject to forty years of uniform interpretation, an issue on which land titles beyond count have been settled, and yet all this was overturned with what looks like something close to nonchalance. If it was in fact necessary for the apples of forty years of uniform interpretation to be cast over – as to which views may differ – then the Supreme Court should at least have agonised. In every litigation the nymphs *Aequitas* and *Utilitas* are potential *amicae curiae*. Land rights need a legal regime that is reasonably certain and predictable. Had utilitarian considerations played a part, perhaps the decision would have been the same, perhaps different: one does not know, for the voice of *Utilitas* was, it seems, not heard. I criticise: yet in fact all this seems to have happened by a sort of accident, *sine culpa*.

### A. THE STATUTORY FRAMEWORK

The law of heritable security – security over immoveable property – is partly common law and partly statutory, the bulk of the statutory rules being in the Conveyancing and Feudal Reform (Scotland) Act 1970. Under that Act, the only kind of heritable security that is now competent is the boringly-named standard security, which, though a new creation in 1970, actually carried forward much of the pre-1970 law. The standard security was a product of the Halliday Report of 1966,<sup>2</sup> a report that covered numerous different topics in a way that would be unimaginable nowadays. One of the topics was the entire law of heritable security. The way that new proposed new standard security would be enforced was relegated to Appendix F. The

<sup>1</sup> [2010] UKSC 50, 2010 SLT 1227.

<sup>2</sup> *Conveyancing Legislation and Practice* (Cmnd 3118: 1966).

1970 Act implemented the report's recommendations about heritable security with few changes.

The enforcement provisions are of labyrinthine complexity.<sup>3</sup> The key issue in the Supreme Court's decision is the meaning of Schedule 3, standard condition 9, listing the types of "default" that can lead to forced sale:

The debtor shall be held to be in default in any of the following circumstances, that is to say –

- (a) where a calling-up notice in respect of the security has been served and has not been complied with;
- (b) where there has been a failure to comply with any other requirement arising out of the security;
- (c) where the proprietor of the security subjects has become insolvent.

A "calling-up notice" is a formal demand for payment, conforming to section 19 of the 1970 Act. If the debtor fails to comply within two months, the power of forced sale emerges at the end of that period. As for (b) and (c) the power of forced sale does not emerge automatically, but the creditor can seek power of sale from the sheriff court, under section 24 of the 1970 Act. What does (b) mean? That question lies at the centre of the case. Does (b) cover monetary default? Professor Halliday took that view,<sup>4</sup> and since he was regarded as an authoritative interpreter of the 1970 Act, his view was universally accepted, not only by other commentators but also by the Inner House.<sup>5</sup> On this view, where a debtor defaults the creditor has a choice: to serve calling-up notice, or to seek warrant to sell from the sheriff court. In practice both methods have been used, but the latter – the section 24 route based on (b) – has been adopted in most cases. Thus since 1970 a majority of forced sales by banks have been based on the view that where a debtor defaults, a calling-up notice is not required, but instead the creditor can sell on the basis of a warrant from the sheriff court under section 24.<sup>6</sup>

## B. IS CALLING-UP MANDATORY?

In *Wilson* the bank had taken the usual road: it had sought a warrant to sell from the court under section 24. It had failed in the Sheriff Court chiefly because it had

3 On this see *Wilson* at paras 15 (Lord Rodger) and 70 (Lord Hope) quoting Kenneth Reid and the present writer.

4 Professor Halliday's views are discussed in the *Wilson* case. See in particular Lord Hope at para 68. But Lords Hope and Rodger do not see eye-to-eye on the question of what Halliday thought: see Lord Rodger's comments at para 47.

5 *Bank of Scotland v Millward* 1999 SLT 901. The fact that this case was decided in 1999 should not be taken to mean that until then there had been any significant controversy.

6 Because of pressures of space, the present note cannot explore many aspects of the case or its background in the Act. It should be mentioned there is also the "notice of default" procedure, but this is rare in practice.

failed to prove the fact of default. The Inner House reversed, and the Wilsons<sup>7</sup> appealed again. In all the twelve years that the case had been before the courts, the question of whether (b) was applicable to monetary default had never been raised: both parties accepted the standard view. But “only minutes into the argument in the Supreme Court, Lord Walker asked a question that introduced a new argument for the appellants”<sup>8</sup> namely the argument that (b) does not apply to monetary default. The basis of the argument was that section 19 can be read as saying that in cases of monetary default, a calling-up notice is mandatory and that accordingly (b) cannot be read as extending to cases of monetary default: “Where a creditor . . . intends to require discharge of the debt thereby secured and, failing that discharge, to [sell], he *shall* serve a notice calling-up the security . . .” Though this argument had not been pled by the defenders, it was upheld, unanimously, by the justices, authority to the contrary<sup>9</sup> being overruled.

Is the decision right? “Shall” is a strong word, but given the obscurities of the 1970 Act it is doubtful whether one can speak of a “right” view. Either view seems tenable. Had the matter arisen for decision soon after the 1970 Act had been passed, then probably the view taken by the Supreme Court would have been the preferable one. Indeed, as I read the Halliday Report, the intention was that calling-up was to be the sole remedy for monetary default,<sup>10</sup> though of course in the 1970s such material was officially not admissible as evidence. And at a policy level, a power of sale based on the warrant of the court is arguably preferable to a power that arises extrajudicially. But this is a case decided not in 1971 but in 2010. In an English conveyancing case, *Rhone v Stephens*<sup>11</sup> the House of Lords refused to overrule a Court of Appeal decision, *Austerberry v Oldham Corporation*:<sup>12</sup>

It is plain from the articles, reports and papers to which we were referred that judicial legislation to overrule the *Austerberry* case would create a number of difficulties, anomalies and uncertainties and affect the rights and liabilities of people who have for over 100 years bought and sold land in the knowledge, imparted at an elementary stage to every student of the law of real property, that positive covenants, affecting freehold land are not directly enforceable except against the original covenantor.

7 There were two conjoined cases. In each the defenders were Mr and Mrs Wilson, the two husbands being brothers and also business partners. The question of the bank’s rights against the two Mrs Wilsons became a leading case in its own right: *Royal Bank of Scotland plc v Wilson* 2004 SC 153.

8 See Bryan Heaney’s commentary at <http://uksblog.com/case-comment-royal-bank-of-scotland-plc-v-wilson-anor-2010-uksc-50>.

9 *Bank of Scotland v Millward* 1999 SLT 901.

10 See *Conveyancing Legislation and Practice* (n 2) at 109. If this is so, why did Professor Halliday himself take a different view? I do not know but it occurs to me that he may not have been much involved in the development of this appendix to the report. Jack Halliday was juggling two jobs (partner in a busy law firm, and professor at the University of Glasgow) and half-way through the committee’s deliberations he picked up a third, Scottish Law Commissioner. The other committee members were also busy professionals. Perhaps some of the details in the appendices were left to the committee’s secretary, A J (“Sandy”) Sim, a distinguished civil service lawyer who probably had more time than the members of the committee to sit down and work through (and write up) some of the details. I speculate.

11 [1994] 2 AC 310. I am grateful to Scott Wortley for drawing my attention to this case.

12 (1885) 29 ChD 750. The quote is from *Rhone v Stephens* at 321 per Lord Templeman.

The same argument should have been considered by the Supreme Court in *Wilson*. Had that argument been considered, the outcome might or might not have been different. The consequences of the *Wilson* decision are, in my view, less dramatic than some have suggested,<sup>13</sup> and less dramatic than what the consequences of overruling *Austerberry* would have been. But the argument should have been considered, and, as far as appears, was not considered. To say this is not to criticise counsel for the pursuer, who had no notice of the issue. Nor is it to criticise counsel for the defenders for not having given fair notice of the argument, for, as already mentioned, the “calling-up notices are mandatory” argument had never been advanced by the defenders. The argument came from the court itself, and hence the utilitarian arguments, which were so effectively put before the court in *Rhone*, were, it seems, never before the court in *Wilson*.

### C. OTHER ISSUES

The law about the enforcement of heritable securities would be worthy of a PhD, and all that there is space for here is a mere skimming of the surface of *Wilson*. But before ending, five more points must at least be mentioned, though not explored. The first is that whilst the Wilsons won, the victory seems more tactical than substantive. The bank still holds what seem to be valid standard securities and the Wilsons do seem to owe money, albeit the amount may be in dispute.<sup>14</sup> So presumably the bank can now start again at Square One and serve calling-up notices. The second is that this case has been in the courts for twelve years. All too often property law cases, and perhaps others, seem to take year after year in the courts. Another leading case, *Burnett's Trustee v Grainger*, decided in the House of Lords in 2004, also took about twelve years.<sup>15</sup> It is not only cases that go to London that can be interminable. The litigation about ownership of 27/29 Main Street, Coatbridge went on for over thirty years.<sup>16</sup> So did the litigation over ownership of 57 Main Street, Dreghorn.<sup>17</sup> I do not allocate blame, but merely observe.<sup>18</sup>

Thirdly, the issue on which the *Wilson* case was actually appealed to London concerned warrant to eject under the Heritable Securities (Scotland) Act 1894. Space is lacking to discuss that fascinating – but less important – aspect of the case. Fourthly, at the same time that the Supreme Court was holding that virtually no enforcement

<sup>13</sup> On this, see below.

<sup>14</sup> The real debtor protection issue in the case is probably about the way that banks charge “default interest”, the effect of which is that if their customers are not insolvent to begin with, they soon will be.

The Inner House called the relevant clause in the loan contract “leonine”: 2009 SLT 729 at para 52.

<sup>15</sup> 2004 SC (HL) 19. The case seems to have begun about 1992.

<sup>16</sup> The last phase was 17 Aug 2006, Lands Tribunal, unreported. See K G C Reid and G L Gretton, *Conveyancing 2006* (2007) 39.

<sup>17</sup> And it is not clear that it is finished even now. The most recent phase was *Bain v Bain* [2006] CSOH 142, on which see Reid & Gretton, *Conveyancing 2006* (n 16) 148.

<sup>18</sup> In App No 19859/04 *Anderson v United Kingdom*, 9 Feb 2010, the pursuer was awarded damages by the European Court of Human Rights for delay in a litigation about a property in Edinburgh. (Jonathan Mitchell notes that the case before the Strasbourg Court took almost six years to reach a determination: <http://www.jonathanmitchell.info/2010/02/22/the-court-of-session-meets-article-6-of-the-echr/>.)

cases should go through a section 24 warrant, the Scottish Parliament has been deciding that most enforcement cases *should* go through a section 24 warrant. But in fact there is no conflict between *Wilson* and the Home Owner and Debtor Protection (Scotland) Act 2010. In future the creditor will, in most cases at any rate, need *both* a calling-up notice *and* a section 24 warrant. Finally, many have compared *Wilson* with *Cadder*<sup>19</sup> and there have been calls for emergency legislation. On the general question of “appeals to London” and their results nothing will be said here. But the analogy with *Cadder* seems overstated. The requirement to serve a calling-up notice is far from onerous. And in my view very few existing titles will in fact be blighted by the decision, though in a sense that is merely good luck.<sup>20</sup>

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## *MacDonald v Nicholson:* A Case of Contractual Confusion

There is no shortage of reported cases where vagueness and uncertainty in the dealings of contracting parties with each other has resulted in an uncertain position at law. One expects such uncertainty, however, to be dispelled by the light of judicial pronouncement on the facts of the case. However, as the case of *MacDonald v Nicholson* (an unreported decision of Sheriff Principal Bowen handed down on 18 January 2011)<sup>1</sup> indicates, uncertainty can unfortunately creep in even to the judgments of the courts.

### **A. CONFUSION OF THE PARTIES AS TO THE CONTRACT PRICE**

The facts of the case were that the pursuer, Ian MacDonald, had been engaged by the pursuers, Mr and Mrs Nicholson, to construct a timber framed riding arena at their property near Biggar. The first matter of uncertainty about the contract related to the price: the pursuer maintained that he had agreed to undertake the work for as much as it cost to build (a somewhat uncertain stipulation, it might be thought); the defenders, on the other hand, argued that an original price of £21,000 had been agreed, with some further additional works having been agreed at £3,721. There was

<sup>19</sup> *Cadder v HM Advocate* [2010] UKSC 43, 2010 SLT 1125.

<sup>20</sup> Some of these issues, including the effect of *Wilson* on existing titles, are considered more fully in K G C Reid and G L Gretton, *Conveyancing 2010* (2011), on which some parts of this note are based.

<sup>1</sup> The judgment is available at [http://www.scotcourts.gov.uk/opinions/A124\\_07.html](http://www.scotcourts.gov.uk/opinions/A124_07.html).

no documentary evidence as to the price, all of the discussions concerning it having, it appears, been undertaken by the parties orally.

Such facts might have led the sheriff at first instance to find that there was no contractual agreement at all, the parties having been in fundamental disagreement as to any price to be paid. However, the sheriff had determined as a matter of fact that, following the discussions as to additional work, the building work would be completed at a total cost of £30,000. The Sheriff Principal was somewhat troubled by this finding, given that there was nothing on record about an agreement as to £30,000, but accepted that the sheriff had in effect concluded that the defenders' stated position that there was a fixed price was correct, but that the fixed price was more than the defenders had averred. The figure of £30,000 was reached by the sheriff on the basis of oral negotiations between the parties as the works progressed, which negotiations the sheriff had interpreted as amounting to a contractually binding statement by the defenders that they would be prepared to go to a limit of £30,000 so far as total costs were concerned. Sheriff Principal Bowen, admitting that such a basis for an agreed price of £30,000 was "not wholly satisfactory", nonetheless concluded that he was not inclined to interfere with the finding in fact that this was the final sum agreed by the parties.

The matter of the price of the contract was thus, in the end, judicially deemed to be certain. The Sheriff Principal was, however, right to worry that the route to such judicial determination was somewhat questionable. A party's indication that it is willing to go to a certain financial limit is a rather shaky foundation for finding a fixed price contract to have been agreed; it might alternatively be argued that such a statement is indicative rather of a measure and value basis for work to be undertaken, the total price to be valued according to the work done, up to the maximum specified amount. That seems consistent with an upper "limit" on price, such an idea suggesting that the final price might conceivably be less than the specified limit. However, this alternative view of the nature of the agreement as to price (which was not advanced, so far as one can tell from the judgment) would perhaps not have been so strong as to justify interference with the sheriff's findings at first instance, the conclusion in any event reached by the Sheriff Principal.

## **B. CONFUSION OF THE COURT AS TO THE NATURE AND EXTENT OF THE BREACH OF CONTRACT**

Matters become murkier, however, when the nature and extent of the pursuer's breach of contract is considered. The pursuer had carried out the building works defectively. Precisely what the pursuer's breach of contract amounted to had not, however, been made clear in the first instance judgment: as the Sheriff Principal noted, "[t]here is . . . a measure of confusion on the face of the Sheriff's Note as to whether the pursuer's failure arose in respect of the construction of the arena in terms of the plans provided, or whether the plans themselves were deficient".<sup>2</sup> Lack of judicial clarity somewhat lingers in to the appeal stage in relation to the extent

<sup>2</sup> See para 17. The plans for the works had been prepared by a structural engineer engaged by the pursuer.

of the breach (whatever its precise nature). The defenders were arguing that the defects rendered the works “not fit for purpose”, a view with which the Sheriff had concurred: he found the arena “lacked structural integrity, and would not qualify for a local authority Completion Certificate”.<sup>3</sup> The remedial works required to effect repairs totalled (so the Sheriff found in fact) £15,000. In other words, the cost of the remedial works amounted to half of the total contract price.

One might reasonably suggest that such an extent of defective workmanship must surely have constituted a material breach of contract on the pursuer’s part. Unfortunately, at no point in the Sheriff Principal’s judgment does the term “material breach” appear. This is troubling, as a determination of whether or not a party’s breach was material is an essential prerequisite in deciding whether or not that party is entitled to sue for the contract price: an immaterial or trivial breach does not preclude such a claim, but a material breach would require a provider of services to fall back on a claim for recompense in unjustified enrichment rather than a claim for the contract price.<sup>4</sup> The pursuer in the present case was maintaining a claim against the defenders for the contract price, or at least for the balance of the price due by them (only £24,721 had been paid to the pursuer by the date of the action), but no *esto* claim for recompense.

Sheriff Principal Bowen’s view of the extent of the breach, and hence of the pursuer’s entitlement to sue for the contract price, is somewhat unclear. The pursuer’s argument before the Sheriff Principal was that the nature of the contract could be split in to “build” and “design” elements: having performed the “build” part of the contract competently, and any fault thus lying in the “design” portion, the pursuer argued that he was entitled to be paid in full for the build portion.<sup>5</sup>

That is a nice argument, though there is nothing in the judgment to make it clear where the dividing line between any such portions was conceived by the pursuer as lying and indeed, in any event, it has been noted that the sheriff had been unclear as to where the fault lay in the pursuer’s performance (whether in construction or design). The Sheriff Principal appears not to have been persuaded by this argument of the pursuer, but neither does he appear to adopt the view that the pursuer’s breach was material, which is odd given the extent of the remedial works required. This at least seems to be the conclusion which one must draw from the fact that the Sheriff Principal calculated the award in favour of the defenders on the basis of the costs of the remedial works less the outstanding balance of the contract price.<sup>6</sup> If the pursuer was disentitled from suing for the contract price because his breach of contract was

3 See Sheriff Principal Bowen’s summary (at para 10) of the sheriff’s findings.

4 See *Ramsay & Son v Brand* (1898) 25 R 1212, (1898) 35 SLR 927.

5 See *MacDonald v Nicholson* at para 16. The idea that, in a contract whose works are divided into portions, an action for the price may be maintained for any portion of the work completed in accordance with the contract is consistent with cases precluding actions for the price in relation to *lump sum contracts*, such as *Ramsay v Brand* (n 4), and *Steel v Young* 1907 SC 360, and is supported by comments of Lord Parmoor in *Forrest v Scottish County Investment Co* 1916 SC (HL) 28 at 36.

6 See the statement of Sheriff Principal Bowen at para 12 that, the sheriff, having found that “the agreed price was £30,000, the defenders’ claim for damages falls to be reduced by the amount which their payments to the pursuer fall short of that figure”.



deemed material, then the contract price should not have been used as an element in the calculation of the final award in favour of the defenders; rather the court would have been required to consider what the pursuer was due by way of recompense (had a claim for recompense been pled) and balanced such amount against the defenders' counterclaim for damages.

The logical conclusion from the fact that the contract price *did* feature in the calculation of the overall payment to be made to the defenders suggests that the Sheriff Principal did not consider the pursuer's breach of contract to be material and that, in consequence, such breach did not preclude the pursuer from maintaining a claim for the contract price. A clear statement that that was the case would, however, have been a welcome aid to clarity in ascertaining the *ratio* of the judgment, as the evidence of the extent of the defects in the works seems to suggest the alternative view that the pursuer *was* in material breach. It is unfortunate that the nature and extent of the breach of contract in question remained uncertain.

### C. POSTSCRIPT: CONFUSION ABOUT *RESTITUTIO IN INTEGRUM*

One further observation might be made of the judgment. The Sheriff Principal's summary of the pursuer's oral pleadings contains the curious reference to "the principle of *restitutio in integrum*, the guiding rule in any question of damages".<sup>7</sup> The pursuer appears to have referred to this principle in support of an argument that any damages due to the defenders must be reduced by the amount of the balance of the contract price which they had not yet paid. The Sheriff Principal passes no comment on these oral pleadings of the pursuer's agent, but they cannot pass here without remark.

The field of application of the principle of *restitutio in integrum* is that of voidable contracts, the principle holding that any party which wishes to avoid a voidable contract must be able to restore the other party to its pre-contractual position.<sup>8</sup> *Restitutio in integrum* thus concerns the unwinding of voidable contracts: it is not a principle which has any relevance to a wholly valid contract, even one which has been breached. It has moreover nothing to do with the assessment of contractual damages, and is certainly not "the guiding rule" of ascertaining such damages. Any such guiding rule in the assessment of damages is surely that the damages to be awarded to a party suffering a breach of contract are such as shall reasonably compensate it for the losses which it has suffered. It is certainly true that the amount to be awarded under a counterclaim for damages by a defender may have to take account of, and be reduced by, any valid claim for a lesser amount which the pursuer may have against the defender in the action. Such a balancing exercise is not, however, styled *restitutio in integrum*. The description apparently given to *restitutio in integrum* by the pursuer in *MacDonald v Nicholson* is so curious that it is odd that the Sheriff Principal did not attempt to correct it; failing to do so might be thought to give rise to the impression

<sup>7</sup> See para 11. The assumption is made here that the judicial reference is an accurate summary of the oral pleadings of the pursuer's agent.

<sup>8</sup> See e.g. *Spence v Crawford* 1939 SC (HL) 52.

that it was at least tacitly approved of by the bench. Whatever may have been the view of the bench on this point, the description of *restitutio in integrum* recited in the judgment cannot be taken as an orthodox description of its proper field of application.

#### D. CONCLUSION

Had the decision in this action been framed in a way which most accurately reflected the facts of the case, the judgment might well have been to the effect that there was no contract between the parties (there being no agreed price), and that any claim by the pursuer should have lain in recompense; or, if a clearer view of the facts would still have warranted a finding that there was an agreed price of £30,000 for the works, that the pursuer was precluded from suing for the price on account of its material breach, and ought to have fallen back on a recompense claim (subject to any counterclaim for damages by the defenders). Judgments are of course necessarily constrained by the pleadings of the parties, and in this case the pleadings may well have missed the mark so far as reflecting the proper legal basis of the case was concerned. Even taking this into account however, the apparent outcome of this case – that, despite serious defects in the work, the pursuer was nonetheless entitled to pursue a claim for the price – seems inconsistent with prior authority in the field.

It is to be hoped that the current review of contract law being undertaken by the Scottish Law Commission, including as one particular focus the area of contractual remedies, may bring greater clarity to the rules concerning the availability of an action for the contract price, a question which currently continues to trouble our courts.

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### Contribution, Indemnification and Exclusion: *Farstad* in the Supreme Court

*Farstad Supply AS v Enviroco Ltd*<sup>1</sup> is concerned with the legal responsibility for a fire which broke out upon a vessel owned by Farstad Supply AS (“the owner”) in July 2002. At the time the vessel was let under a charter to Asco UK Ltd (“the charterer”), who had instructed a service company, Enviroco Ltd, to remove an accumulation of

<sup>1</sup> [2010] UKSC 18, 2010 SLT 994.

residue from its oil tanks. The vessel berthed, and on the charterer's instructions the master of the vessel started the engines to allow the vessel to move to another berth. Shortly afterwards, one of the service company's employees opened a valve which released oil into the engine room, where it was ignited by the hot engine. The vessel was extensively damaged.

The owner sued the service company in negligence. The service company contended *inter alia* that the charterer had at least contributed to the accident and if the service company were found liable to pay damages to the owner, the charterers should be ordered to pay a contribution in accordance with section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940. The owner was obliged, as part of the suite of risk allocation provisions contained in the charter, commonplace in the oil and gas industry<sup>2</sup> and generally referred to (somewhat inaccurately, it now seems)<sup>3</sup> as an indemnity clause, to "defend, indemnify and hold harmless" the charterer against and from *inter alia* all "claims, demands, liabilities, proceedings and causes of action resulting from loss or damage in relation to the Vessel".<sup>4</sup> Thus the effect of the service company's plea, if successful, would be to reduce the amount of damages that the owner was able to recover from it.

#### A. PROCEDURAL HISTORY

At first instance, Lord Hodge held that the clause, in using the words "defend, indemnify and hold harmless" went further than a bare indemnity: it also acted as a renunciation by the owner of "any right to claim damages from the [charterer] in the circumstances which have arisen in this case".<sup>5</sup> As the possibility of such a claim was effectively excluded by the clause, it could not be said that the charterer was a person who "if sued, might also have been held liable in respect of the loss or damage".<sup>6</sup> As a result, the service company were precluded from obtaining a contribution from the charterers and, if found liable after proof, would on the face of it<sup>7</sup> be responsible for the full loss suffered. Lord Hodge recognised that this had the potential for inequity as, so long as the service company passed the threshold of negligence, it would bear full liability even if it was significantly less culpable than the charterers. Nonetheless, it was for the contractor to take steps to guard against this.<sup>8</sup>

<sup>2</sup> Such arrangements depart from the law's fault-based approach to the distribution of liability. Responsibility for losses is, for economic reasons and in the interests of clarity, allocated on the basis of identity rather than fault. For further discussion see T Hewitt, "Who is to blame? Allocating liability in upstream project contracts" (2008) 26 *Journal of Energy and Natural Resources Law* 177.

<sup>3</sup> See D. below.

<sup>4</sup> The risk allocation provisions are helpfully reproduced in their entirety as an appendix to Lord Clarke's judgment. The material provision is clause 33.5.

<sup>5</sup> *Farstad Supply AS v Enviroco Ltd* 2008 SLT 703 at para 26.

<sup>6</sup> Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 s 3(2).

<sup>7</sup> It may yet be that the service company will not ultimately be required to pay damages, even if negligence is established: a second case between the same parties is being pursued through the English courts to determine whether the benefit of the risk allocation clause extends to the service company. At time of writing, this case had been argued before the Supreme Court, but not yet decided.

<sup>8</sup> 2008 SLT 703 at para 31.

A majority of the Inner House<sup>9</sup> reversed this judgment. Lord Carloway treated the case primarily as a matter of statutory interpretation and was influenced by *dicta* in previous cases on the interpretation of the 1940 Act stating that it is never within the power or whim of an injured party to determine by his own actings whether or not one joint wrongdoer would be liable to relieve another in respect of damages payable to the injured party.<sup>10</sup> He held that a person who subsequently becomes a pursuer cannot exclude the right of relief of the defender by a contract which he enters into with the third party in advance of the accident.<sup>11</sup>

Lady Paton, by contrast, viewed the case as one of contractual interpretation. She considered that “clear and precise language is required to achieve exclusion of liability” and that this was not present.<sup>12</sup> This conclusion was largely based upon the fact that the material clause imposed an obligation upon the charterer to defend, indemnify and hold harmless the operator against *inter alia* any “liabilities . . . resulting from loss or damage in relation to the vessel”. This, Lady Paton thought, was strong evidence that the parties did not intend the clause to exclude liability: the wording envisaged the possibility of liability arising on the charterer’s part.<sup>13</sup>

The effect of this decision, despite the lack of a clear *ratio*, would have been to permit the service company to claim contribution from the charterers. As a result of the charter’s risk-allocation provisions, the net effect would be to reduce the amount of damages which the owners could recover from the service company,<sup>14</sup> which both judges of the majority considered equitable.<sup>15</sup> The owner appealed.

## B. FARSTAD IN THE SUPREME COURT

The Justices emphatically held that the majority of the Inner House had erred. The *dicta* which Lord Carloway had found persuasive were dismissed as “rather sweeping”,<sup>16</sup> and it was tersely observed that there was “nothing in section 3” to support his approach.<sup>17</sup>

Neither were the Justices persuaded by Lady Paton’s approach. Lord Mance considered that the use of the word “liabilities” in the material clause did not, as she had thought, indicate that the parties envisaged the possibility of the charterer being liable for damage to the vessel. Instead, this was “precisely what the parties intended to exclude—with the obvious concomitant that Farstad should insure against all risk

9 *Farstad Supply AS v Enviroco Ltd* 2009 SC 489. Lord Osborne dissented.

10 *Singer v Gray Tool Co (Europe) Ltd* 1984 SLT 149 at 150 per Lord President Emslie; *Dormer v Melville Dundas & Whitson Ltd* at 300 per Lord Allanbridge.

11 2009 SC 489 at para 53.

12 Para 39.

13 *Ibid.*

14 Always assuming that fault on the part of the charterers could be established.

15 See 2009 SC 489 at para 42 per Lady Paton and para 55 per Lord Carloway.

16 [2010] UKSC 18, 2010 SLT 994 at para 42 per Lord Hope.

17 Para 43 per Lord Hope.

of loss to their property”.<sup>18</sup> And of the “equitable” result, the Justices observed that this would arise solely because of the particular risk allocation arrangements in place. Absent such arrangements, a party in the charterer’s position “would indirectly bear a liability for which it never contracted”.<sup>19</sup>

Lord Hodge’s decision, by contrast, was ringingly endorsed<sup>20</sup> and the indemnity and hold harmless provision was held, on the facts of the case,<sup>21</sup> to operate as an exclusion of liability clause, not as an indemnity. The Justices considered that the exclusion of liability meant that the charterer had a solid contractual defence to any claim brought against it by the owner relative to damage to the vessel; therefore the charterers could not be a person who might be found liable to the owners if sued. Thus the service company could not maintain a claim for contribution. It should be noted, however, that in the event nothing turned on the clause’s legal categorisation. The Supreme Court held that precisely the same practical result would have obtained if it had been a mere indemnity. Lord Hope considered that the “brocard of civil law” *frustra petis quod mox es restiturus* (broadly, “in vain you ask that which immediately you will have to restore”) was well recognised in Scots law.<sup>22</sup> The Justices held that this principle, taken together with the charterer’s right to an indemnity from the owner, would have been sufficient to defeat any claim for damages by the owner relative to losses arising from damage to the vessel.<sup>23</sup>

### C. CONTRIBUTION

As an authority on the law of contribution, the case’s most significant element appears to be the reining-in of the expansive *dicta* relied on by Lord Carloway. This is to be welcomed. There are limits to contractual freedom. The courts should not be deferential to any after the event attempts on the part of a pursuer and one wrongdoer to dump liability upon the other. Nor should they be quick to tolerate unfair results flowing from capricious or wrong-headed decisions on a pursuer’s part. But to fetter the right of a person, well in advance of any accident, to enter into the contractual risk allocation model of their own choice would go too far.

*Farstad* may be seen as a decision which priorities the right of parties to a contract to order as they see fit the risks inherent in its performance above any putative right of persons who are strangers to the contract to be held liable only for a share of damages capped at an equitable proportion of the damage their actions contributed towards.

18 Para 57.

19 Para 55 per Lord Mance.

20 At paras 14 and 25 per Lord Clarke, para 40 per Lord Hope and para 49 per Lord Mance.

21 This qualification is important. It is plain that there will be circumstances when such a clause *will* operate as an indemnity. See further D.

22 [2010] UKSC 18, 2010 SLT 994 at para 44 per Lord Hope. In support, his Lordship cites only *Nordic Travel Ltd v Scotprint Ltd* 1980 SC 1 at 26 per Lord Cameron. The citations in the other Justices’ speeches are all to English authority.

23 At paras 32-33 per Lord Clarke, para 44 per Lord Hope and para 59 per Lord Mance.

Even if this may produce harsh results on occasion, it nevertheless appears correct. As Lord Mance noted:<sup>24</sup>

[N]o wrongdoer has a right to assume that there will be other wrongdoers available to contribute to the liability which he incurs . . . In the present case, the consequence of giving effect to Lord Carloway's view would be to ignore the actual legal position between [the owners] and [the charterers] and to introduce by the back door a liability which was barred at the front.

It is undesirable for the parties to commercial contracts to be left wondering if critical terms will be subject to indirect challenge by third parties. In assessing the overall equity of the situation, it seems appropriate to observe that a person in the service company's position will either be aware of the principal contract's existence or at least able to make enquiries. From the standpoint of such a person, the lesson to be learned is not that the law of contribution is capricious, but that it is imperative that they be aware of the principal contract's risk allocation provisions and either ensure that they are included and procure an effectual back to back provision in the subcontract,<sup>25</sup> or else insure appropriately.

#### D. INDEMNIFICATION AND EXCLUSION

The Supreme Court held that the indemnity and hold harmless clause under discussion had a mixed quality, operating as an indemnity on some occasions and as an exclusion on others. The clause would act as an indemnity when being used to determine who was to bear responsibility for "third party exposure". However, when (as here) the clause was being used to regulate "direct exposure to the other contracting party", the "hold harmless" portion became engaged, and the clause would operate so as to exclude liability.<sup>26</sup>

Here, the Justices expressly relied upon Lord Hodge's reasoning.<sup>27</sup> However, as observed in a previous note, Lord Hodge had very little authority to work with, much of which was equivocal.<sup>28</sup> That note also indicated that contractual draftsmen in the oil and gas sector would not expect the words "hold harmless" to modify the meaning of the word "indemnify". It is understood that this observation did not play well in oral argument before the Supreme Court.

<sup>24</sup> Para 54.

<sup>25</sup> As the service company may yet be found to have succeeded in doing: see n 7.

<sup>26</sup> [2010] UKSC 18, 2010 SLT 994 at para 29 per Lord Clarke and para 59 per Lord Mance.

<sup>27</sup> At para 25 per Lord Clarke.

<sup>28</sup> G Gordon, "Contribution and indemnification: *Farstad Supply AS v Enviroco Ltd*" (2010) 14 EdinLR 102 at 104.

It is possible that sections of the industry and its advisors and commentators (the current author included)<sup>29</sup> have been guilty of a degree of confused<sup>30</sup> or wishful<sup>31</sup> thinking. A more generous interpretation is that a pragmatic approach to dispute resolution has meant that litigation is rare. There has therefore been a lack of authoritative discussion of the indemnity and hold harmless clause. But there are good economic reasons to re-allocate risk as the industry does,<sup>32</sup> and even when the law is unclear, work must still be done and standardised wording settled upon. The fact remains that the holding that indemnity and hold harmless clauses sometimes operate as exclusions of liability has come as a surprise to many practitioners. But surprise will escalate to consternation only if there are likely adverse consequences.

*Farstad's* full import will only become clear with time, but at present it seems unlikely that it provides serious cause for concern. The most obvious potential consequence would appear to be that the Unfair Contract Terms Act 1977 (UCTA) will now become engaged. UCTA had hitherto been largely overlooked by the oil and gas industry as the restrictions imposed upon the use of indemnity clauses apply only when the indemnifying party deals as a consumer.<sup>33</sup> However, as indemnity and hold harmless clauses would now appear to function as exclusion clauses when they operate in the context of "direct exposure to the other contracting party", the various restrictions imposed by UCTA now need to be considered. Thus, if a party wishes to rely upon an indemnity and hold harmless clause to regulate losses which, in Lord Mance's formulation, fall into the category of direct exposure to the other contracting party,<sup>34</sup> it will have to demonstrate that the provision satisfies UCTA's requirements.<sup>35</sup>

29 There is not a breath of criticism of or doubt about the industry's approach to be found in G Gordon, "Risk allocation in oil and gas contracts", in G Gordon and J Paterson (eds), *UK Oil and Gas Law: Current Issues and Emerging Trends* (2007) 335.

30 There is some evidence of confusion, or at least a lack of precision, to be seen when one examines the industry's attempt to put in place a contractual risk allocation regime between offshore contractors who would not otherwise have a contractual relationship. The contractual scheme is known throughout the industry as the Industry Mutual Hold Harmless Deed. However the Deed is formally entitled the "Mutual *Indemnity and Hold Harmless Deed*" (emphasis added). Although the Deed's central risk allocation clause uses the wording "indemnify *and hold harmless*", the clause is entitled merely "Indemnities by the Signatories", and the Deed is itself referred to in the Deed of Adherence (by which parties other than the original signatories can enter the scheme) as the "Indemnity Deed". For citations and further examples see G Gordon, "Risk allocation in oil and gas contracts", in G Gordon and J Paterson (eds), *UK Oil and Gas Law: Current Issues and Emerging Trends*, 2<sup>nd</sup> edn (2011, forthcoming).

31 "Wishful" because, as we shall see, it in some respects simplifies matters if these clauses are always indemnities and never exclusions.

32 *Caledonia North Sea Limited v London Bridge Engineering Ltd* 2000 SLT 1123 at 1150I per Lord President Rodger.

33 Sections 18 (for Scots law) and 4 (for the rest of the UK). A party deals as a consumer when he does not contract in the course of a business but the other party does: see s 12. Thus these provisions are not germane to business to business transactions.

34 For instance, damage to property owned by that party, or consequential loss suffered by it.

35 i.e. (on the example given) ss 16(1)(b) and 17 (for Scots law) and ss 2(2) and 3 (for the rest of the UK). The provisions regulate exclusion of liability for negligence outside of the context of personal injury and death, and situations where the parties contract on the basis of one of the parties' standard terms.

This may, in some circumstances, cause doubt as to whether a particular provision should be enforced, but is unlikely to cause serious problems.<sup>36</sup> The provisions which would be of greatest concern to the industry would be the rule, contained in sections 16(1)(a) and 2(1) of the Act, that any attempt to by a party to restrict its liability for death or personal injury resulting from negligence will be ineffectual. At first sight, this prohibition might seem to be triggered by an indemnity and hold harmless clause which pertains to losses associated with personal injury or death and which applies even in the case of negligence on the part of the party so indemnified and held harmless. Such clauses are a central plank of the industry's risk allocation model. It would be little short of a disaster for the industry if such clauses were ruled unenforceable. They have hitherto been seen not as exclusions of liability but background risk allocation clauses, which specify who is to bear ultimate responsibility for paying damages.<sup>37</sup> As neither contracting party will have corporeal bodies to injure, claims relative to personal injury cannot be instances of direct exposure to the other contracting party, but will instead invariably be made by persons who are third parties for the purposes of Lord Mance's formulation. As a result, the clause would seem to operate as an indemnity, and sections 16(1)(a) and 2(1) UCTA cannot be engaged. Assuming that this is so, the surprise caused by *Farstad* will quickly be forgotten.

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## The Marriage Contract: *Radmacher v Granatino*

No deed, known in practice, plays a more important part in the affairs of modern life than the ante-nuptial contract of marriage.

So wrote David Murray at the end of the 19<sup>th</sup> century when commenting on the law of matrimonial property in Scotland,<sup>1</sup> but even as he wrote, a revolution, albeit of a slow and piecemeal variety, was taking place. The reforms of the Married Women's Property Acts, in both Scotland and England, together with significant social change, led Clive to comment a century later that "marriage contracts are now rare".<sup>2</sup> Until recently, in both Scotland and England, an ante-nuptial marriage contract would not have featured on the lists of many couples or their wedding planners. It is relatively

<sup>36</sup> Given the widespread use of indemnity and hold harmless clauses within the industry and the economic benefits of the practice, one would not expect such a clause to be struck down by the court other than in unusual circumstances. See e.g. Hewitt (n 2) at 205.

<sup>37</sup> *Thompson v T Lohan (Plant Hire) Ltd* [1987] 1 WLR 649.

<sup>1</sup> D Murray, *The Law Relating to the Property of Married Persons* (1891) para 111.

<sup>2</sup> E M Clive, *The Law of Husband and Wife in Scotland*, 4<sup>th</sup> ed (1997) para 17.005.



rare for family law, and in particular family law relating to a traditional, opposite sex, married couple, to make the headlines, but it certainly did with the decision of the Supreme Court in *Radmacher v Granatino*,<sup>3</sup> an appeal which hinted at a change of fortune for the marriage contract.

#### A. THE FACTS

In 1998, the marriage took place in London of a German woman, of good family and independent means, and a French man, with “excellent prospects”.<sup>4</sup> She came from an extremely wealthy family, from whom she had already acquired considerable independent assets, providing her with “substantial unearned income”,<sup>5</sup> and from whom she would receive more in the future. He was a banker, with an annual income of £120,000 and an expectation of higher future rewards. The couple had two daughters but drifted apart and, in 2006, they separated. Divorce was granted in 2007 and, in terms of a shared residence order, the children were to live with their father for approximately one third of the time and with their mother for the remainder.

Several months before the wedding, the parties entered into an ante-nuptial marriage contract at the suggestion of the woman, whose father “insisted” upon it and who herself was “anxious that the husband should show, by entering into the agreement, that he was marrying her for love and not for money”.<sup>6</sup> Despite this ante-nuptial agreement, in which they had agreed to a mutual waiver of any kind of claims for maintenance on divorce, “to the fullest extent permitted by law” and regardless of whether either party was “in serious difficulties”,<sup>7</sup> the husband sought ancillary relief, in the form of a lump sum and periodical allowance. In awarding him a total of £5,560,000, Baron J held that factors surrounding the conclusion of the agreement and, in particular the fact that it failed to meet a number of safeguards proposed in an earlier Home Office consultation document on marital agreements,<sup>8</sup> resulted in reduced weight being given to the agreement.

The wife subsequently appealed to the Court of Appeal, which held that Baron J had erred in finding that the ante-nuptial agreement should be of reduced value in light of the circumstances surrounding it. The sum awarded was significantly reduced to reflect only the husband’s ongoing role as a father and not to make provision for his own needs.<sup>9</sup> It was the subsequent appeal against that decision which presented the Supreme Court with the opportunity to consider this particular ante-nuptial agreement and to contribute more broadly to the law, and debate, in this area.

3 [2010] UKSC 42, [2010] 3 WLR 1367. All paragraph references are to the majority judgment delivered by Lord Phillips unless indicated otherwise.

4 Para 14.

5 Para 13.

6 Para 13.

7 Para 99.

8 Home Office, *Supporting Families: A Consultation Document* (1998) para 4.23.

9 Para 16.

## B. THE DECISION

This case is the latest stage in the developing English jurisprudence on the nature and legal status of ante-nuptial and post-nuptial agreements.<sup>10</sup> The specific consideration of ante-nuptial agreements is set against a broader background of the current provisions of English law for ancillary relief. The Matrimonial Causes Act 1973, as amended, gives the court power to make a range of orders, including a lump sum or periodical payments.<sup>11</sup> In making such orders the court is directed to take into account all of the circumstances of the case and in particular to have regard to a range of matters set out in section 25. These provisions were considered by the House of Lords in *White v White*<sup>12</sup> and more recently in the high profile and high wealth appeals in *Miller v Miller; McFarlane v McFarlane*,<sup>13</sup> in which the guiding principles relating to ancillary relief were expressed as fairness, compensation and sharing.

The Supreme Court in *Radmacher* focused on two key issues: the distinction, if any, between different types of marital agreements, in particular between those concluded before and after marriage, and, in the context of a subsequent application for ancillary relief, “the question of the principles to be applied by the court when considering the weight that should be attached to an ante-nuptial agreement”.<sup>14</sup> The majority judgment of the court was presented by Lord Phillips, with a separate short judgment being delivered by Lord Mance and a longer, fully reasoned and partially dissenting judgment from Lady Hale.

In essence, the Supreme Court concluded that there should be no general distinction between ante-nuptial and post-nuptial agreements.<sup>15</sup> Building on previous jurisprudence<sup>16</sup> to the effect that agreements should be taken into account by a court in assessing an application for ancillary relief, they sought to assess the impact in this particular case of factors surrounding the execution of the agreement and, in so doing, set out more general guidance which can be summarised in their conclusion that:<sup>17</sup>

The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.

## C. A PECULIARLY ENGLISH PROBLEM?

At the outset, the Supreme Court acknowledged that English law differs “significantly from the rest of Europe and most other jurisdictions”.<sup>18</sup> English law’s singularity in

10 Early developments are described in *Hyman v Hyman* [1929] AC 601 at 625-626, and more recent history is set out in *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298 at paras 21-23.

11 ss 23-24B.

12 [2001] 1 AC 596.

13 [2006] UKHL 24, [2006] 2 AC 618.

14 *Radmacher* at para 2.

15 A conclusion echoed in the recent sheriff court decision in *Kibble v Kibble* 2010 SLT (Sh Ct) 5.

16 Culminating most recently in the opinion of the Privy Council in *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298.

17 Para 75.

18 Para 3.

this substantive area is evident, for example, in the context of the current search by the Commission for European Family Law for common European principles in matrimonial property.<sup>19</sup> The different approach of English law, when compared to its European neighbours, is evident too in its preference for its own law as the applicable law, regardless of domicile of the parties or in this case the parties' choice of law,<sup>20</sup> and in the United Kingdom's decision not to be bound by the Hague Protocol.<sup>21</sup>

Differences between Scots and English law in this area abound, both in terms of the legal framework for financial provision on divorce and in the specific context of nuptial agreements. In *Radmacher*, the first obstacle to enforceability of the ante-nuptial agreement was a lingering uncertainty stemming from "the old rule that agreements providing for future separation are contrary to public policy".<sup>22</sup> Such agreements, in Scotland, have never been regarded as contrary to public policy and it is clear that spouses may reach agreement in terms of financial provision on divorce, with the court having only very limited power to vary or set aside an agreement where it is regarded as not having been "fair and reasonable at the time it was entered into".<sup>23</sup>

Not only are there strong indications in favour of the legality and enforceability of such agreements in Scotland, together with very limited opportunities for judicial interference, but the underlying statutory framework for financial provision on divorce seeks to provide clear principles<sup>24</sup> and by so doing to reduce judicial discretion; thus creating an environment which will encourage private agreement safe in the knowledge of the likely outcome of judicial resolution.

To that extent, the particular problems with English law that were encountered in *Radmacher* are alien to Scots family lawyers. It might be argued, however, that it is not in the detailed legal analysis offered by the Supreme Court, but in the allusions to the relationship of marriage and its potential discord with commercial values,<sup>25</sup> that the shared concerns of different jurisdictions emerge. As Lady Hale highlights, it should not be forgotten that "the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she – it is usually although by no means invariably she – would otherwise be entitled".<sup>26</sup>

#### D. CONTRACTS AND AGREEMENTS

Having concluded that there was no need to distinguish between ante-nuptial and post-nuptial agreements, the Supreme Court considered briefly whether they needed to take a step further and address the distinction between an "agreement" and a

19 See K Boele-Woelki, B Braat and I Curry-Sumner (eds), *European Family Law in Action Volume IV: Property Relations Between Spouses* (2009).

20 Para 98.

21 Paras 103-108.

22 Para 52.

23 Family Law (Scotland) Act 1985 s 16; *Thomson v Thomson* 1982 SLT 521.

24 Family Law (Scotland) Act 1985 s 9.

25 In particular in the judgment of Lady Hale: paras 132-137.

26 Para 137.

“contract”. They quickly concluded that such a distinction was a “red herring”<sup>27</sup> and, with relief, moved on. Having decided that nuptial agreements, of whatever type, were enforceable, subject always to fairness, they were not required to enter into detailed consideration of their contractual status. The issue of intention to create legal relations was important but it was the intention to create an enforceable obligation, rather than specifically to establish a contract, that was required.<sup>28</sup>

While respecting the principle of autonomy, the court acknowledged the uncomfortable juxtaposition of commercial minds and personal emotion. In the account of how the parties approached the conclusion of the agreement in *Radmacher*, the complexities of personal and financial relationships are clear:<sup>29</sup>

Although the judge was sure that the wife wanted her husband to love her for herself, the wife emphasised her father’s insistence, because she felt it made her seem less insensitive to her future spouse, given that the terms excluded all his potential rights . . . The judge found that the husband was eager to comply because he did not want the wife to be disinherited, he wanted to marry her.

“Family relationships are not like straightforward commercial relationships”<sup>30</sup> and in deciding what weight should be given to an agreement, in the context of an application for ancillary relief, the court should take into account not only the formal vitiating factors associated with contracts, such as undue influence and misrepresentation but the lesser albeit more complex problems which may stem from the personal relationship between the parties.<sup>31</sup>

As an isolated case, *Radmacher* would be easy to dismiss as having more to do with the preservation of family business and wealth than the relationship of marriage, but the decision comes at a time of review and proposed reform on a much wider scale. The research of the English Law Commission into matrimonial agreements, together with the Family Justice Review and the anticipated reforms resulting from it, place greater emphasis on mediation and consensus and suggest that there is under way in England a significant shift away from the family courts and in favour of private ordering. While there is much to be welcomed in a system that encourages and supports individual negotiation and settlement, Lady Hale’s reservations and concerns, merit careful consideration. There is a simplicity and clarity in developing rules and principles which apply to all marital agreements and in moving towards a presumption of enforceability, but the diversity in terms of intention, circumstance, bargaining power and need should not be overlooked.

## E. HISTORICAL PRECEDENT

When ante-nuptial marriage contracts were last in vogue, in the days prior to the reforms of the Married Women’s Property Acts, they were a means of avoiding

<sup>27</sup> Para 63.

<sup>28</sup> Para 70.

<sup>29</sup> Para 86.

<sup>30</sup> *Edgar v Edgar* [1980] 1 WLR 1410 at 1417 per Ormrod LJ, cited in *Radmacher* at para 42.

<sup>31</sup> Paras 71-72.

the impact of what had become an unpopular and inappropriate legal regime of matrimonial property. That the default regime, which affected the majority of ordinary married couples, remained in place for so long was, to some extent, due to the ability of the rich and the propertied to contract out of it. There is a similar risk of bias in recent developments that, “[b]y concentrating our analysis on the ‘big money’ cases we are masking what actually happens in everyday practice”.<sup>32</sup> Individual modification of the rules of matrimonial property will always be appropriate for some, and all couples should certainly be encouraged to consider and provide for the economic, and not simply the romantic, implications of marriage but, if the demand to opt-out continues to grow, it may be time to revisit the underlying rules.

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## Progress Towards Principles on the Breakdown of Cohabitation: *Selkirk v Chisholm*

In *Selkirk v Chisholm*,<sup>1</sup> Sheriff Hammond considers the body of reported jurisprudence to date on section 28 of the Family Law (Scotland) Act 2006, which allows for financial provision on the breakdown of cohabitation.<sup>2</sup> “The decided cases are instructive as examples of the application of the section 28 considerations,” he advises. “However the cases do not as yet reveal any authoritative underlying principles of general application in interpreting the provisions.”<sup>3</sup> With this case the sheriff has taken clear steps towards remedying this uncertainty. The question of whether the underlying principles he extrapolates are correct within the scheme of the legislation remains, however, in doubt.

<sup>32</sup> E Hitchings, “The impact of recent ancillary relief jurisprudence in the ‘everyday’ ancillary relief case” (2010) 22 CFLQ 93. For a comment on the significance, or otherwise, of this decision, see C Barton, “‘In Stoke-On-Trent, my Lord, they speak of little else’: *Radmacher v Granatino*” [2011] Fam Law 67.

<sup>1</sup> Duns Sheriff Court, 25 Nov 2010. The decision is available at [http://www.scotcourts.gov.uk/opinions/A15\\_08.html](http://www.scotcourts.gov.uk/opinions/A15_08.html).

<sup>2</sup> There have been five substantive decision to date on section 28, aside from the instant case: *Jamieson v Rodhouse* 2009 Fam LR 34; *CM v STS* 2008 SLT 871; *F v D* 2009 Fam LR 11; *Gow v Grant* 2010 Fam LR 21 and *Lindsay v Murphy* 2010 Fam LR 156. *Cameron v Leal* 2010 SLT (Sh Ct) 164 is also of assistance.

<sup>3</sup> Para 100.

### A. FACTUAL BACKGROUND

*Selkirk* offered perhaps the clearest opportunity so far for clarification of the rationale on which a financial award under section 28 should be based. The case appears to have been well presented, avoiding the lack of detail in the financial aspects of the pleadings which blighted many of the earlier decisions. More significantly, the factual circumstances giving rise to the claim, at least on the basis of the sheriff's findings, were relatively straightforward. In October 1998, Leanna Selkirk and Robert Chisholm became engaged to be married.<sup>4</sup> They viewed a house in Eyemouth together, which was subsequently purchased in the defender's sole name.<sup>5</sup> The parties cohabited there from April 1999 for roughly nine years.<sup>6</sup> Both parties worked throughout the huge majority of this period, the pursuer in various retail service positions, the defender initially as a panel beater employed by a local company, later becoming self-employed with his own business as a "bodyshop".<sup>7</sup> The financial arrangements during the cohabitation were disputed, and although the sheriff considered the pursuer to be "naive in financial matters"<sup>8</sup> and the defender to have "parsimonious attitudes",<sup>9</sup> the evidence of the defender was generally preferred.<sup>10</sup> It was accordingly found that the defender paid the mortgage and all household bills,<sup>11</sup> with the pursuer contributing only to the cost of food and particularly expensive phone calls.<sup>12</sup> The parties maintained separate bank accounts<sup>13</sup> and had no children.<sup>14</sup>

Section 28 allows for a financial award where the defender has derived economic advantage from the contributions of the pursuer. Economic advantage to the defender was held to exist, in the form of both increased capital and increased earning capacity. Capital had accrued firstly in respect of the house. At the time of purchase, the house was valued at £43,999 and contained equity of only £2,000.<sup>15</sup> At the termination of cohabitation, the house was worth £97,500 and contained equity of £25,942.<sup>16</sup> The increase in the value of the house was attributed solely to market forces.<sup>17</sup> Capital had also accrued in respect of the bodyshop business the defender had set up in 2005, which was funded partially through a loan secured on a remortgage of the house.<sup>18</sup> The capital in the business at the date cohabitation ceased was £45,366.<sup>19</sup> The parties agreed that a figure of £20,693, representing money which the defender

4 Finding in fact 1.

5 Findings in fact 2-4.

6 Finding in fact 4.

7 Findings in fact 9-15.

8 Para 109.

9 Para 110.

10 Para 107.

11 Finding in fact 28.

12 Findings in fact 28 and 29.

13 Finding in fact 27.

14 Finding in fact 4.

15 Finding in fact 2.

16 Finding in fact 8.

17 Finding in fact 8.

18 Findings in fact 7 and 13.

19 Finding in fact 19.

had himself inherited and invested in the business, should be discounted from this figure.<sup>20</sup> The net capital gain across the two assets was therefore £48,615.<sup>21</sup> It was also accepted by the sheriff that, although the defender's income had not increased during the cohabitation, the upward trend in the net profits of the defender's business since its creation formed the basis for a finding of increased earning capacity, albeit that uncertainty remained over how this was to be quantified.<sup>22</sup>

## B. LEGAL ARGUMENTS AND DECISION

Advantage having been established, could the next part of the test be satisfied: namely, had this advantage derived from the contributions of the pursuer? This question lies at the root of the uncertainty over section 28. The legislation does not make explicit the nature of the connection to be established between contributions by one party and advantage to the other. What is the underlying redistributive rationale? Several potential answers have been hinted at in the case law. In *CM v STS*,<sup>23</sup> the sole Court of Session decision so far, Lord Matthews took the view that cohabitants were engaged in a joint endeavour during their relationship, with the result that any benefits or losses obtained by either should be shared equally as part of the "burden of cohabitation".<sup>24</sup> This approach essentially mirrors the scheme for financial provision on divorce.<sup>25</sup> The decision was subsequently criticised in the academic literature<sup>26</sup> and has not been followed in any of the later cases. An alternative was suggested in *Gow v Grant*,<sup>27</sup> where Sheriff Mackie suggested that a payment made under s28 should be "more in the nature of compensation",<sup>28</sup> and quantified the claim with a view to placing the pursuer in the position she would have been in but for the cohabitation. In the instant case, notwithstanding his desire to "adopt the clear analysis of the relevant provisions by Sheriff Mackie in *Gow v Grant*",<sup>29</sup> Sheriff Hammond does not follow this approach, albeit that the eventual outcome would likely have been similar had he chosen to do so.

The findings in *Selkirk v Chisholm* suggest, in fact, that quantification of an award under s28 should be rooted in the law of unjust enrichment. This approach does not allow for legal title in respect of relevant assets to be disturbed at the cessation of cohabitation, but examines rather the exact contributions that each party has "paid in" to the relationship with a view to ensuring they are "paid out" the same amount at the relationship's conclusion. Changes brought about by external factors, such

<sup>20</sup> Finding in fact 20 and para 59.

<sup>21</sup> This figure differs slightly from the total given in the pursuer's submissions as her calculations were based on the lower figure of £25,307 in respect of equity in the house. The figure eventually agreed by the parties, £25,942, is used in this article.

<sup>22</sup> Para 114.

<sup>23</sup> 2008 SLT 871.

<sup>24</sup> Para 290.

<sup>25</sup> Family Law (Scotland) Act 1985 ss8-10.

<sup>26</sup> J Thomson, "Palimony – Scottish style" (2008) 76 SLG 95.

<sup>27</sup> 2010 Fam LR 21.

<sup>28</sup> Para 42.

<sup>29</sup> *Selkirk v Chisholm* at para 99.

as an increase in the value of the family home as a result of a rising market, are not relevant.<sup>30</sup>

Although Sheriff Hammond does not refer explicitly to the rationale of his decision, his findings fit neatly with the restitutionary approach outlined. The increased equity in the home was found to be in no part derived from the pursuer's contributions. She had not contributed to the deposit put down on the house, or to repayments of the mortgage debt.<sup>31</sup> Furthermore, the sheriff agreed with the defender's counsel that, even had it been established the pursuer paid a half share of the mortgage throughout, the appropriate measure of the economic advantage to the defender would be not half of the increased equity, but merely a one half share in the reduction of the debt, calculated as a figure of £4,982.<sup>32</sup> The increased equity arose purely from market forces, and was not derived from either party. Had payment of domestic bills been shared between the parties, this would have had no relevance to the issue of increased equity: bills would have to have been paid by both parties regardless of whether they were together or not.<sup>33</sup> The pursuer's non-financial contributions to the household in terms of work in the home, which the sheriff accepted were probably greater than the defender's non-financial contributions, were also not found to have any connection to the increase in equity.<sup>34</sup> The argument made by the pursuer along the lines of Lord Matthews' approach in *CM v STS*<sup>35</sup> – that had the house been held in joint names, she would have shared in the increased equity, meaning she had suffered economic disadvantage as a result of the defender's sole title<sup>36</sup> – was rejected as irrelevant.<sup>37</sup> Since the pursuer had made neither direct contributions to the defender's business, nor contributed to the increased equity in the home, she had no claim in respect of the capital value of the business, or to the defender's increased earning capacity. Overall, the pursuer was essentially seen to have received as much from the relationship as she had paid into it, and so no award was justified. The fact the defender was emerging from the relationship with substantially more than he had paid into it was a matter of his own good fortune, rather than an imbalance to be rectified in the pursuer's interests.<sup>38</sup>

### C. ANALYSIS

Lord Matthews' approach in *CM v STS*<sup>39</sup> is arguably now discredited. The last two reported decisions on section 28<sup>40</sup> have positioned themselves squarely on

30 For further discussion of this form of redistributive rationale, see G Douglas, J Pearce and H Woodward, "Cohabitants, property and the law: a study of injustice" (2009) 72 MLR 24 at 29-30.

31 Para 116.

32 Para 118.

33 Para 117.

34 Para 120.

35 2008 SLT 871

36 *Selkirk v Chisholm* at para 73.

37 Para 124.

38 Para 126.

39 2008 SLT 871

40 In addition to the instant case, see *Lindsay v Murphy* 2010 Fam LR 156.



restitutionary principles. Are we seeing the emergence of a judicial consensus on the redistributive rationale underlying these provisions? Clarity in interpretation is, of course, to be welcomed in any area of legislation, and most especially an area such as this which may affect how individuals order their private relationships. It should not be forgotten, however, that one of the parliamentary objectives outlined for this legislation was to protect economically vulnerable parties emerging from a cohabiting relationship.<sup>41</sup> Ms Selkirk may not have been in this unfortunate position, but it is easy to envisage a slightly different scenario where economic hardship would almost certainly follow. For example, imagine the parties had had a child, and the pursuer had given up employment to care full time for the baby. As here, she would not have been contributing financially to the household. Her non-financial contributions, following the decision here, would not be held to have any connection to the increase in the equity of the house. At the cessation of cohabitation, she would presumably be entitled to some payment in respect of the economic burden of post-relationship childcare costs under section 28(2)(b), but beyond that, she would have nothing. One might answer that the pursuer ought to have ensured that the house was held in joint names, but this renders the position no different to what it had been prior to the introduction of the 2006 Act. If the hypothetical Ms Selkirk with child is not the economically vulnerable party this legislation was designed to protect, who is?

*Selkirk v Chisholm* is, in itself, a well-reasoned decision resulting in an outcome which many may consider fair. If the restitutionary rationale adopted in the case is correct, however, it is ultimately unclear whether this legislation can ever achieve the purpose for which it was introduced.

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41 See the Policy Memorandum accompanying the Family Law (Scotland) Bill (SP Bill 36-PM) at paras 64-66 and 77.