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# Cohabitants' rights in conflict: The Family Law (Scotland) Act 2006 vs unjustified enrichment in *Courtney's Executors v Campbell*

## A. INTRODUCTION

The interaction between statutory family law and common law unjustified enrichment was the focus of the 2016 decision of Lord Beckett in *Courtney's Executors v Campbell*.<sup>1</sup> The circumstances are all too familiar: what happens when a client seeks advice about a potential claim under the cohabitation provisions of the Family Law (Scotland) Act 2006 (the "2006 Act"), but only after the expiration of the 2006 Act's strict time limits? Does a claim lie in unjustified enrichment instead? This Outer House decision is the latest to confirm that it does not, thereby raising issues about the correct application of unjustified enrichment in such cases, and the potential need for reform of the 2006 Act, to protect cohabitants further.

## B. THE FACTS

The action was raised by the executors of the late Mr Courtney, who sought a reversal of a transfer of £100,000 made by Mr Courtney to Ms Campbell, plus recompense of £50,000 in respect of benefits gained by Ms Campbell through Mr Courtney's labour and payments in respect of renovation work to her house. Mr Courtney and Ms Campbell had commenced a relationship in 2009 and in May 2010 Ms Campbell purchased a property for £195,000. Although title was taken in her name only, the pursuers submitted that the intention had been for it to be a family home and that she would live there with Mr Courtney. He paid her £50,000 shortly before the date of purchase, and a further £50,000 nine months later. Between 2010 and 2013, Mr Courtney also spent £36,750 on solar panels and on renovations, and used his skills as a joiner in the renovation work, such that his executors estimated he had contributed a further total of £50,000 towards the property.<sup>2</sup>

The averments by the executors were met by claims from Ms Campbell that Mr Courtney knew that the property was being bought in her name only. She was working while

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<sup>1</sup> [2016] CSOH 136.

<sup>2</sup> Paras 7-10.

Mr Courtney was not, and consequently she met the costs of the household, amounting to £35,000, and she also spent £65,000 on renovations. She further averred that Mr Courtney gained financial and other benefits as a result of living with her for three years. Moreover, she claimed that she was not enriched by Mr Courtney's work on the property as she subsequently required the work redone professionally.<sup>3</sup> Both parties agreed that the relationship had ended by May 2013, and Mr Courtney moved out.<sup>4</sup>

Following Mr Courtney's death, his executors raised this action in unjustified enrichment to recover the two sums of £50,000 paid by Mr Courtney to the defender, and a further £50,000 as recompense for outlays on materials and the cost of his labour to make improvements to the property in question. The claims were resisted on a number of grounds: (i) that the availability of an alternative remedy — under section 28 of the 2006 Act — precluded resort to an “equitable remedy”; (ii) the pursuers had failed to show that any gains made by the defender were retained with “no legal justification”; and (iii) the pursuers had failed to demonstrate the costs of materials and labour for improvements. The third line of defence is essentially a matter of fact, and of proof, therefore no more will be said about it here. The ultimate decision in the case, and the interesting element from an enrichment perspective, rested upon the assertion, made once again by a Scottish court, that an enrichment claim is a subsidiary one.<sup>5</sup> In order to assess that assertion and its implications something must be said about subsidiarity.

### C. UNJUSTIFIED ENRICHMENT: SUBSIDIARITY

Subsidiarity is a doctrine which is familiar, to some degree, to most legal systems that accept the doctrine of unjustified enrichment.<sup>6</sup> Broadly, if an individual can make the claim based

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<sup>3</sup> Paras 8-11.

<sup>4</sup> Para 12.

<sup>5</sup> Para 70.

<sup>6</sup> See, by way of example, the valuable introductions to the comparative study of subsidiarity: J Beatson and E Schrage (eds), *Cases, Materials and Texts on Unjustified Enrichment* (2003) ch 7; H L MacQueen, ‘Unjustified Enrichment, Subsidiarity and Contract’, in V Palmer and E Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (2009) ch 11; D Visser, ‘Unjustified Enrichment’, in J M Smits (ed), *Elgar Encyclopaedia of Comparative Law* (2<sup>nd</sup> edn, 2013) 947, at 951 ff; C Jooste and E Schrage, ‘The Subsidiarity of the General Action for Unjust Enrichment (Parts 1 and 2)’ (2016) *Journal of South African Law* 1 & 220.

upon an area of law other than unjustified enrichment s/he must raise that alternative claim.<sup>7</sup> The operational detail of this doctrine gives rise to variant approaches which can be (and are) taken by different legal systems. The law might insist upon the alternative claim being raised before the enrichment claim, or, at least, as an alternative or secondary cause of action.<sup>8</sup> Concomitantly, it is often assumed that the enrichment claim is excluded by the existence of the alternative cause of action, or, at least, that the enrichment claim is excluded in the absence of an exceptional or compelling reason to depart from the subsidiarity rule. Scholars have been dubious about the extent and status of the doctrine of subsidiarity in Scottish enrichment law, particularly since the enrichment revolution;<sup>9</sup> but judicial decisions applying the rule are numerous<sup>10</sup> and it will not be easily uprooted. Nearly half a century ago, it was made clear by the Inner House, in *Varney (Scotland) Ltd v Lanark Town Council*,<sup>11</sup> that an action for recompense was a subsidiary one:

Recompense is an equitable doctrine. That being so, it becomes a sort of court of last resort, recourse to which can be had only when no other legal remedy is or has been available. If a legal remedy is available at the time when the action which gives rise to

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<sup>7</sup> The doctrine is complex, and alternative elements or interpretations of subsidiarity exist, but they are not discussed here in detail due to considerations of space and the fact the decision in *Courtney* is concerned with the version of subsidiarity concerning enrichment law's subservience to claims against the same defender but based upon another cause of action. The other versions include the subsidiarity of claims based upon a "general enrichment action", as opposed to claims which rest upon "specific" or already recognised enrichment actions, and the version concerned with third party enrichment: see D Visser, 'Unjustified Enrichment', in J M Smits (ed), *Elgar Encyclopaedia of Comparative Law* (2<sup>nd</sup> edn, 2013) 947, at 952. Both are relevant to Scots law.

<sup>8</sup> See *Gebroeder v Sunderland Sportswear Ltd (No 2)* 1990 SC 291, at 306 per Lord Dunpark and at 308 per Lord Coulsfield.

<sup>9</sup> R Evans-Jones, *Unjustified Enrichment* (2003) vol I, at paras 1.97 ff; N R Whitty, '*Transco plc v Glasgow City Council*: developing enrichment law after *Shilliday*' (2006) Edin LR 113. A potentially important question, and something of a hanging question in the law generally — whether the subsidiarity doctrine's application has been expanded to apply to the whole of enrichment law and not just recompense, following the enrichment revolution — was affirmed at least as regards this case by agreement of the parties: paras 52–53, and 60.

<sup>10</sup> Cf another case involving the interaction of a statutory right of recovery and its interaction with the 'equitable remedy' of unjustified enrichment, where the non-equitable nature of the Secretary of State's right to recover overpayments of benefits was the basis of the Lord Ordinary's decision that such a right did not prescribe as an enrichment obligation under the Prescription and Limitation (Scotland) Act 1973, see *Cullen v Advocate General for Scotland* [2016] CSOH 170, 2017 SLT 1, particularly at paras 41–43 per Lord Armstrong.

<sup>11</sup> *Varney (Scotland) Ltd v Lanark Town Council* 1974 SC 245.

the claim for recompense has to be taken, then normally that legal remedy should be pursued to the exclusion of a claim for recompense.<sup>12</sup>

*Varney* is one of a number of cases,<sup>13</sup> some revisited in *Courtney*, which make this point. While those cases apply the subsidiarity doctrine, they also recognise that there might be exceptional circumstances in which the subsidiarity doctrine might be dispensed with.<sup>14</sup> Lord Beckett, in *Courtney*, accepted that the doctrine of subsidiarity was not an absolute one, such that it might “normally” apply, but not invariably.<sup>15</sup> He further accepted that where “special and strong circumstances” could be shown, that might justify dispensing with subsidiarity to allow recovery in unjustified enrichment.<sup>16</sup> However, he concluded that “special and strong circumstances” had not been shown in the present case.<sup>17</sup> Accordingly, the decision reached in *Courtney* is to the point and, assuming the existence of an alternative cause of action under the 2006 Act, embodies a valid application of the enrichment authorities as they currently stand.<sup>18</sup> The question then arises: was the prior claim under the 2006 Act indeed a sound one in this case?

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<sup>12</sup> *Varney (Scotland) Ltd v Lanark Town Council* 1974 SC 245, at 252–53 per the Lord Justice-Clerk (Wheatley).

<sup>13</sup> See e.g. *Gebroeder v Sunderland Sportswear Ltd (No 2)* 1990 SC 291, at 300–01 per the Lord President (Hope); *Transco Plc v Glasgow City Council* [2005] SCOH 79; 2005 SLT 958.

<sup>14</sup> *Glasgow DC v Morrison McChlery* 1985 SC 52, at 64 per the Lord Justice-Clerk (Wheatley). Hence the decision in this note to describe it as a doctrine, rather than a rule.

<sup>15</sup> *Courtney*, para 66.

<sup>16</sup> *Courtney*, para 66, using the language of *Varney*: see *Varney (Scotland) Ltd v Lanark Town Council* 1974 SC 245 at 259–260, per Lord Fraser.

<sup>17</sup> The principal reason advanced by the pursuer was that Mr Courtney had been reluctant to make demands on the defender when her son was ill. Lord Beckett concluded that the deceased’s “benevolent motivation need not have prevented him from taking legal advice” within the time limited period: para 69.

<sup>18</sup> It is also worth bearing in mind that the decision in *Courtney* is a decision of a Lord Ordinary in the Outer House, who was bound by (or least faced with) Inner House authority in the form of *Varney*. There are academic treatments which argue that any subsidiarity doctrine should be more refined in the modern law, and only applicable to cases involving imposed enrichment: see H L MacQueen, ‘Unjustified Enrichment, Subsidiarity and Contract’, in V Palmer and E Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (2009) 322, at 344–45. If this were the case, then subsidiarity would have no application in a case such as *Courtney*, where the enrichment was by transfer, rather than imposition.

#### **D. THE 2006 ACT – COHABITANTS’ CLAIMS AT THE END OF A RELATIONSHIP**

Since the pursuers’ remedy in unjustified enrichment was precluded by the existence of a (now time-barred) claim under section the 2006 Act, it is necessary to examine the statutory provisions in more detail. Section 28 provides a statutory route by which cohabitants can seek financial compensation for any economic disadvantage suffered, or to redress any economic advantage gained by the other cohabiting party, during the course of the cohabiting relationship. Such a claim can only be made on the breakdown of the cohabitation and must be made within one year of the day on which the parties cease to cohabit.<sup>19</sup> A provision (with a time limit of six months) also exists in respect of cohabiting relationships which are terminated through the death of either party.<sup>20</sup> In this case, however, while the claim was raised after Mr Courtney’s death, the cohabitation had ceased while he was still alive, so the correct route to claim would indeed have been section 28. The problem was that, during the year following the end of the cohabitation, Mr Courtney had not sought to recover any of these sums.<sup>21</sup> By the time he did seek legal advice, in August 2014, he had missed the 12 month window by three months. The time limits in the 2006 Act are clear, and there is no provision to extend them.<sup>22</sup> Both parties were thus in agreement that the pursuers could no longer avail themselves of this statutory claim.<sup>23</sup>

However, a peculiar aspect of the defender’s evidence is worth further comment. In terms of section 25 of the 2006, cohabitants are defined as “a man and woman who are (or were) living together as if they were husband and wife”.<sup>24</sup> The inherent problems with this definition have been compellingly outlined by Dr McCarthy:

The only characteristic which all spouses and civil partners necessarily have in common is that they have formally registered their relationship. In other words, the

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<sup>19</sup> Section 28(8) provides the time limit.

<sup>20</sup> Section 29 of the 2006 Act: here the court can only make an order from an intestate estate, and in making an order must have regard to the size and nature of the intestate estate, any benefit received by the surviving cohabitant as a result of the death, otherwise from the net intestate estate, and the nature and extent of other rights against or claims on the net intestate estate.

<sup>21</sup> The reason given for his lack of action was that the defender’s son was ill and later died: para 41.

<sup>22</sup> Section 29A makes provision for extension of the time limits where there has been cross-border mediation in the dispute, but not otherwise.

<sup>23</sup> *Courtney*, para 50.

<sup>24</sup> Section 25(1)(a), with s25(1)(b) providing a comparable definition for same sex cohabiting couples.

one characteristic shared by all spouses and partners is the very characteristic that cohabitants by definition do not share.<sup>25</sup>

Section 25(2) directs the courts to have regard to three factors when determining whether a couple are cohabitants. These are (i) the length of time during which they lived together; (ii) the nature of their relationship; and (iii) the nature and extent of any financial arrangements which subsisted during that period.<sup>26</sup> These factors were not canvassed in the present case, with the judge noting simply that it was “not in dispute that the deceased and the defender were cohabitants as defined by section 25”.<sup>27</sup> Yet although the parties were apparently in agreement that sections 25 and 28 of the 2006 Act were relevant, it is not clear that this was in fact the case. The defender herself averred

... the relationship between the defender and the deceased *was a friendship rather than a lifetime commitment*... When the house was purchased, they tried sharing a bedroom, but the relationship did not develop *in that way* and the deceased began to sleep downstairs... The deceased would have had no reasonable expectation that he would live there for the rest of his life.<sup>28</sup>

While some married or cohabiting couples will occupy separate bedrooms, the picture painted here does not reveal a scene of cohabiting bliss. If the relationship did not develop “in that way”, such that the parties were no longer sharing a bedroom *and* Mr Courtney could not have expected to live there for the rest of his life, this does not seem to be an unequivocal account of a cohabiting couple, living together as if they were husband and wife, sufficient to fulfil the section 25 definition. And if Mr Courtney and Ms Campbell were not cohabiting in terms of the 2006 Act, then Mr Courtney could never have had a claim under section 28, and there would have been no 12 month time limit for him to meet. Consequently, the defence to the unjustified enrichment action based on subsidiarity would not have been applicable, and the executors might have succeeded in recovering some or all of the sums transferred.

## **E. POLICY CONSIDERATIONS AND CONCLUDING OBSERVATIONS**

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<sup>25</sup> Frankie McCarthy, “Defining Cohabitation” 2014 SLT (News) 143, at 143.

<sup>26</sup> There is little judicial precedent to draw on in interpreting and applying this definition: as McCarthy notes “the fact of cohabitation has been disputed very rarely”. See Frankie McCarthy, “Defining Cohabitation” 2014 SLT (News) 143, at 143.

<sup>27</sup> *Courtney*, para 48.

<sup>28</sup> *Ibid*, para 14, emphasis added.

Questions thus remain concerning the efficacy and fairness of the interaction between the statutory regime for cohabitants and the law of unjustified enrichment that will not be easily resolved.<sup>29</sup> One can be sympathetic to a concern that allowing an enrichment claim can unpick the provisions of the 2006 Act – an Act which was designed to cover the inevitably somewhat messy and imprecise<sup>30</sup> bundle of claims and counterclaims arising from a relationship recognised as having legal effects beyond those that would apply to two unrelated individuals. Why would any economically disadvantaged cohabitant utilise the statutory provisions if an enrichment action could avoid the detailed provisions of section 28, not least the absolute time limits, all embedded within a broad interpretative fairness framework?<sup>31</sup> And why should a cohabitant find it harder to recover an economic enrichment than someone who is *not* in a relationship recognised by the law as requiring a special regime? This is particularly the case since the remedies in unjustified enrichment and under statute are not identical: the common law regime allows claims to be raised over a longer period after the enrichment becomes unjustified, but it is narrower in scope as to what can be recovered. There is arguably room for both remedies, serving different ends. Yet in large measure, the answer to the subsidiarity question lies in divining what Parliament might be thought to have intended.<sup>32</sup> One view<sup>33</sup> states that the absence of an express exclusion of the common law suggests that Parliament intended to allow a cohabitant to continue to use the common law (including enrichment).<sup>34</sup> Another view, and apparently that taken in *Courtney*,<sup>35</sup> is that Parliament is taken to know the common law — including the subsidiarity doctrine — and its silence can be interpreted as endorsing or acknowledging the subsidiarity doctrine. The decided cases on the 2006 Act send, probably inevitably, somewhat mixed

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<sup>29</sup> On the interaction of statutory regimes and the common law in general, see: *R (Child Poverty Action Group) v SSWP* [2011] 2 AC 15, at paras 27 et seq per Lord Dyson, who states (in a case about enrichment claims at common law being excluded due to a very detailed statutory code) that it is always a matter of interpretation in context whether an enactment creates a statutory scheme which displaces/replaces common law rights; also *Deutsche Morgan Grenfell Group plc v IRC* [2007] 1 AC 558, at para 19 per Lord Hoffmann and at para 135 per Lord Walker. For an academic commentary, see A Burrows, 'The relationship between common law and statute in the law of obligations' (2012) 128 LQR 232.

<sup>30</sup> See *Gow v Grant* [2012] UKSC 29; 2013 SC (UKSC) 1, at paras 54–55 per Lady Hale.

<sup>31</sup> *Gow v Grant*, paras 35–36 per Lord Hope.

<sup>32</sup> See n 29.

<sup>33</sup> See H L MacQueen, 'Unjustified Enrichment' University of Edinburgh Law School Working Paper 2010/01, 4–5.

<sup>34</sup> *Courtney*, paras 34 & 60.

<sup>35</sup> *Courtney*, para 60.



messages.<sup>36</sup> It has been decided that the character of the “novel jurisdiction to entertain cohabitants’ financial claims” mandates a strict or restrictive interpretation of the procedural rules (time limits) in the enacting statute.<sup>37</sup> One could argue that that points towards a benign or a restrictive view of the appropriateness of an enrichment action. Later cases have suggested that while there is a “novel jurisdiction”,<sup>38</sup> that should not necessarily be considered to be exclusive and comprehensive,<sup>39</sup> and the provisions are to be classified under existing categories of private law.<sup>40</sup> One might say, therefore, that the interpretation of sections 28 and 29<sup>41</sup> in decided cases could be explained narrowly as a specialised and narrow jurisdiction to raise a claim which does not disturb any other areas of law; or one might suggest that the strictness of the interpretation implicitly asserts the exclusivity or presumptive primacy of the new statutory rules.

Likewise, one can be concerned that denying the enrichment claim inappropriately relegates the status of enrichment law to perpetual subsidiarity. Perhaps the nub of the problem is the instability of the core nature of an enrichment claim in Scotland. The instability is linked, as is becoming apparent from the pleading and tenor of decided cases, to the use of equitable terminology. Simply put, the question devolves into this: is an enrichment claim the vindication of a right vested in the impoverished party according to a notion of strict liability, or, is the profusion of “equity” and “equitable” language in connection with enrichment law tangible insofar as any claim brought by the impoverished party lies at the discretion of the court, or some other degree of discretion bound up with the concept of demonstrating the equity of claiming or resisting a claim? These questions feed

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<sup>36</sup> The cases deal with sections 28 and 29 of the 2006 Act, and the construal of one of the sections often utilises the other.

<sup>37</sup> *Simpson v Downie* [2012] CSIH 74; 2013 SLT 178, at paras 13–14 per Lord Emslie (delivering the Opinion of the Court). Cf *X v A (No 2)* [2016] SC Edin 55; 2016 SLT (Sh Ct) 411.

<sup>38</sup> *Kerr v Mangan* [2014] CSIH 69; 2015 SC 17, at para 6 per Lady Smith.

<sup>39</sup> “I do not think that there was any intention to suggest [in *Simpson v Downie* (n 37)] that the jurisdiction conferred on the court by secs 28 and 29 of the 2006 Act should be regarded as self-contained, wholly independent of general legal categories. In my view any attempt to construe those sections in that manner would give rise to significant difficulties, even greater than those that have been encountered in the practical application of the two sections.” *Kerr v Mangan* 2015 SC 17, para 45 per Lord Drummond Young.

<sup>40</sup> *Kerr v Mangan* 2015 SC 17, para 36 per Lady Smith and at para 43 per Lord Drummond Young (noting section 29 must be considered part of the law of succession). Cf *X v A (No 1)* 2016 SLT (Sh Ct) 404, at para 17 per Sheriff Holligan.

<sup>41</sup> Although similar and often analysed together, the courts do distinguish between the sections when appropriate: *Kerr v Mangan* 2015 SC 17, at paras 9 and 15 per Lady Smith; *X v A (No 1)* 2016 SLT (Sh Ct) 404, at para 19 per Sheriff Holligan.

back into the meaning of “unjustified” in the context of unjustified enrichment. On one view, with considerable authoritative pedigree,<sup>42</sup> Scots law takes the rather dry “absence of legal basis” approach to the meaning of “unjustified”. That is a wide approach, which, it can be argued, is near to a general enrichment action<sup>43</sup> or at least a pervasive law of enrichment, which it is appropriate to control from a policy perspective by using a doctrine of subsidiarity.<sup>44</sup>

It appears that the judicial inclination to interpret the statutory provisions as excluding a common law claim combines unforgivingly with the strict time limits in the 2006 Act: together they have the potential to knock out cohabitants’ claims, leaving the economically-disadvantaged party in a worse position than pre-2006. Statutory clarity on the interaction of the 2006 Act provisions with unjustified enrichment might ameliorate this somewhat, as would a slight extension of the time limits, or the recognition of judicial discretion to extend them. In the absence of parliamentary intervention, however, cohabitants must be astute in seeking legal advice as soon as possible on the breakdown of their relationship, regardless of any “benevolent motivation” in delaying.

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<sup>42</sup> *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1996 SC 331 at 348–49 per Lord Cullen, subsequently endorsed and adopted by Lord President Rodger in *Shilliday v Smith* 1998 SC 725 at 727D.

<sup>43</sup> N R Whitty and D P Visser, ‘Unjustified Enrichment’, in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective* (2004) 399, at 401–406.

<sup>44</sup> See e.g. D Visser, *Unjustified Enrichment* (2008) 56 *et seq.*