SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2025] SC GLA 19

GLW-A1279-23

JUDGMENT OF SHERIFF S REID

in the cause

JONATHAN RUSSELL (AS EXECUTOR OF THE LATE STUART RUSSELL) & IRENE RUSSELL

Pursuers

against

REBECCA RUSSELL (AS EXECUTRIX OF THE LATE SIMON RUSSELL)

Defender

Act: Mr J. Reekie, Brodies LLP, Edinburgh
Alt: Mr M. Allport, Authorised Lay Representative

Glasgow 19 March 2025

The sheriff, having resumed consideration of the cause, makes the following

FINDINGS-IN-FACT:

1. The late William Stuart Gibb Russell (known as "Stuart") and his wife, Irene Russell, had two sons, Jonathan Russell and Simon Russell.

2. The younger son, Simon, died on 21 April 2023.

3. The father, Stuart, died on 1 March 2024.

4. The elder son, Jonathan, is the executor of the late Stuart Russell.

5. Rebecca Russell is the widow and executrix of the late Simon Russell.

6. Prior to his retirement, Stuart practised as a chartered accountant; Jonathan is a chartered accountant; Simon, a former salesmen, tried to set up various business ventures over the years but with no material success.

7. At various times, relations within the family have been strained.

8. For 6 years or so prior to 2009, Jonathan was estranged from his parents; in contrast, at that time, Simon's relationship with his parents was good.

9. From 2020 until his death in 2023, Simon was estranged from his parents and sibling; in contrast, at that time, Jonathan's relationship with his parents was good.

10. The breakdown of Simon's marriage to his first wife, Fiona, was also a source of tension between the siblings, in that Jonathan perceived the separation as an abandonment by Simon of his former wife and children.

11. In around 2009, Stuart and Irene Russell were relatively comfortable financially.

12. In 2008, they owned a substantial home in Edinburgh; they had obtained capital payments from Norwich Union under an equity release loan secured on that home; and, in due course, in 2021, the home was sold for a sum in excess of £1.6 million, sufficient to clear the security thereon and to fund the purchase for them of a retirement home in Glasgow.

13. On 14 January 2009, Stuart received the sum of £430,000, being the initial payment of Stuart's share of the proceeds of sale of family farm land in Bathgate; and on 9 February, 3 April, 6 May, 14 July, 4 August and 23 October, all in 2009, Stuart received further deferred payments of £100,000, £40,000, £45,000, £25,000, £50,000 and £40,000, respectively, from that sale.

14. On 10, 13 & 26 February, 7 April, 7 May, 14 May, 23 June, 4 July, 6 August and 24 October, all in 2009, Stuart invested (through stockbrokers) the sums of £30,000, £25,000,

£25,000, £30,000, £25,000, £20,000, £10,000, £10,000, £50,000 and £25,000, respectively, in various stock market investments.

15. Between January and March 2009, by a series of cheque payments, Stuart paid £5,000 to each of his grandchildren (that is, to the children of Jonathan and Simon); and, in addition, by three separate cheques of £5,000 each, Stuart paid a total of £15,000 to Simon's former wife, Fiona, to assist her with raising her children to Simon.

16. For many years, Simon lived beyond his means, he was unsuccessful in business, and he often found himself in financial difficulty; but Stuart, who was generous and soft-hearted in relation to his youngest son, often provided financial support to Simon and his businesses.

17. Between 2005 and 2009, Stuart paid the following sums to Simon: (i) on 7 December 2005, by cheque, he paid the sum of £25,000 to Simon ("the 2005 Payment"); (ii) on 30 November 2007, by bank transfer, he paid the sum of £30,000 to Simon ("the 2007 Payment"); (iii) on 15 August 2008, by cheque, he paid the sum of £30,000 to Simon ("the 2008 Payment"); and (iv) on 30 January 2009, by cheque, he paid the sum of £70,000 to Simon ("the Disputed 2009 Payment").

18. All of the foregoing payments to Simon were made by Stuart from a Bank of Scotland account held jointly with Irene Russell.

19. None of these payments to Simon is documented in a written deed or contract between Simon and Stuart.

20. None of these payments to Simon is referred to in, or evidenced by, any written communication between Stuart and Simon, contemporaneous or otherwise, formal or informal.

21. From time to time, Stuart also paid sums to Simon to cover the private school fees of Merridy, the daughter of Simon and the defender.

22. At no time were any sums of equivalent magnitude or frequency paid by Stuart to his eldest son, Jonathan.

23. For a period of time, Stuart acted as chairman of one of Simon's businesses (called "iAuctionshop"); and from time to time, from 2009 onwards, Stuart was in the habit of buying artefacts in junk shops and sending them to Simon to generate and support on-line sales by that business.

24. In 2020, the health of Stuart and Irene Russell deteriorated: Stuart required to be hospitalised for a hip operation and was subsequently diagnosed with symptoms of cognitive impairment; Irene was diagnosed with cancer, and required to undergo surgery.

25. At this time, Jonathan (who lived in Glasgow) intervened to provide essential day-to-day practical care to his parents, specifically by relocating to Edinburgh for a period of five months or so (until around May/June 2021) to live in his parents' home, where he looked after his ailing father while his mother convalesced from surgery.

26. Jonathan's actions at this time coincided with a renewal of harmonious relations between Jonathan and his parents; in contrast, Simon (who lived in England) came to be perceived by his parents (and Jonathan) as having failed to provide sufficient emotional and practical assistance to his parents during this period of ill-health and need.

27. Moreover, at this time, Stuart & Irene Russell perceived that Simon wanted his parents to be admitted, against their wishes, to a care home due to their perceived infirmity.

28. As a consequence of the perceptions referred to in findings-in-fact (26) & (27), relations between Simon and his parents deteriorated dramatically, resulting in Simon's complete estrangement from the family from this point onwards.

29. Until around 2020, the siblings, Jonathan and Simon, had been nominated as joint attorneys of Stuart and Irene Russell under the parents' Powers of Attorney, and as joint executors under their Wills; but in December 2020 Stuart and Irene Russell terminated Simon's nomination as their joint attorney; on 5 December 2020, they executed fresh Powers of Attorney nominating Jonathan (and a third party) as their joint welfare and financial guardians; and by letter dated 17 December 2020, Irene Russell wrote to Simon disclosing to him that he was no longer nominated as joint attorney for his parents for the reasons explained in findings-in-fact (26) & (27).

30. On 18 December 2020, Stuart was examined by a consultant in old age psychiatry; the examination was arranged due to concerns raised by Stuart's general practitioner as to Stuart's cognition and capacity to make decisions; and, in the course of the examination, Stuart admitted to the consultant that he was losing his memory, that he was having difficulty keeping track of days and dates, and that his memory difficulties (which had existed for 5 to 7 years prior to that date) had been progressing gradually.

31. On 5 January 2021, the consultant diagnosed Stuart as presenting with very gradual progressive cognitive impairment; the consultant opined that there had been a mild decline in Stuart's functioning, especially in complex tasks, in keeping with a diagnosis of Alzheimer-type dementia, but that his deficiencies were mild and early at that stage; the consultant opined that Stuart was able to give a reasonable breakdown of his current financial affairs, that he was able to understand information provided to him, and that he was capable of making decisions in both financial and welfare matters, as well as expressing his wishes.

32. On 20 January 2021, Stuart executed a fresh Will *inter alia* revoking all prior testamentary writings and appointing Jonathan and a third party as his executors.

33. In early 2021, during his temporary relocation to Edinburgh to care for his parents, Jonathan reviewed his father's financial records (including his father's bank statements) and discovered, for the first time, that the Disputed 2009 Payment (and the other sums referred to in finding-in-fact (17)) had been paid by Stuart to Simon.

34. In June 2021, Stuart was assessed as no longer having capacity and was admitted to a care home.

35. Between January 2009 and 1 March 2024 (when he died), Stuart never personally demanded repayment from Simon of the Disputed 2009 Payment.

36. Between January 2009 and 1 March 2024 (when he died), Stuart never personally demanded payment from Simon of any monthly interest on the Disputed 2009 Payment.

37. Between January 2009 and 1 March 2024 (when he died), Stuart never personally protested to Simon that any monthly interest on the Disputed 2009 Payment was overdue or outstanding.

38. Jonathan believes that his late brother Simon was manipulative and profligate; that he uttered falsehoods to his parents about Jonathan's supposed wealth; that he misrepresented to his parents the viability and prospects of his various business ventures and the financial pressures affecting him from time to time; all with a view to extracting money from his parents, including gifts and investment in his business ventures.

39. By letter dated 21 July 2021 from Jonathan to Simon, Jonathan accused Simon of having "hoodwinked" their parents into believing that Jonathan was "extremely wealthy" in order for Simon and his family to benefit financially; Jonathan accused Simon of "manipulative and Machiavellian tactics" to ensure that Jonathan and his family received "virtually nothing over the years" whilst Simon and his family "regularly received large amounts of money and other assets"; Jonathan alleged that Simon had "learned to prey

very effectively" on Stuart's "good nature" and "gullibility"; Jonathan stated that his parents were "now both deeply remorseful for being so gullible and for showing [Simon] and [his] family such favouritism over the years"; and in this letter Jonathan alleged, for the first time, that the Disputed 2009 Payment was one of several "unpaid interest bearing loans".

40. By letter dated 20 September 2023 to the defender, Jonathan (then acting as attorney for Stuart under Stuart's Power of Attorney) demanded repayment from the defender (in her capacity as Simon's executrix) of various "interest bearing loans and investments", including the Disputed 2009 Payment.

41. Items 5/1/1-18 are true copies of extracts from the bank statements of Stuart and Irene Russell issued by Bank of Scotland plc in relation to their joint account; these copy bank statements bear certain handwritten annotations; some of these annotations were made by Irene Russell upon receipt of the bank statements shortly after the dates that they bear; other annotations (including handwritten references to "£70K loan to Simon" and "monthly interest" thereon) were made by Jonathan many years later in 2021 or thereafter.

42. *Esto* the Disputed 2009 Payment was agreed by Stuart and Simon to be a loan, it was an express term of the agreement that the loan would be repayable only when Simon was financially able to do so.

Makes the following FINDINGS-IN-FACT AND IN-LAW:

1. The pursuers have failed to prove that the sum of £70,000 paid by Stuart to Simon on 30 January 2009 ("the Disputed 2009 Payment") was a loan.

2. The pursuers have failed to prove that monthly interest was agreed to be payable on the Disputed 2009 Payment.

3. Absent proof to the contrary, the Disputed 2009 Payment is presumed to have been a gift made *ex pietate* by Stuart to Simon, without mutual intention to constitute a contract of loan between the parties or otherwise to impose any counterpart financial obligation upon Simon to repay the sum.

4. *Esto* the Disputed 2009 Payment was a loan, the pursuers have failed to prove that the express precondition for repayment thereof has been purified namely, that Simon (or his estate) is financially able to repay it.

Makes the following FINDINGS-IN-LAW:

1. The pursuers having failed to prove that the sum first craved was loaned to Simon *et separatim* that monthly interest was payable thereon as second craved, the defender is entitled to be assoilzied;

ACCORDINGLY, Grants decree of absolvitor in favour of the defender, whereby, Assoilzies the defender from the first and second craves of the initial writ; meantime, Reserves the issue of expenses.

NOTE:

Summary

[1] In 2009, a father paid £70,000 to his youngest son. More than 12 years passed, and the father never demanded repayment of the money from his son. Both are now dead. There is no documentary evidence at the hand of either the father or the son, contemporaneous or otherwise, describing the payment as a loan, interest-bearing or otherwise.

[2] In 2021, in the throes of a bitter family rift, with the younger son now estranged from his elder sibling and parents, the elder sibling discovered that the £70,000 sum had been paid to his brother. He questioned his father about it. He claims that his father told him that the payment was an interest-bearing loan and should be repaid. The elder son, then acting under his father's power of attorney, demanded that his brother repay the £70,000 with accrued interest.

[3] In this ordinary action, the pursuers are the elder son (now acting in his capacity as executor of his late father) and his mother. The defender is the widow and executrix of the younger son.

[4] The pursuers rely on the ordinary presumption against donation. In my judgment, the ordinary presumption does not apply. Instead, where a person who makes a payment to another is under a natural obligation to support and provide for the recipient (as in the case of, say, a father and a son), there is no presumption against donation. On the contrary, in that familial context, where a natural duty to support and provide exists, the presumption is that the payment was a gift made *ex pietate* (that is, out of natural affection, compassion and duty): *Macalister's Trustees* v *Macalister* (1827) 5S 219; *Nisbet's Trustees* v *Nisbet* (1868) 6M 567; *Forbes* v *Forbes* (1869) 8M 85; *Malcolm* v *Campbell* (1889) 17R 255; *McGraddie* v *McGraddie* [2009] CSOH 142; *Mailer* v *Mailer & Quinn* 2009 WL 07285344). In such cases, the onus lies not on the recipient but on the paying party to displace the rebuttable presumption that the payment was a gift.

[5] In this case, the pursuers have failed to discharge that onus. The evidence does not support their contention that the payment was a loan, repayable on demand, with monthly interest (at 6% per annum) from the date of first receipt.

[6] *Esto* the disputed sum was agreed to be a loan (for which I find no reliable evidence), it was an express term of the agreement that the loan would be repayable only when the younger son was financially able to do so. The pursuers have failed to prove the purification of that express pre-condition for demanding repayment. Accordingly, I assoilzie the defender. I explain my reasoning below.

The evidence

[7] I heard evidence from three witnesses: the two pursuers (Jonathan Russell and his mother Mrs Irene Russell) and the defender (Rebecca Russell). The testimony of Jonathan Russell was given orally in court. The testimony of the second pursuer and defender was given, in part, in writing (by signed written witness statement) and, in part, orally (by video conference call). Neither of the key protagonists (the late Simon Russell and Stuart Russell) gave evidence. They died in April 2023 and March 2024, respectively.

Jonathan Russell

[8] Jonathan Russell (63), is the eldest son of Irene Russell and the late Stuart Russell. His younger brother is the late Simon Russell. In 2020, when his parents' health deteriorated, Jonathan undertook an audit of his father's finances. He discovered that several large payments had been made to his younger brother, including a payment of £70,000 in January 2009 ("the Disputed 2009 Payment"). He questioned his father about this payment. He said his father had replied: "I loaned that money to Simon and he should repay it". By June 2021, his father had lost capacity, he was admitted to a home, and Jonathan assumed control of his father's affairs under a power of attorney.

[9] He spoke to his father's capacity. He insisted his father's memory was good. Reference was made to a report dated 5 January 2021 from Dr Pervez Thekkumpurath and to his father's power of attorney dated 5 December 2020 (items 5/2 & 5/4 of process).

[10] He spoke to his interpretation of copy bank statements for his father's joint bank account (item 5/1/1-18). He said that the 2005 Payment (of £25,000) was an investment in iAuctionshop in exchange for a 25% shareholding. The 2007 Payment (of £30,000) was said to comprise a further investment in that business, but this time by way of an interest-bearing "reducing loan" of £24,000, with the balance of £6,000 being a gift to Simon and the defender, split equally between them for inheritance tax allowance purposes (though Jonathan conceded he had "made certain assumptions" as to the allocation of the component elements as between investment and gift). The 2008 Payment (of £30,000) was said to comprise an "investment" in "School Adviser", another of Simon's businesses which subsequently failed. The Disputed 2009 Payment (of £70,000) was said to be an interest-bearing loan to Simon to allow him to pay off his mortgage. He characterised certain regular credit entries in the bank statements as interest payments on the Disputed 2009 Payment and on the "reducing loan" element of the 2008 Payment.

[11] In cross-examination, questioned on the circumstances of the Disputed 2009 Payment, Jonathan could not recall his father's specific words on the issue. Jonathan understood the loan was intended to repay Simon's mortgage; it was to be repaid "when [Simon's] business improved" and "when he could"; until then, Simon was to pay monthly interest; regular monthly payments of £350 were then received into his father's joint account from iAuctionshop for about 9 months after receipt of the Disputed 2009 Payment; these monthly payments were said to correspond to interest on the alleged loan at 6% per annum; but the monthly payments then stopped, and never recommenced. He conceded that his

father would not have chased Simon for the outstanding interest. He speculated that Simon, who was "forever in difficulty with money", "would have come up with excuses", and his father, being "soft" and "kind-hearted", would have "let him off". He spoke to the deterioration in family relations by late 2020. In March 2021, Jonathan discovered that his father's 25% shareholding in iAuctionshop had been "misappropriated" by Simon and the defender; this news was said to have made his father "furious" and "ballistic"; and the disclosure prompted Jonathan's demand letter to Simon in July 2021 seeking repayment of the Disputed 2009 Payment. Such was the mutual animosity within the family that Jonathan and his parents were not notified of Simon's subsequent terminal illness until just 2 days prior to his death.

[12] Jonathan clarified in cross-examination the source and timing of the handwritten annotations on the copy bank statements. He identified those he believed were appended by his mother (close to the date of the statements); he identified others appended by him many years later. He insisted his parents could not have afforded to gift £70,000 to Simon in January 2009.

[13] In re-examination, Jonathan claimed to have a letter, found within his father's papers though not lodged in this process, which recorded the terms of the £24,000 "reducing loan".

Irene Russell

[14] Mrs Russell (87) adopted the terms of her affidavit dated 25 January 2024 and supplementary statement 15 August 2024. In her affidavit, she stated that Stuart agreed to loan £70,000 to Simon in January 2009. Though Stuart dealt with most of the couple's financial matters in those days, she testified that she knew about the loan at the time; she knew the money had been debited from their joint account; and she did not object, because

Stuart was not concerned. Simon needed the money for his mortgage and because iAuctionshop was not performing well. She stated that Stuart had been "clear", when he had capacity, that the money was a loan, and that he expected it to be paid back with interest. He did not tell her "the details of what was agreed about interest". She understood from the bank statements that interest "worked out" at 6%. She did not know if her husband had ever chased up the unpaid interest. She conceded Stuart could be "a bit soft with Simon" and would not have wanted to cause any upset "by bringing the issue up", but she insisted that Stuart "always hoped and expected the money to be repaid when things got better for Simon" (para 7). She said that a gift of £70,000 to Simon would have been unaffordable for them. Some money was gifted to Simon and his family "from time to time", but for special occasions like birthdays, Christmas, and to help with his adoptive daughter's private school fees. Simon had previously asked his parents for money. As a result, Stuart had invested in Simon's iAuctionshop business in exchange for a 25% shareholding; further business investments were then made later, by way of interest-bearing loans; and a gift of £6,000 was also made to Simon, set up by Stuart "with inheritance tax in mind". From time to time, Stuart would also go around "junk shops in Stockbridge" and buy "bits and pieces" to gift to Simon, in order to generate business for iAuctionshop.

[15] In her supplementary statement, Mrs Russell spoke to the deterioration in Stuart's mental capacity. It was "fair to say" that he could get confused at times. She narrated incidents indicating a gradual decline in his mental abilities (including erroneously reporting stolen items to the police). But Stuart's long-term memory was said to be very good and she reiterated that, before he lost capacity, he had been "very clear" that he wanted to pursue repayment of the alleged "loan" from Simon. She recalled sitting around

a kitchen table with Stuart and Jonathan in late 2020/early 2021 when Stuart confirmed to her that the £70,000 payment was a loan. She stated this was "in line with" her "understanding at the time" when the sum was paid to Simon. She spoke to the bank statements. She identified her annotations on them. She stated that Stuart would deal with most of the couple's finances at the time, but that she "liked to reconcile the cheques from her account" by way of annotations on the statements. She sought to clarify the meaning of her handwritten letter dated 6 February 2022 to the defender's former solicitors (which, in its terms, appeared to record her lack of awareness of the loan). She explained that she was aware of the existence of the loans to Simon (for £70,000 and £24,000, respectively) but was "unaware" until 2021 that those loans were still outstanding.

[16] In cross-examination, she acknowledged that Stuart and Simon often spoke together privately; she was not involved in these conversations; and she was not involved in the particular discussion between Stuart and Simon regarding the £70,000 loan. She said there was "a lot going on unbeknown to me" in discussions between Stuart and Simon. She did not know whether the loan agreement was made orally or recorded in writing; she did not know whether the interest was to be simple or compound; she conceded that her husband "dealt with all these things". She did not deal with the family finances apart from "ticking things off" on the bank statements. She understood that the January 2009 loan was "to be repaid when [Simon's] business was flourishing". When pressed as to how she knew that the payment was a loan, she replied: "Because I know it was a loan". She said that she knew that the monthly payments of £350 referred to in the bank statements were attributable to interest on the loan because Stuart "probably" told her so, or that he "would have" told her so, but that she could not specifically remember. She acknowledged that she and her husband were "soft" with Simon, who was "always full of hard luck stories". She

said that Stuart would do "anything to help" Simon. They felt sorry for him. He was removed as their attorney because Simon had wanted them to be admitted to a care home.

Rebecca Russell

[17] In her witness statement dated 23 May 2024, Rebecca Russell spoke to the history of her relationship with Simon and his parents; the deterioration in Simon's health; the deterioration in Stuart's mental capacity; emerging strains in the family relationship during the COVID lockdown; the death of her husband, her distress at the lack of compassion allegedly shown by the family, and her shock at the demand and allegations now made against her and Simon.

[18] Rebecca's testimony on the supposed loan was limited. She said that Simon had told her it was a gift from his father. It was one of several "generous financial gifts" received from Stuart over the years. They assumed Jonathan had been similarly treated.

Closing submissions

[19] Written submissions were lodged for both parties. The pursuers founded upon the ordinary presumption against donation; the onus lay on the defender to rebut it; cases such as *Mailer* were distinguishable; in any event, the pursuers' evidence, which was to be preferred, was supportive of loan. For the defender, it was submitted that the payment was a gift, made out of natural affection and duty; the pursuers' testimony was unreliable; and the wider circumstances supported the inference of donation.

The legal principles

The ordinary presumption against donation

[20] In Scots law, "there is a strong presumption against donation and it requires very strong and unimpeachable evidence to overcome it" (*Sharp* v *Paton* (1883) 10R 1000, 1006; *Brownlee's Executrix* v *Brownlee* 1908 SC 232). It is presumed that individuals do not render services without payment, nor do they make payments without expecting anything in return. When moveable property has passed from one person to another, the onus lies upon the person alleging donation to prove it by evidence which is "reasonably convincing", and which is so clear as to displace all other reasonable explanations put forward in evidence (*Grant's Trustees* v *McDonald* 1939 SC 448, 471). If, on the evidence, the transfer can be ascribed to a purpose other than donation, the onus has not been discharged. In the case of doubt, the decision will fall against donation (*Callendar* v *Callendar's Executor* 1972 SC (HL) 70).

The special presumption in favour of donation

[21] However, less well-known perhaps is the special presumption which applies where a payment or transfer is made by a person who is under a natural obligation to support or provide for the recipient (as in the case of a parent and child). In that scenario, a different rule applies. Contrary to the ordinary presumption, such a payment or transfer is presumed to be a gift made *ex pietate* (that is, out of natural affection, compassion, or duty), and the onus falls upon the person seeking repayment to rebut the special presumption in favour of donation. In the particular situation of a payment by a parent to a child, the special presumption can apply even where the child is "no longer in the first flush of youth"

(*Mailer's Executrix* v *Mailer* 2019 WL 07285344). A parent's devotion and sense of duty to a child may be life-long.

[22] The existence of this special presumption appears, at times, to be overlooked. Some textbooks analyse the position as merely an illustration of the ordinary presumption (against donation) being discharged more easily where the relationship between the parties is familial in nature. But this seems to be erroneous. On a proper analysis, the "ordinary presumptions" against donation simply do not apply where the payment or transfer is made by a person who is under a natural obligation to support or provide for the recipient (*Malcolm* v *Campbell* (1889) 17R 255, 258). Instead, the presumption is that the payment or transfer is a gift made *ex pietate*. This is the rule stated in *Macalister's Trustees* v *Macalister* (1827) 5S 219; *Nisbet's Trustees* v *Nisbet* (1868) 6M 567; *Forbes* v *Forbes* (1869) 8M 85; and *Malcolm* v *Campbell, supra*. All are Inner House decisions. All are binding upon me. More recently, the special presumption was applied by Lord Brodie in *McGraddie* v *McGraddie* [2009] CSOH 142 and by Sheriff di Emidio in *Mailer's Executrix, supra.*

[23] A brief review of the four leading decisions may be of assistance.

[24] In *Macalister's Trustees,* a wealthy uncle advanced money to his nephew during his minority, for the education and outfit of the child. He entered the advance in his books, but died without requiring repayment or taking any document of debt. The deceased uncle's trustees sued the nephew for repayment. The action failed. The Inner House agreed that it was to be presumed that the advances were gifted. Merely keeping an accurate account of the money expended in his books did not infer that the uncle intended to insist on repayment.

[25] In *Nisbet's Trustees*, a father advanced sums of money to a son for the purchase of a commission in the army, without taking from the son any obligation to repay. The Inner

House held that there was a presumption against loan in such circumstances. Instead, the advances were presumed to be collated, to be off-set against any claim for legitim in the deceased father's estate. Following *Macalister's Trustees*, the Division stated (at 572):

> "Every presumption is against the inference that advances thus made were intended by the father and received by the son on the footing of debtor and creditor. They are rather to be viewed as made by the father for advancement of a son to whom at the time he no doubt looked forward as his heir and successor… But the relative situation of the father and son at the time the advances in question were made forbids the idea of the father's intention having been to constitute himself his son's creditor for the amount".

[26] In *Forbes*, a younger brother advanced sums of money to (and discharged debts of) his elder brother. Many years later, the younger brother sued for repayment, alleging that the payments were loans. Lord Cowan stated:

> "[W]here there exists such relation between them as to infer a natural obligation to make the advances – as in the case of father and son, or uncle and nephew, or even an elder brother and younger – there is room for the presumption that the advances have been made *ex pietate*, and the presumption will be for donation rather than for debt…".

However, in *Forbes*, the parties did not stand in such a position towards each other as to impose on the younger brother any natural obligation to make advances to the elder brother. Accordingly, the special presumption did not apply in that case. Instead, the ordinary presumption against donation applied.

[27] In *Malcolm*, a payment was made by a father to a prospective son-in-law on the occasion of his daughter's marriage. This sum amounted to about one-fifth of the father's means. He had four other children. Four years later, the father sued the son-in-law for repayment of the alleged loan. At first instance, the sheriff-substitute had simply applied the ordinary presumption against donation and held that the onus rested on the recipient (the son-in-law) to prove donation. (In the event, on the evidence, the sheriff-substitute concluded that the son-in-law had discharged that onus and had proved that the payment

was a gift.) On appeal, the Inner House agreed that, on the evidence, the payment was a gift, but it disagreed with the sheriff-substitute (and sheriff) on the issue of onus. The Inner House held that, having regard to the relationship between the parties, the ordinary presumption against donation did not apply, because the paying party was under a natural obligation to provide for the recipient. Instead, the opposite presumption in favour of donation applied. Therefore, the onus lay properly on the paying party (the father) to rebut that special presumption. Lord Lee stated (at 257):

> "If the balance of evidence be equal, much will depend on the question on whom the onus lies. On the question of onus we have heard an argument, and have had authority cited to us. Now I assent to the doctrine in the sheriff's note that donation is not presumed, but where the person said to have made it is under a natural obligation to provide for the person to whom it is said to be made, there is no onus on the person receiving. The presumption rather is that it may have been a gift *ex pietate*. That is the principle of the case of *Nisbet's Trustees* v *Nisbet*".

Likewise, Lord Kyllachy stated (at 258):

> "But the question is, what – looking to the relations of the parties – is the legal presumption as to the footing on which this took place? In the general case it is clear that the presumption would be for repayment… But the presumption is the other way where, as here, the case is one between parent and child, and especially where the occasion of the advance is the marriage of a daughter, and the advance is made to her husband at the time of the marriage".

The Lord Justice-Clerk agreed (at 258). The onus was properly on the father to prove his case "rather than on the defender to rebut a presumption against donation".

[28] Against that formidable line of authority, the pursuers now advance their claim.

Can a loan be repayable only when the debtor is "able" to do so?

[29] Before turning to my conclusions on the evidence, I pause to highlight a further interesting aspect of the *Forbes* decision.

[30] *Forbes* is an illustration of a case where the special presumption in favour of donation did not apply (because the relationship between the parties did not import a natural obligation on the paying party to support or provide for the recipient); the ordinary presumption against donation did apply; but, on a proper construction of the agreement between the siblings, the Inner House concluded that the money was only repayable when the recipient (the elder brother) was financially "able to do so". Payments had been made by the younger brother to relieve the elder brother from "pecuniary embarrassment". But the Court held that they were not gifts. According to the Inner House, they were repayable "should the tide of fortune turn" and the elder brother "became prosperous" (page 90).

[31] In other words, such an arrangement is not necessarily too vague or uncertain to be enforceable. Aside from *Forbes*, the enforceability of a loan repayable only when the recipient is "able to do so" has been sustained in other cases (*Shaw* v *Kay* (1904) 12 SLT 6; *Thompson* v *Jardine* 2004 SC 590).

Reasons for decision

[32] Applying these legal principles, I conclude that the pursuers have failed to discharge the onus upon them of rebutting the presumption in favour of donation. I reach that conclusion for the following reasons.

[33] In the first place, there is no document of debt evidencing the alleged loan. Of course, it is not essential for such a document to exist, but its absence is a relevant circumstance to be taken into account (as it was by the Inner House in both *Macalister's Trustees* and *Forbes*). The absence of a document of debt sits uneasily with the subsistence of a binding legal obligation to repay the sum.

[34] In the second place, there is no contemporaneous (or even non-contemporaneous) written communication between the father and the son over a prolonged period in excess of 12 years (from January 2009 to July 2021), describing, characterising, or referring (even obliquely) to the Disputed 2009 Payment as a supposed loan, interest-bearing or otherwise. Again, the absence of any such written communication between creditor and debtor is not fatal to a claim of this nature, but it is another relevant circumstance that is inconsistent with the subsistence of a binding legal obligation to repay the sum (*a fortiori* where monthly interest was allegedly payable on the sum from the date of its first receipt).

[35] In the third place, the absence of any demand for repayment of the alleged loan over a prolonged period in excess of 12 years (from January 2009 to July 2021) is inconsistent with the notion of a legally-binding commitment to repay the sum. A similar incongruity was observed by the Lord Ordinary in *Macalister's Trustees* where the absence, over a prolonged period, of challenge or demand for repayment of the sum was itself supportive of the inference that there never was a loan.

[36] In the fourth place, the pursuers' belated characterisation of the Disputed 2009 Payment as an interest-bearing loan over 12 years after the sum was paid arises in the context of a rancorous family quarrel. The relationship between Simon, on the one hand, and his parents and elder sibling, on the other, had evidently broken down by the date of the first demand in July 2021. In his oral testimony, Jonathan lost no opportunity to narrate a litany of grievances with his profligate younger brother. In language often dripping with judgement, Jonathan testified that: (i) Simon had "walked out" on his first wife, Fiona, and his two "blood children", one of whom was just a "babe in arms"; (ii) Simon was "manipulative and Machiavellian"; (iii) Simon was forever in financial difficulties; (iv) Simon, a former Rank Xerox salesman, was trained in the art of persuasion and adept at

spinning a story to his father to extract money from him; (v) Simon had been treated more favourably by his parents than Jonathan, in that Simon had received tens of thousands of pounds from his father, whereas Jonathan had only ever received £250; (vi) Simon was a waster, who never paid his debts, and had allegedly been bankrupted; (vii) Simon had shown no interest in visiting or supporting his parents in the 18 months or so prior to his mother's admission to hospital in 2020; (viii) Simon reneged on a promise to travel from England to relieve Jonathan, for just one week, in caring for his ailing father when his mother was in hospital for chemotherapy, merely because he was "too busy", it was "Black Friday", and he had shopping to do; (ix) Simon placed pressure on Jonathan to admit both parents to a care home when they fell ill in 2020, despite having benefitted from their generosity over many years; (x) Simon then left Jonathan to care for his elderly parents on his own for about 5 months in 2021; (xi) Simon misappropriated Stuart's 25% shareholding in iAuctionshop Ltd; and (xii) over many years Simon propagated falsehoods about Jonathan to his parents, falsely asserting that Jonathan was very wealthy, and therefore not in need of any financial assistance from his father. Jonathan's bitterness towards Simon was palpable.

[37] One strand of this family quarrel is also very personal to Jonathan. A recurring theme of Jonathan's testimony is his own grievance that Simon, whom he perceived as undeserving, had received so much from his parents, while Jonathan, who latterly bore the brunt of caring duties, had received so little. The whole issue of the alleged loan first materialised after Jonathan had taken it upon himself to carry out an "audit" of his father's affairs, discovered that money had been paid to Simon over the years, and questioned his father about it. By that stage, relations with Simon were charged with rancour and personal umbrage. In my judgment, that context of familial and personal animosity undermines the

reliability of Jonathan's testimony about the alleged "loan", absent evidence from some other source (documentary or oral) that is not so tainted.

[38] The same may be said of Mrs Irene Russell's testimony. Though her hostility towards Simon was articulated in less trenchant terms, it was no less evident. She candidly disclosed that she and Stuart had removed Simon as attorney under their powers of attorney because Simon had expressed the wish that she and Stuart be admitted to a care home, which had "upset" them both. She considered that Simon was "always full of hard luck stories", he was unreliable in financial matters, and he should have sold some of his "stupid cars" to fund "the good life" he so enjoyed, rather than asking his parents for money.

[39] In the fifth place, more generally, the reliability of Jonathan's testimony on the nature of the disputed payment (as a loan) was undermined by two issues: (i) its lack of detail and (ii) his recurring tendency to speculate. Over and over, when asked to shed light on the nature of the alleged loan, he failed to do so, merely repeating the mantra that his father was adamant that the payment was a loan and should be repaid. He also tended to offer speculation in place of actual knowledge. He speculated that his brother would have spun a hard luck story to his father; he speculated that his father, being a kind-hearted person, would have relented; he speculated that Simon would have used his charm and "other techniques" to persuade his father to give him money; he speculated that he would have done all number of things. His testimony sat on an inherently precarious foundation. This undermined my confidence in its reliability. On certain issues, Jonathan's testimony had the flavour of *ex post facto* rationalisation. He conceded that he had "made certain assumptions" about the allocation of the 2007 Payment (of £30,000), with £24,000 ascribed to a "reducing loan" and the balance of £6,000 being a gift split equally between Simon and the defender. This aspect of his testimony appeared to be based on nothing more concrete than an

assumption by Jonathan, after the event, as to the most efficient way of using inheritance tax allowances. Likewise, Jonathan's identification of credit entries in the bank statements as "interest payments" (on the Disputed 2009 Payment and the 2007 Payment) seemed to involve Jonathan working backwards from those credits to calculate an interest rate after the event. (Nor was he always consistent in relation to interest. In his letter to Simon letter dated 10 May 2023, Jonathan demanded payment of "accumulated compound interest", only later changing the claim to one for simple interest.) Further, when pressed as to when the Disputed 2009 Payment was supposedly repayable, Jonathan testified that it was to be repaid when Simon's business improved and he was able to do so. This explanation, which emerged only in cross-examination, had never been mentioned by him in evidence-in-chief. It also contradicts the pursuers' pleadings, which state that the loan was repayable "on demand", there being "no agreement" as to when it was to be repaid (Article 5). Overall, the impression I gained was that Jonathan was inclined to make up the details as he went along.

[40] In the sixth place, likewise more generally, the reliability of Irene's testimony (specifically, of her supposed knowledge of the loan from the outset) was undermined by four factors. First, in written and oral testimony she conceded that she had little involvement in most of the couple's finances and left all such matters to Stuart. Second, in cross-examination she conceded that she was not actually privy to the discussions between Stuart and Simon regarding the Disputed 2009 Payment. Third, in her handwritten letter dated 6 February 2022 to Simon's former solicitor, she stated that she had been "unaware" of the loan until 2020. This conflicts with her written and oral testimony that she was aware in 2009 that the payment was a loan. She sought to clarify the meaning of her letter. She insisted that she meant merely that she was "unaware" that the loan was outstanding. I did not accept this explanatory gloss. It seemed contrived and implausible. While she was

aware in 2009 that the payment had been made to Simon, the wording of her letter is clear that she was "unaware" of the loan. That is also consistent with Irene's concession in testimony that she actually had no substantive involvement in "the majority of the [couple's] finances in those days" (affidavit, para 3), and was not privy to discussions between Stuart and Simon on this payment. Consistent with that, none of her contemporaneous annotations on the bank statements characterise the payment as a loan, or as any other kind of investment. None of her contemporaneous annotations identify any of the subsequent credit entries as "interest" on a supposed loan. Fourth, in any event, like Jonathan, Irene could provide no substantive detail on the discussions in 2009 between Stuart and Simon that allegedly constituted the loan. In summary, like Jonathan, her characterisation of the Disputed 2009 Payment as a "loan" is a recent phenomenon. It emerged much later, in 2020, only after Jonathan, on his own initiative, had undertaken an audit of his father's affairs; after he had discovered multiple payments to his brother; after he had raised the issue with his father, aggrieved at the inequitable treatment of the siblings; and after relations with Simon had already descended into acrimony.

[41] In the seventh place, even if I accepted Jonathan and Irene's hearsay testimony (that Stuart had asserted in around 2020/2021 that the Disputed 2009 Payment was an interest-bearing loan), the reliability of Stuart's assertion is itself undermined by evidence of Stuart's deteriorating mental faculties at around this time. Jonathan and Irene were adamant that Stuart's long-term memory was good. They also founded upon a consultant psychiatrist's report dated January 2021 (following an examination in December 2020) that bears to record that Stuart then suffered from only a mild cognitive impairment. But that is to be counter-balanced against the fact that, just a few months later (by June 2021), Stuart had lost capacity and had been admitted to a home (per Jonathan's handwritten letter to Simon dated

6 February 2022). Irene also conceded in her testimony that Stuart could become confused, that he erroneously reported items as stolen to the police, that he could not recall what he had done with family heirlooms (specifically, service medals) and speculated that he may have given them to Simon. In my judgment, this wider context of deteriorating mental capacity and failing memory undermines the reliability of Stuart's alleged assertion (to Jonathan and Irene) as to the true nature of the Disputed 2009 Payment made over 12 years earlier.

[42] In the ninth place, there is no evidence of substance or quality shedding light upon the detailed discussion(s) that allegedly took place between Simon and Stuart regarding the Disputed 2009 Payment. The key protagonists, Stuart and Simon, are dead. Neither gave parole or written testimony. All that Jonathan could offer (supported by Irene) was the repeated assertion that, when he had questioned his father (at some unspecified time in 2020/2021) about the payment, Stuart had insisted that the payment was an interest-bearing loan and should be repaid. Even if Stuart were to have given that same evidence at proof, his bald assertion, however insistent or sincerely held, that the payment was an interest-bearing loan would not have advanced the claim greatly, because it amounts to little more than an articulation of Stuart's subjective belief and lacks any substantive detail on the constitution of a mutual agreement with Simon (such as whether, how, and when Stuart's characterisation of the payment as an interest-bearing loan was ever communicated to Simon; and whether, how, and when Simon ever indicated his agreement to that characterisation of the payment).

[43] Besides, the limited evidence that did emerge was more consistent with the inference that Stuart would have gifted the money to Simon, rather than lent it on binding, onerous terms. Both Jonathan and Irene described Stuart as being generous, kind-hearted, and "soft"

when it came to his younger son. Both lamented that Stuart was likely to have succumbed to Simon's hard-luck stories. Irene testified that Stuart would have done "anything to help" Simon. None of this squares with a father committing his son to repay a loan, and meanwhile insisting upon monthly interest at 6% per annum. In my judgment, Jonathan's letter to Simon dated 21 June 2021 comes closest to summing up the essential truth here: his parents were "now both deeply remorseful for being so gullible and for showing [Simon] and [his] family such favouritism over the years".

[44] In the tenth place, much weight was placed by the pursuers upon the 9 or so monthly credits (of £350 each) to Stuart's joint account, as disclosed on the bank statements. These payments were said to evidence the payment of "interest" on the alleged loan. In my judgment, that inference is not justified. Firstly, the credited payments do not bear to have been made by Simon at all. Rather, they all emanate from iAuctionshop. True to form, Jonathan sought to address the discrepancy with a speculation, namely, that Simon's accountants would (presumably) have made a necessary adjustment to Simon's (presumed) director's account within the financial records of iAuctionshop. But an equally plausible explanation, on the evidence, is that the payments from iAuctionshop represented remuneration for Stuart's chairmanship role, or reimbursement for the "bits and pieces" purchased by Stuart in junk shops to generate on-line sales for the business. In truth, the paucity of evidence leads to little more than a fog of speculation as to why these sums were being credited to the account at all. Secondly, no adequate explanation was given as to why Stuart did, and said, absolutely nothing when those monthly payments ceased just 10 months or so later. If a binding legal commitment to pay monthly interest on the loan had indeed been agreed between Stuart and Simon, one would ordinarily have expected a remonstration by Stuart, as creditor, in response to the cessation of the promised interest

payments. In the event, nothing happened. A prolonged period of silence and inaction in the face of such a flagrant breach is inconsistent with the notion of a binding legal commitment to pay monthly interest. That circumstance "strengthened and confirmed" the presumption in favour of donation (*Macalister's Trustees*, 220, per the Lord Ordinary).

[45] Lastly, in the eleventh place, a recurring theme of the pursuers' evidence was that Stuart and Irene could not afford to gift £70,000 to Simon in January 2009. In law, it is correct that the amount of the alleged gift, as a proportion of the alleged donor's assets, is a relevant criterion in determining whether there was an *animus donandi*. A disposal representing the whole or a substantial part of the value of the donor's estate is less likely to be viewed as affordable, and therefore less likely to be sustained as a gift. In contrast, by way of illustration, in *Malcolm* v *Campbell, supra,* a payment representing just one-fifth of the alleged donor's estate was sustained as an affordable gift. In the present case, there is simply no complete or reliable evidence to establish the full value of Stuart's assets and liabilities, or of his actual or projected income and expenditure, as at January 2009. The evidential position was opaque. Much was made of an equity release loan mortgaged over Stuart and Irene's house in Edinburgh a year or so earlier, but there was no vouched evidence from the pursuers of the value of the house, or the total secured debt on the house, or of the instalment repayment liabilities, or of sources of income to fund the borrowing. In contrast, there was undisputed evidence that Stuart had received substantial payments in excess of £600,000 from the sale of family farmland in 2008/2009, much of which was invested on the stock market, some of which was gifted to family members. On the patchy evidence available, an alleged gift of £70,000 to Simon appeared to represent far less than one-fifth of (at least some of) Stuart's available assets at that time. Therefore, drawing a broad analogy with *Malcolm,* the disputed payment to Simon cannot be said to represent a

dissipation of the whole, or substantially the whole, of his father's estate at that date. The pursuers thereby failed to establish the non-affordability of the presumed gift.

[46] For all these reasons, I concluded that the pursuers have failed to discharge the onus upon them of rebutting the presumption that the Disputed 2009 Payment was a gift to Simon made *ex pietate*.

Two further difficulties

[47] Unfortunately, the pursuers' difficulties do not end there. First, if I am wrong in characterising this disputed payment as a gift, and if instead it were properly characterised as a loan, I would have concluded on the evidence that the sum was repayable only when Simon was financially able to do so. This was the testimony of both Irene and Jonathan. It is also a conclusion that accords more closely perhaps with their description of Stuart's character and relationship with Simon. But that raises a separate problem for the pursuers. There was no evidence that Simon was ever financially able to repay the loan (or that his executry estate can do so now). On that basis, *esto* the Disputed 2009 Payment was a loan, the pursuers have failed to establish the purification of an essential pre-condition attached to its repayment.

[48] Second, two pursuers sue for repayment of this alleged loan. However, on the evidence, the second pursuer (Simon's mother) had nothing to do with the transaction. In her affidavit dated 25 January 2024 (para 3), she states that it was Stuart who agreed to loan the sum to Simon. Irene subsequently conceded in cross-examination that she was not privy to the discussions. There are no averments, and there was no evidence, to the effect that Stuart acted as agent for his spouse. It is correct that the £70,000 derived from the parents' joint bank account, but that is not sufficient to impute agency. And, of course, in her letter

dated 6 December 2022 to Simon's former solicitor, Irene stated that she had been "unaware" of the alleged loan "until last year". The upshot is that, even if a loan were to be constituted, Irene (the second pursuer) would not be a party to it. The action, so far as directed against the defender at the instance of the second pursuer, would fall to be disposed of by way of absolvitor.

[49] To be clear, I have sympathy for Jonathan's position. Simon, with little apparent effort or gratitude, has benefited handsomely from his father's kindness over many years, while Jonathan, a dutiful and caring son, has received nothing of equivalent monetary value. The story has echoes of the parable of the prodigal son in St. Luke's Gospel (15:11-32). In the parable, a father allowed his youngest son to take and squander his inheritance but still welcomed him back with open arms and a feast. The elder brother, who for years had worked diligently in his father's fields, was aggrieved at the perceived inequity. However, as in the parable, Stuart, the father, was entitled to do with his money whatever he wished. It was up to him if he chose to gift it to a wastrel son. Like his biblical counterpart, Jonathan must address his grievance, if he has one, to his father for the choices he made with his own money. He has no legitimate complaint or remedy against his younger sibling, who merely enjoyed the benefit of his father's boundless generosity and grace.