



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 4
A136/18

Lord President
Lord Menzies
Lord Glennie

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion by

MAVIS ANNE CAMPBELL'S EXECUTRIX

Pursuer and Reclaimer

against

JAMES CAMPBELL'S EXECUTORS

Defenders and Respondents

Pursuer and Reclaimer: Johnston QC, BTO Solicitors LLP
Defenders and Respondents: MacColl QC; Thorntons Law LLP

28 January 2020

Introduction

[1] This is a reclaiming motion against the Lord Ordinary's interlocutor dated 26 June 2019 dismissing the pursuer's action on the basis that she had not pled a relevant case of fraud against the late James Campbell. Mr Campbell had acquired the sole title, rather than

a joint title with his late wife, namely Mavis Campbell, to the subjects which had been their former matrimonial home.

[2] The conclusions are, first, for a declarator that the disposition of the subjects by Annie McLean to Mr Campbell is “void” (there is no conclusion for reduction). Secondly, and in the alternative, the pursuer seeks “to ordain” the defenders to convey the subjects to the pursuer’s daughter. Thirdly, as an alternative to both the first and second conclusions, the pursuer seeks payment from the defenders of £200,000; that sum representing one-half of the value of the subjects. This conclusion is intended to encompass an additional claim for recompense, which is based upon unjustified enrichment. This claim was introduced by amendment after the Lord Ordinary’s decision.

[3] The issues, as focused at the hearing of the reclaiming motion, are whether relevant claims of fraud and unjustified enrichment have been pled and whether, in any event, these claims have prescribed.

The pursuer’s averments

[4] The pursuer is the daughter of the late James and Mavis Campbell. Mr and Mrs Campbell were married in 1958, and remained so up until the time of Mrs Campbell’s death on 23 June 2016. The pursuer sues as Mrs Campbell’s executrix under her will dated 13 May 2016. She previously held a power of attorney on behalf of Mrs Campbell.

Mr Campbell died on 5 September 2018, after the present action had been raised. The defenders, who are the other daughter and the son of Mr and Mrs Campbell, have been sisted as his executors. The dispute concerns the circumstances in which the subjects, which are located in Carnoustie, came to be disposed by their then owner, Mrs McLean, solely to Mr Campbell on 30 December 1981.

[5] The pursuer's pleadings are of extreme length (39 articles of condescence). Her averments are, in substantial part, repetitive, irrelevant, discursive, argumentative and occasionally contradictory. The ultimate question, however, is whether they are entirely irrelevant; applying the test in *Jamieson v Jamieson* 1952 SC (HL) 44 (Lord Normand at 50). In order to provide an answer, the following is an attempt to summarise the essence of the pursuer's case.

[6] The pursuer initially avers (art 2) in relatively straightforward terms, albeit as a response to the defenders' answers, that:

"Mrs McLean's act of executing a disposition conveying [the subjects] to [Mr Campbell] was a unilateral and material error on her part. Her error was induced by [Mr Campbell and his solicitor]. They misrepresented to Mrs McLean that title to [the subjects] was to be taken in the sole name of [Mr Campbell], when they knew the true position to be that Mrs Campbell expected to be made infert in a one half pro indiviso share... They did nothing... to correct Mrs McLean's misapprehension. They instead accepted delivery of, and proceeded to record, a signed disposition in the sole name of [Mr Campbell]. [Mr Campbell and his solicitor] could have been under no illusion that such an outcome was not consistent with Mrs Campbell's instructions and expectations. They did not take any steps... to alert Mrs Campbell. Had they done so, she would have instructed [Mr Campbell's solicitor] to ensure that title was taken in joint names at the time of the purchase or that the title was rectified. [Mr Campbell and his solicitor] knew that a purchase in joint names was consistent with the terms of the Standard Security over [the subjects] already granted by both Mr & Mrs Campbell and consistent also with the terms of a personal bond already granted by Mr & Mrs Campbell to Royal Bank of Scotland dated 4th November [1981]... The disposition is accordingly void".

[7] There is a clear averment (art 5) that the solicitor was instructed by Mr Campbell, who made all the decisions of financial significance in the marriage. There is a later averment (art 9) that Mrs Campbell was not a client of the solicitor and that the solicitor never considered her to be a client. Nevertheless, the pursuer avers (art 5) that Mrs Campbell "understood" the solicitor "to be acting for both herself and [Mr Campbell]". Mrs Campbell had been led into the belief that the solicitor was acting in both her interests

and those of Mr Campbell. She was encouraged to do so given the terms of the standard security, relative to a loan taken out in Mr Campbell's name, which had been signed by both Mr and Mrs Campbell on 4 November 1981.

[8] At an early stage, the Bank had raised a concern about the inconsistency, between the title and the standard security (and relative loan documentation), with the solicitor. They were concerned to obtain the consent of Mr Campbell to transfer the title into joint names. On 27 September 1984 the solicitor wrote to the Bank assuring them that, in practical terms, the discrepancy did not matter, so far as the Bank's interests were concerned. The letter suggested that, subject to Mr Campbell's agreement, the title could be placed in joint names and a new standard security drawn up, but that would incur unnecessary expense. The matter was not pressed.

[9] The pursuer states that the defender's original position on record had been that Mr Campbell had not known that the title had not been taken in joint names. This is, incidentally, denied. Later in the averments (art 15), it is said that a letter dated 15 March 2018 from Mr Campbell's new law agents recorded that he had believed that the title had been in joint names ("and the survivor"). Mr Campbell had discovered that this was not the case only upon Mrs Campbell's death. The pursuer later avers (art 15), as a double alternative proposition, that the only reasons for the title being disposed into Mr Campbell's sole name "are solicitor error or fraud". Thus,

"It is reasonable to infer that... Mr Campbell's words and actions... led Mrs Campbell to share [Mr Campbell's] professed understanding of the title."

[10] Mrs Campbell did not know that "her name had been excluded" from the title to the subjects. She had believed that the title was in joint names "and their survivor" (art 10).

This was consistent not only with the joint signing of the standard security, but also the title to the Campbells' previous house in Monifeith. The pursuer continues (art 11):

“In reliance upon the false premise presented to her by [Mr Campbell] that the ... disposition would be granted in... joint names... Mrs Campbell took certain steps to her prejudice”.

These included merging her bank accounts with Mr Campbell, signing the loan documentation, including the standard security, and disposing of her share in the Monifeith property.

[11] The pursuer's averments then divert (art 12) to the state of the marriage. It had not been a happy one. From the early 1970s, Mrs Campbell had received medication for stress and anxiety. Mr Campbell was “exacting in his requirements”. He frequently criticised Mrs Campbell in front of the family and others. He regularly reminded the family of his superior earning power. He was disparaging in his comments about Mrs Campbell and unappreciative of her efforts. Mrs Campbell told family and friends that she saw her contribution to the family assets as equal to that of her husband. Her joint interest in the subjects was a recognition of this. Mrs Campbell had worked full time as a teacher and contributed to the household finances and the renovation of the subjects from 1981 to 1985. She continued to invest in the subjects, including the installation of a new boiler, in 2016. Much later on in the record (art 17), it is said that there was a cessation of marital relations following Mr Campbell's infatuation with a named person. Mr Campbell had moved out of the subjects in early 2016. Upon his intimation of an intention to return, Mrs Campbell had herself moved out in about March (art 16) or May 2016 (art 21). There are further averments about Mr Campbell's controlling or manipulative nature, his spending of redundancy money on a car whilst claiming statutory sick pay and his general bad behaviour, at least in relation to financial matters, during these months.

[12] The pursuer's unjustified enrichment claim is phrased (art 15) as being based on two propositions (neither of which is accepted), notably that Mr Campbell had understood that the title was to be in joint names and that instructions to the solicitor had reflected this understanding. Upon this basis, it is said that "the basis for" Mrs Campbell's expectation of a joint title "is made out". When, shortly before Mrs Campbell's death in 2016, Mr Campbell's agents had proposed a sale of the subjects, they had commented that an action for division and sale would not be necessary. This had induced Mrs Campbell to refrain from consulting her own solicitor:

"with a view to seek financial provision through the courts. Had she done so, Mrs Campbell would have discovered immediately Mr Campbell owned [the subjects]. She would have sought a payment representing half the value [of the subjects]. [Mr Campbell's] actions dissuaded Mrs Campbell from seeking legal advice and litigating for financial provision. Those actions have unjustly enriched his estate to the value of a one half share... The estate of Mr Campbell has been enriched at the expense of the estate of Mrs Campbell. There is no legal justification for the enrichment. It would be equitable to compel the Defenders to redress the enrichment".

[13] The averments on unjustified enrichment continue (art 16) on a different tack (albeit one not ultimately insisted upon). Mrs Campbell had "reposed her trust" in Mr Campbell in the purchase of the subjects. It had been Mrs Campbell who had suggested to Mr Campbell that he engage the particular solicitor. She had trusted Mr Campbell to deal with him and "to act in her best interests". She understood that the solicitor was acting for both herself and Mr Campbell:

"She trusted [Mr Campbell] to procure...a title in joint names. The defender breached that trust. He took title... in his sole name. He did not tell Mrs Campbell... [By] ... 1984 [Mr Campbell] knew or ought to have known that there was a problem with [the] title...and ought to have disclosed it to Mrs Campbell."

Given the correspondence with the Bank (*supra*), Mr Campbell had been aware of the title problem. If the letter to the Bank from the solicitor had been written without Mr Campbell's

instructions, this constituted a breach of the solicitor's fiduciary duty towards his clients.

Since Mr Campbell knew that he was wholly infert in the subjects, but had remained silent about this, he:

“only ever held Mrs Campbell's one-half pro indiviso interest in the subjects ... in a fiduciary capacity for the benefit of Mrs Campbell. ...[He] was a 'trustee' within the meaning of the Prescription and Limitation (Scotland) Act 1973.”

On this basis (1973 Act Sch 3 e (ii) or (iii)), Mr Campbell had an imprescribable obligation to convey one half share in the subjects to Mrs Campbell. Mr Campbell had, in breach of his obligations to Mrs Campbell “to make reparation or restitution” in respect of a fraudulent breach of trust, to make “furthcoming” of trust property, or to “make good” the value of the property, “appropriated” the subjects.

[14] The defenders counter (ans 16) that:

“... esto ... Mr Campbell ... would otherwise be liable to Mrs Campbell ... in damages ... title having been taken in [Mr Campbell's name] ... and recorded ... more than twenty years before the commencement of this action any right to claim damages ... has ... been extinguished by operation of prescription”.

[15] In relation to the second conclusion, the pursuer avers (art 22) that Mrs Campbell had told the pursuer that she had left her estate equally between the pursuer and her (the pursuer's) daughter:

“The Pursuer asked Mrs Campbell whether she would ultimately wish the Pursuer to take whatever action she thought appropriate to secure her interest in [the subjects] so that it would benefit [the pursuer's daughter]. Mrs Campbell responded that she had complete trust in the Pursuer.”

There are detailed averments about family events occurring shortly before Mrs Campbell's death. These culminate in a statement (art 22) that the pursuer had decided to act as she saw fit to ensure that Mrs Campbell's share in the subjects was disposed of in accordance with Mrs Campbell's wishes. Mrs Campbell had instructed solicitors to realise the value of her

interest in the subjects. Various payments had already been made to the defenders, as individuals. Mrs Campbell had told the pursuer that she felt that she and Mr Campbell had done enough to secure property for the defenders. She thought that the pursuer's daughter should inherit her (Mrs Campbell's) interest in the subjects. The pursuer had telephoned Mrs Campbell's agents and instructed them to transfer Mrs Campbell's share in the subjects forthwith to the pursuer's daughter. She had been advised that this was not possible as the title was in Mr Campbell's name only.

[16] Article 25 returns to a contention that the disposition had been granted "pursuant to a fraud" perpetrated on Mrs Campbell by Mr Campbell. It refers to an "agreement" between Mr and Mrs Campbell that title to the house would be held in joint names.

Mrs Campbell had been entitled to call upon "the pursuer" (*sic*):

"to fulfil his part of the contract. The disposition is void by reason of Mrs McLean's signature being adhibited whilst she was under essential error as to the identity of the party intended to become infet. The essential error was induced by the pursuer's (*sic*) and [Mr Campbell's solicitor's] misrepresentations. The disposition is void because Mrs McLean's essential error was coupled with aggravating conduct in the form of steps omitted to be taken by [Mr Campbell and his solicitor]...".

It is believed and averred (art 28) that Mr Campbell induced Mrs Campbell to sign the standard security in order to persuade her that the subjects were in joint names. It was "not plausible" to assert that this had occurred through the solicitor's negligence or error. A further set of averments (art 29) relates to the pursuer and Mrs Campbell going to the solicitor's office in July 1982, when the solicitor presented a document to Mrs Campbell to sign, without explaining its import.

[17] Article 32 of condescendence contains the following:

"In all the circumstances the taking of title to [the subjects] in [Mr Campbell's] sole name was effected by [Mr Campbell's] fraud with assistance from solicitors who were complicit in a fiction established by [Mr Campbell] whereby, already living in the matrimonial home, [the subjects were] to be purchased by [Mr Campbell] in his

sole name for reasons other than occupation by [Mr Campbell] and Mrs Campbell as their matrimonial home. The subsequent ongoing concealment of the true title position from Mrs Campbell and the pursuer was also a fraud. The components of fraud founded upon... comprise (i) Mr Campbell's concealment of his deliberate omission for Mrs Campbell's name from the application to the Bank for a mortgage to purchase [the subjects]; (ii) [Mr Campbell's] concealment of the omission of Mrs Campbell's name from the disposition...; (iii) [Mr Campbell's] concealment from Mrs Campbell of the particular purpose of the meeting between [the solicitor] and Mrs Campbell at [the solicitor's office] in or around July 1982; (iv) the inducement of Mrs Campbell by [Mr Campbell] to sign the standard security relating to the title... in the belief that she would be the owner of a one half pro indiviso share of the property; (v) Mr Campbell's failure thereafter to disclose the actual title position to Mrs Campbell; (vi) the subsequent recording of the disposition... in the sole name of [Mr Campbell]; and (vii) [Mr Campbell's] insistence through his solicitors when he and Mrs Campbell separated that an action of division and sale would not be necessary... The disposition... was affected by an essential error arising from the unilateral fraudulent misrepresentation of [Mr Campbell] and accordingly is void".

[18] The pursuer's first plea-in-law is that the declarator first concluded for should be granted on the basis that the disposition in the sole name of Mr Campbell was procured by fraud. The second plea (no 3) is as follows:

"Alternatively the fraud perpetrated upon... Mrs Campbell having denied her title to her one half pro indiviso share of [the subjects] and having prevented her from transferring her interest in [the subjects] to [the pursuer's daughter] contrary to Mrs Campbell's expressed wishes, [Mr Campbell] should be ordained to execute the disposition...".

The third plea (no 4) is expressed in terms of the sum fourth (*sic*) concluded for being a reasonable pre-estimate of loss caused by the fraud. The final plea (no 6) is:

"[Mr] Campbell and his estate standing unjustly enriched to the extent of the value of a one half share of [the subjects] and it being equitable in the circumstances to do so, decree should be granted for payment as third concluded for."

[19] There is no plea of prescription from the defenders. However, the defenders do have a general plea to the relevancy, together with a somewhat peculiar one which proposes "dismissal" of the pursuer's sixth plea-in-law and, at the same time, the exclusion of the supporting averments from probation.

Lord Ordinary's reasons

[20] The Lord Ordinary sustained the defenders' plea to the relevancy of the fraud claim. He recorded the pursuer's submission as being that the case involved "an extremely simple fraud", whereby Mr Campbell tricked Mrs Campbell into signing the standard security, whereby she took certain steps to transfer her funds into joint accounts. Mr Campbell's actions were, it was argued, to be looked at as instructing a case of fraud "in the special context of a family situation". Such a case was, on that basis, capable of surviving a prescription challenge.

[21] The Lord Ordinary held that the claim was fundamentally flawed. Its genesis was a retrospective view of events from Mrs Campbell's perspective and, once the pursuer had realised that the title was not in joint names, an attempt to piece together a case of fraud. For the conveyance to be void because of fraud, it was the granter of the disposition who had to have been the subject of a "mechanism (*sic*) or contrivance to deceive". The pursuer was not offering to prove that the disponent had been deceived. There was never an obligation upon Mrs McLean to disponent a one-half share to Mrs Campbell. The assertion of a unilateral and material error on Mrs McLean's part was not enough. She, as the disponent, had complied with her own obligations under the missives, for which she had received payment. Even if she had a different understanding of what had been happening on the other side of the transaction, this would take the pursuer nowhere.

[22] Although it was averred that Mr Campbell and his solicitor could have been under no illusion that the outcome was not consistent with Mrs Campbell's instructions or expectations, these words "slid off a cliff", ending when specification would be anticipated; for example, of the content, context and form of any such instructions or expectations.

[23] The second conclusion was now being sought on the basis that the fraud claim failed; but the pursuer's case was confined to fraud. There was no foundation for the second conclusion. If Mr Campbell had held a valid title to the subjects, there could be no basis upon which to ordain the conveyance proposed. The court could not order the transfer of property to the pursuer's daughter, when she was not a party to the action.

[24] The third conclusion failed due to the irrelevancy of the fraud case, and also because no loss had been adequately averred. In any event, sections 7 and 8 of the 1973 Act, which provided for the 20-year long negative prescription, would extinguish any such claim, which was essentially one for damages.

Submissions

Pursuer

[25] In her written note of argument, the pursuer prefaced matters with some aspirational contentions, not all of which are reflected in the pleadings. She explains that her motivation for bringing the action is to test the law. The original case had been based on a single proposition; that Mr Campbell had deceived his wife in 1981, when he had instructed his solicitor to record title in his sole name. This deception had been sustained until it had been discovered very shortly before Mrs Campbell's death. It was equitable that the law should grant relief from longstanding dishonesty resulting in enrichment. Relief from the effects of prescription should be available to a party who has been the subject of a coercive relationship. Fifty eight years of marriage to a controlling oppressive husband had prevented Mrs Campbell from managing her own affairs or seeking legal advice.

[26] In marked contrast to the pleadings, the pursuer's submissions at the hearing were clear and focused. They were directed towards supporting the cases based on fraud and

unjustified enrichment and attacking the claim of prescription. No arguments were to be advanced by the pursuer either in support of the first conclusion or on the basis of a breach of fiduciary duty. It was accepted that Mrs Campbell could not have sought recourse against Mrs McLean, since her obligations would have been defined by the missives. The only remedy depended upon fraud or unjustified enrichment; the value of that enrichment being the same as the pursuer's loss from the fraud. As a generality, the Lord Ordinary had erred in his application of the test in *Jamieson v Jamieson (supra)*. His views on the genesis of the action had transgressed into matters of the weight or significance of evidence. There had been sufficient specification on Mrs Campbell's expectations or instructions to the effect that the title was to be taken in joint names. The averments of loss were clear, given that it amounted to the value of half of the house.

[27] The case was, first, one of fraudulent concealment, as set out in the summary averred in article 32 of condescence (*supra*). It was one of inference (*Shedden v Patrick* (1852) 14 D 721 at 727). The deception had been continuing and was only discovered in 2016. The remedy was a disposition of one half of the subjects or damages representing the value of a half share. The Lord Ordinary ought to have given greater weight to the terms of the letter to the Bank (*supra*). There were averments about the inducement to Mrs Campbell to sign the standard security in the belief that she was to own one half of the house. There were averments about concealment.

[28] A relevant case of unjustified enrichment had been pled (*Shilliday v Smith* 1998 SC 725 at 727-8; *Transco v Glasgow City Council* 2005 SLT 958). Payment of the sum by which Mr Campbell had been unjustifiably enriched was sought (plea-in-law 6).

[29] The obligations upon which the pursuer founded had not prescribed. It was accepted that the prescriptive period had started to run in 1983, when the title was recorded.

It was therefore necessary to look at the five years under section 6 of the 1973 Act and the twenty years under section 7. Although the obligation would normally have prescribed after five years (1973 Act s 6) or 20 years (*ibid* s 7), regard had to be had to the other provisions of the 1973 Act. In terms of section 11(1), Mr Campbell's concealment was a continuing act, neglect or default, which continued after the loss had been sustained in 1983. The short negative prescription started to run only from the date when the act, neglect or default ceased (ie in June 2016). In any event, in terms of section 6(4), any period during which Mrs Campbell had been induced by fraud not to make a claim for the one half share required to be discounted (*Caledonian Railway Co v Chisholm* (1886) 13 R 773 at 776; *Rowan Timber Supplies (Scotland) v Scottish Water Business Stream* [2011] CSIH 26 at paras [8] and [10]); *BP Exploration Operating Co v Chevron Transport (Scotland)* 2002 SC (HL) 19 at paras [107]-[108]). This applied equally to the long negative prescription (1973 Act s 11(2)).

[30] The five year prescription was not applicable because the obligation, which was one to grant a disposition, related to land (1973 Sch 1 para 2(e)). Only the twenty year prescription applied (*Barratt Scotland v Keith* 1993 SC 142 at 154). The plea of *non valens agere* (not able to act) applied to the long negative prescription on the basis of Mrs Campbell's fear arising from spousal coercion, which prevented her seeking independent legal advice. The plea was an equitable one to which the court could give effect in appropriate circumstances (Scottish Law Commission Report (No 15, 1970) *Reform of the Law Relating to Prescription and Limitation of Actions* at para 33). Even if Mrs Campbell had known that she could have claimed one half of the subjects, she would have been unable to do so. This was a continuing, and not a temporary, state of affairs. The plea should recognise the developments in the criminal law which were encapsulated in the Domestic Abuse (Scotland) Act 2018. It should only be determined after proof. The loss sought was not only

calculable by reference to the loss of the one half share, but also to the sums expended by Mrs Campbell on the subjects.

[31] The pursuer did not raise the argument, which had appeared in the note of argument, that prescription could not be considered in the absence of a plea-in-law to that effect.

Defenders

[32] The defenders submitted that the second conclusion, which sought the conveyance of half of the subjects to a third party, was inept. If the third party, who was named in the conclusion, had such a right, it was for her alone to seek to enforce it.

[33] In relation to the remaining monetary conclusion, the pursuer's underlying complaint was principally that of breach of contract; that Mrs Campbell had had an entitlement in law to receive a disposition of one half of the subjects. It was not clear in the pleadings whom the pursuer was saying had the obligation to convey; whether it was Mrs McLean or Mr Campbell. It was not averred that Mrs McLean had been the victim of a machination or contrivance to deceive, whether induced by Mr Campbell or otherwise. An expectation on the part of a spouse of a disponent did not give rise to any obligation on the disponent. At its highest, the pursuer's case was that Mr Campbell and his solicitor had deceived Mrs Campbell into believing that the title would be in joint names, but that would not void the disposition. If it did, the title would revert to Mrs McLean.

[34] Fraud and unjustified enrichment did not sit easily together. If there had been a fraud, the action rested on the law of delict, with the relevant acts occurring prior to the 1981 disposition or, at the latest, the date upon which the title was registered in 1983. Loss would occur then, irrespective of any regime of matrimonial property. The latter did not involve

any real right. It was not known what the fraud consisted of. There were no specific averments on this. Mrs Campbell may have had an expectation, and what had happened may have been a bad thing. Where, however, was the legal entitlement? What had occurred fell short of constituting a legal wrong which would sound in damages. If there was no contract or undertaking, the pursuer had to set out the legal basis for any claim of fraud (*Shedden v Patrick (supra)*; *Thomson & Co v Pattison & Elder* (1895) 22 R 432). What was the machination or contrivance to deceive? It seemed to be accepted that this could all have been just a conveyancing error.

[35] Even if fraud had been relevantly pled, there would be no loss for two reasons. First, Mrs Campbell had not sought to evacuate the survivorship destination. Title to the whole subjects would have vested in Mr Campbell in any event. Secondly, the pursuer maintains that Mrs Campbell would have gifted her share to the pursuer's daughter.

[36] If there had been a fraud, the loss had occurred in 1981 or 1983. There was no continuing loss. Section 11(2) of the 1973 Act did not apply. There had been no ongoing duty to disclose. Nothing had happened thereafter until 2016, but by that time the twenty year prescription had applied. It was not necessary to address the short five year prescription. The Lord Ordinary had not done so. In the absence of a claim within twenty years of 1983 the claim had been extinguished.

[37] The plea of *non valens agere* was no longer available. Since the period only ran once an obligation became enforceable, there was no need for any equitable adjustment of the statutory terms (Johnston: *Prescription and Limitation* (2nd ed) paras 7.18-19). The 1973 Act set out a comprehensive and clear scheme, which included circumstances, such as non-age or legal disability, in which a prescriptive period would not run. Even before the 1973 Act, it had been recognised that the plea had to be given a restricted application (*A v Murray* 2004

SLT 1273, reviewing the authorities at para [24] *et seq*, esp para [43] citing *Pettigrew v Harton* 1956 SC 67 at 72 and [54]). In any event, a fear arising from spousal coercion had not been averred. It was not said that Mrs Campbell had been prevented from seeking legal advice.

[38] The principle which permitted recompense for unjustified enrichment existed in order to fill any lacuna in the ordinary law. Where there was a case either of breach of contract or fraud, there was no room for recompense. In any event, any enrichment occurred by 1983 and the long negative prescription had extinguished any remedy on this ground. The loss claimed was in respect of the loss of the share in the house; not any money expended upon it.

Decision

Relevancy

[39] The pursuer's case, as first set out on record, is one of error on Mrs McLean's part, which is said to have been induced by representations made by Mr Campbell and his solicitor. It was recognised at the hearing that this was irrelevant. First, stating to Mrs McLean that the title was to be taken in Mr Campbell's name was not a misrepresentation, if that was in fact what was to be done. Secondly, even if it was, Mrs McLean had suffered no loss which could ground any action. Her obligation in relation to the correct disponee would have been defined in the missives. These are not produced, but there is no reason to suppose that Mrs McLean did anything other than comply with her contract with Mr Campbell and that she was duly paid for the subjects. The first conclusion was always inept, especially in the absence of a sister conclusion for reduction. The latter decree is what would be bound to follow as a result of the disposition being void. The effect

would have been to return the transaction to the stage of the missives. None of this could be achieved in an action which did not involve Mrs McLean.

[40] The second, and alternative, conclusion, although not in customary form, seeks a conveyance of one-half of the subjects by the defenders to the pursuer's daughter. Although there are situations in which a pursuer can seek payment or delivery to a third party, such as where trust or company funds or assets are to be restored to that trust or company, this is not such a case. If it transpired that Mrs Campbell had been defrauded of her half-share in the subjects and if the remedy for the fraud was to recover the share *in forma specifica*, which is highly doubtful, the conveyance ordered could only be in favour of the wronged party, namely Mrs Campbell and now the pursuer as her executrix. The second conclusion is also inept in these circumstances.

[41] The search then is for a relevant case of, as it was put in submissions, "fraudulent concealment". Fraud is a "machination or contrivance to deceive" (Bell: *Principles* (10th ed) para 13). It normally requires a false representation and a practical result, but these requirements may not be applied with strict rigour when the party affected is facile, a child or where there is a fiduciary relationship (see generally Glegg: *Reparation* (4th ed) 227 and 233). As was correctly conceded at the hearing, in modern times there is no legal fiduciary relationship brought about by marriage. In this case, it is not, at least now, said that there was any representation by Mr Campbell to his wife that he would ensure that the title was in joint names. There were shades of such a suggestion in the pleadings, notably the averment (*supra*, art 11) that there was a "false premise presented to" Mrs Campbell by her husband, but this is entirely lacking in specification and was not founded upon at the hearing. Similarly there are averments (*supra*, art 25) about there having been an agreement between Mr and Mrs Campbell that the house would be in joint names. That could have instructed

an action for breach of contract, but that too is wholly inspecific and was not founded upon at the hearing.

[42] The pursuer ultimately relied on the terms of article 32 of condescence which refer to Mr Campbell's concealment of the "omission" of Mrs Campbell's name from the loan documentation and the disposition whilst arranging for her to sign the standard security. This boils down to a contention that Mr Campbell simply did not tell his wife that he was taking title in his own name. There is no relevant averment of any agreement or undertaking that he would arrange for the title to be in joint names, or even any instruction to him or his solicitor by Mrs Campbell that this is what ought to happen. If fraud had occurred, it required, so far as the result is concerned, to have occurred before the disposition was signed and delivered in 1981. There are insufficient averments of any such fraud. Concealment may be sufficient in certain circumstances to found a case of fraud. That normally requires the existence of a duty, springing from a fiduciary relationship or similar situation, to disclose a material fact. No such duty, arising prior to the signing of the disposition, is averred.

[43] The pursuer's case, even pared down to its essentials, is irrelevant on this basis.

Prescription

[44] If any loss occurred to the pursuer through the concealment by Mr Campbell of the fact that he was taking title in his name alone, it occurred when the disposition was signed and delivered to him in 1981 (or at the latest when he registered the disposition in 1983). Equally, he was enriched at that time. Any obligation arising from his fraud or a duty to recompense the pursuer for unjustified enrichment became enforceable then. Section 7 of the Prescription and Limitation (Scotland) Act 1973 provides that obligations of this nature

are subject to the long negative prescription of 20 years from that date. These obligations do not fall within those deemed imprescriptible (*ibid*, sch 3). The fraudulent act, or that giving rise to a claim for recompense, took place prior to the occurrence of the loss. Section 11(2) of the 1973 Act, which extends the commencement of the prescriptive period to the point when a continuing act ceases to cause loss, is of no application.

[45] The plea of *non valens agere* was available at common law to prevent prescription running when a pursuer was unable to sue, or until the claim became enforceable. For the reasons explored in Johnston: *Prescription and Limitation* (2nd ed at para 7.22 *et seq* and see *A v Murray* 2004 SLT 1272, Coutts QC at para [56]) it may be that this plea is still open in a situation in which a pursuer has been prevented, whether physically or by some other conduct sufficient to overcome will, from pursuing a claim. However, the circumstances advanced on record in this case fall far short of such a situation. The pursuer's averments point to an unhappy marriage and a bullying husband, but it is not said that Mrs Campbell was rendered physically or mentally incapable of (as distinct from being dissuaded from) raising an action as a result of Mr Campbell's behaviour.

[46] It would have been preferable if a specific plea-in-law relative to prescription had been tendered. However, the matter was raised in the defenders' averments and it can be dealt with under the general relevancy plea (*Dunlop v McGowans* 1979 SC 22, LJC (Wheatley) at 34).

[46] The court will refuse the reclaiming motion and adhere to the interlocutor of the Lord Ordinary dated 26 June 2019.