SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT DUNDEE

[2019] SC DUN 2

A101/14

JUDGMENT OF SHERIFF SG COLLINS QC

in the cause

CAROLINE LYLE

Pursuer

against

ROSELINE WEBSTER & BRIAN WEBSTER

Defenders

Pursuer: Kelly, Advocate; Rollos, Solicitors
Defenders: Fordyce, Advocate; RSB Lindsays, Solicitors

Dundee, 12 February 2018

The sheriff, having resumed consideration of the cause,

(1) sustains the first and eighth pleas in law for the defenders to the extent of excluding from probation the following averments:

a. in Article 2 of Condescendence (i) on the third line of the third page of the Record, all of the sentence beginning with the words "As hereinafter more fully condescended upon, by at least around 2009…"; (ii) on the sixteenth line of the sixth page, in the sentence beginning "However, because of her…", the words "because of her excessively compliant nature"; (iii) on the seventeenth line of the sixth page, all of the sentence beginning with the words "She has been clinically assessed…" together with all of the following sentence ending with the words "more than 2 standard deviations higher";

and (iv) on the seventh page, in the final sentence of the Article, the words "Such was the influence of the defenders over the pursuer that";

b. on the twenty fifth page of the Record, all of the first sentence of Article 8;

c. in Article 9, (i) on the thirty first page of the Record, the whole of the first sentence of the Article beginning with the words "On or around 31st August 2010…"; (ii) on the thirty second page of the Record, on the tenth line, from the beginning of the sentence beginning with the words "The defenders have breached…" to and including the words in the thirteenth line "…between the Pursuer and the Defenders, which is denied,";

d. in Article 11, on the thirty sixth page of the Record, (i) on the fourth line, all of the sentence beginning with the words "As hereinbefore condescended upon the Pursuer is significantly…" (ii) on the sixth line, the word "Consequently"; (iii) on the seventh line, all of the sentence beginning with the words "The Defenders took advantage…";

e. in Article 12, on the thirty ninth page of the Record, on the eighteenth line, in the sentence beginning with the words "They took advantage of…", the words "the Pursuer's suggestible and compliant nature, the position of trust in which the Pursuer held them and";

and

f. by deleting the sixth and seventh pleas in law for the pursuer, and the word "alternatively" in the first line of her eighth plea in law.

(2) sustains the first plea in law for the pursuer to the extent of excluding from probation the following averments:

a. In Answer 2, (i) on the twenty third line of the ninth page of the Record, all of the sentence beginning with the words "Not known and not admitted that the Pursuer has been clinically assessed…"; (ii) on the seventh line of the tenth page, all of the sentence beginning with the words "Not known and not admitted that by at least around 2009…"; (iii) on the twelfth line of the fifteenth page, all of the sentence beginning with the words "There was no agreement between the parties…"; (iv) on the twenty first line of the fifteenth page, all of the sentence beginning with the words "She was or ought to have been aware…" together with all of the following sentence ending with the words "…to that effect (which is denied)"; (v) on the seventh line of the sixteenth page, all of the sentence beginning with the words "The pursuer was emotionally well…" together with the whole of the following sentence ending with the words "…incorporated herein *brevitatis causa*";

b. In Answer 4, on the nineteenth page of the Record, in the ninth line, from the beginning of the sentence beginning with the words "At all times, the pursuer was aware…" to the end of the Answer;

c. In Answer 11, (i) on the thirty seventh page of the Record, in the sixth line, all of the sentence beginning with the words "Not known and not admitted that the Pursuer is significantly…"; (ii) on the thirty seventh page, in the thirtieth line, all of the sentence beginning with the words "The pursuer was emotionally well…" together with all of the three following sentences, ending with the words "…Dr Stewart aforesaid"; (iii) on the thirty eighth page, on the thirtieth line, all of the sentence beginning with the words "*Separatim*, the Pursuer is personally barred…"; (iv) on the thirty ninth page,

on the fifth line, all of the sentence beginning with the words "In the circumstances condescended upon, the Pursuer is not entitled…";

and

d. by deleting, from the defenders' seventh plea in law, the words "*et separatim* the Pursuer by her actings being personally barred from seeking repayment".

(3) *quoad ultra* assigns a proof before answer on all remaining averments and pleas in law, on a date to be afterwards fixed;

(4) certifies the cause as suitable for the instruction of junior counsel *quoad* preparation for and appearance at the debate on 16 November 2017; and reserves all questions of expenses meantime.

NOTE:

Background

[1] This case concerns claims for payment arising from the circumstances in which the pursuer came to live with the defenders in their family home between around November 2011 and September 2012. Over the three years that the case has been in court the pleadings have been repeatedly amended, and have got somewhat out of control. The Record now runs to forty six pages. To some extent this reflects the difficulties in analysing and pleading financial claims based on non-commercial agreements arising out of cohabitation, where parties do not tend to commit their arrangements to writing nor keep running accounts. It is such difficulties, in the context of unmarried parties living together as if they were husband and wife, which led to the enactment of sections 25 to 28 of the Family Law (Scotland) Act 2006: see *Gow* v *Grant* 2013 SC (UKSC) 1 at paragraphs 33 to 36 per Lord Hope of Craighead.

Of course, these statutory provisions are inapplicable in the present case, and so the pursuer seeks to found on the common law of contract and unjust enrichment cf. *Shilliday* v *Smith* 1998 SC 725.

[2] In essence, the pursuer's position is that there were three verbal contracts between the parties, and that further or in the alternative the defenders were unjustly enriched in certain respects. The first of the verbal contracts ("the accommodation contract") was to the effect that the pursuer would be provided with accommodation by the building of an extension to the defenders' property, with the intention that she would then live there indefinitely as a member of the defender's family. Broadly, the defenders agree that there was such a contract, and that as part of it the pursuer agreed to fund the construction of the extension by selling her own home. It is also agreed that the pursuer did indeed sell her home, made substantial payments to the defenders, and lived in their house for almost a year. The parties part company as to the precise nature of the accommodation which was to be provided, and whether ultimately it was provided. In particular the pursuer avers that what came to be constructed did not accord with the agreement, that she was not treated as a member of the family, and that accordingly the defenders are in breach of contract. She seeks damages of around £133,000, as first craved. The defenders deny that they are in breach of contract.

[3] The pursuer also seeks damages of around £37,000, as second craved. Her primary position in relation to this crave is that she made a number of payments to the defenders, over a period of around a year, to help them pay certain personal unsecured debts which were unrelated to the accommodation contract. The money came from an additional payment which the pursuer received from her late husband's estate. She claims that the defenders were unjustly enriched as a result, and that she is entitled to repayment. The

defenders' position on this matter is to accept that £33,000 was paid to them, but they aver that this sum was also used to fund the building works, and is therefore merely a further aspect of the accommodation contract and subject to the same dispute in relation to this contract as noted above. This is then adopted by the pursuer as an *esto* position, in the event that her unjust enrichment claim fails, on the basis that she does not know what the defenders actually spent the money on.

[4] The second verbal contract between the parties founded on by the pursuer ("the transport contract") was in essence that they would provide transport for her as and when required, to, for example, hospital appointments, in return for the pursuer purchasing a car for each of the defenders. The pursuer's position is that having purchased those cars for the defenders they failed to provide her with the agreed transport and so are in breach of contract. The pursuer accordingly seeks payment of around £31,000, as third craved, being the total sum which she paid to the supplier of the cars. If there was no contract, the pursuer avers in the alternative that the defenders were unjustly enriched. The defenders' position is that the cars were gifts, and so dispute that there was either a contract or unjust enrichment.

[5] The third and final verbal contract on which the pursuer claims ("the loan contract") relates to a sum of money which the pursuer claims she loaned to the first defender to enable her to buy an item of jewellery. This sum has not been repaid, and accordingly the pursuer claims a breach of contract. *Esto* there was no such contract, the pursuer avers that the defenders have been unjustly enriched at the pursuer's expense. Either way the sum of £1,660 is sought, as fourth craved. The defenders' position, again, is that the money was a gift and that no repayment is due.

[6] This matter called before me for debate on both parties' preliminary pleas on 16 November 2017. Mr Kelly, Advocate, appeared for the pursuer and Ms Fordyce, Advocate,

appeared for the defenders. I am grateful to both of them for their clear and helpful submissions.

Submissions for the defenders

[7] Opening the debate Ms Fordyce, for the defenders, moved me to sustain their first, eighth, ninth and tenth pleas in law. In line with her revised Rule 22 Note (No. 33 of Process) she advanced her submissions in three chapters.

[8] Ms Fordyce's first chapter related to certain of the pursuer's averments which she submitted were relevant only to a claim based on facility and circumvention or undue influence. She explained that following an earlier diet of debate, which had been discharged in May 2017, the pursuer had agreed to discontinue any such claim, and had made certain deletions by minute of amendment. The defenders maintained that these deletions did not go far enough, however, and Ms Fordyce therefore asked me to make the further deletions specified at paragraph 4 of her Note.

[9] Expanding on this, Ms Fordyce submitted that averments going to establish facility and circumvention or undue influence were relevant in circumstances where the intention was to undermine a claim based on contract. However there were no pleas in law to that effect in the present case, and such averments were irrelevant where what was sought was to found on the contract as a means to obtaining damages for breach. And where (as here) the parties were in dispute as to the terms of the contract between them, the pursuer's state of mind was not relevant to resolving this dispute. Ms Fordyce cited *Muirhead* v *Turnbull & Dickson* (1905) 7 F 686 per Lord Dunedin at 694 and *Storer* v *Manchester City Council* [1974] 1 WLR 1403 per Lord Denning MR at 1408, in support of the general proposition that the terms of a contract are to be determined objectively by reference to the parties' statements

and actions alone. Averments as to the pursuer's state of mind, and her unhappiness at the contractual arrangements between the parties – which she accepted had not been communicated to the defenders – were irrelevant.

[10] Turning to the particular averments complained of, Ms Fordyce first drew attention to Article 2 of condescendence where the pursuer avers, in the context of the agreement and variation of the terms of the construction contract, that:

> "As hereinafter more fully condescended upon, by at least around 2009 the defenders had gained the pursuer's full confidence and trust, and the defenders abused that position of trust in their dealings with the pursuer…
>
> The pursuer was not happy about these proposed changes… However, because of her excessively compliant nature she did not make a fuss. She has been clinically assessed as being of average intelligence but significantly more suggestible and compliant than the average population. Reference is made to a report by Ian B Stephen, consultant clinical psychologist dated 1 May 2015 which concludes that: "On the Gudjonsson Scales of Suggestibility and Compliance Mrs Lyle obtained scores which indication (sic) that she was significantly more suggestible and compliant than the average population with both scores more than 2 standard deviations higher." Moreover, she had just sold her house on the faith of her agreement with the defenders. Consequently she felt that although she did not agree with the proposed changes, there was nothing she could do about it...
>
> Such was the influence of the defenders over the pursuer that the pursuer avoided contact with Mrs Methven for several months."

As regards the reference to Mr Stephen's report, Ms Fordyce pointed out that the pursuer, in her Rule 22 Note, made a similar complaint about a psychiatric report instructed by the defenders on which averments are made at Answer 2. She explained that the defenders' report was obtained in response to Mr Stephen's report, and their averments in relation to it were made in answer to the corresponding averments by the pursuer. Ms Fordyce accepted that her argument for deleting the pursuer's averments therefore cut both ways, and that if her submission in this regard was upheld, the defenders' averments in answer also fell to be deleted.

[11] Next Ms Fordyce drew attention to the averment in Article 3 that:

> "Accordingly the defenders persuaded the pursuer to obtain an unsecured personal loan from the Clydesdale Bank…"

These averments were again made in relation to the accommodation contract. In particular, the pursuer averred that in addition to giving the defenders the proceeds from the sale of her house she also took out a personal loan and gave them more than £4,000 to help pay for the cost of works to their kitchen. Ms Fordyce submitted that insofar as the pursuer sought to found on some 'persuasion' or 'influence' on the part of the defenders this was inconsistent with her claim for breach of contract.

[12] Turning to Article 5, Ms Fordyce sought deletion of the following averments:

> "The pursuer was not happy with this arrangement. She was also unhappy, because the room was very small and no separate dressing room or ensuite shower facility was provided for her use as the defenders had suggested would be done."

Ms Fordyce accepted that these averments related to the pursuer's claim that she did not get what was agreed under the accommodation contract, but she submitted that it was not suggested that the pursuer had ever communicated her unhappiness to the defenders and that these averments were simply about her innermost state of mind, and were irrelevant. Ms Fordyce accepted, however, that the references to the pursuer's unhappiness could be seen as a dressed up manner of expressing her position that she did not get what she had contracted for. Accordingly if the specific references to happiness and unhappiness were deleted what remained (i.e. that "the room was very small…" etc.) would not be problematic.

[13] In similar vein Ms Fordyce drew attention to the following averments in Articles 8, 11 and 12 of Condescendence respectively:

> "As hereinbefore condescended upon by at least 2009 or 2010 the defenders had gained the pursuer's full trust and confidence."
>
> "As hereinbefore condescended upon the pursuer is significantly more suggestible and compliant than the average person. Consequently, although she was unhappy with the changed arrangements which were imposed upon her, she did not express that unhappiness at the time. The defenders took advantage of the pursuer's compliant nature."
>
> "They took advantage of the pursuer's suggestible and compliant nature, the position of trust in which the pursuer helped them and the fact that the pursuer had already sold her own home in order to impose upon the pursuer an arrangement whereby she was to have the use of two small existing rooms on the first floor together with an ensuite shower room. The defenders did not fulfil even this arrangement."

These averments essentially repeated averments already complained of, and again and for the same reasons, submitted Ms Fordyce, they had no place or relevance given that they related to a claim for damages for breach of contract where no undue influence arguments were to be advanced.

[14] In closing on this chapter, Ms Fordyce submitted that all the averments complained of should not be remitted to probation. She pointed out that one consequence of this would be that there would be no need, nor scope, for calling either Mr Stephen or the defenders' expert witness to give evidence, thereby shortening the proof and minimising expense. This was therefore not an issue which should be left to be considered at a proof before answer.

[15] Ms Fordyce's second chapter related to the pursuer's averments as regards unjust enrichment in respect of the sum second craved. In this regard she submitted that the pursuer had set out no proper legal basis for her claimed entitlement to recompense. She had failed to specify the basis upon which to assess the value of her claim that the defenders had been unjustly enriched, taking due account of the benefit derived by her from residence in the defender's home for several months. Accordingly it was submitted that the pursuer's

second crave for unjust enrichment should be dismissed, and that the averments in support of it should not admitted to probation.

[16] Expanding on this chapter, Ms Fordyce drew attention to the following averments in Article 13 of condescendence:

> "The pursuer provided the money to the defenders in contemplation of the situation discussed with the defenders that the pursuer would be allowed to live with the defenders on a permanent basis as part of their family in suitable accommodation, partly exclusive and partly communal. That situation did not materialise. The pursuer would not have spent the money which was paid to the defenders, had she known the true situation. The extent of the defenders' benefit was the amount paid to them by the pursuer."

Ms Fordyce submitted that these averments, and in particular the last sentence, were the only averments which set out the quantification of the unjust enrichment claim on this issue. She submitted that they failed sufficiently to specify the quantification of the claim. She accepted that there were other averments elsewhere which specified "the amount" which the pursuer had paid to the defenders, but she submitted that it was the pursuer's position that she was entitled to simple repayment of that amount, and that what had been averred was insufficient by way of specification in the circumstances of the particular case. The pursuer ought to further specify the basis on which the sums paid over unjustly enriched the defenders, and in doing so the pursuer must necessarily take account of any benefit derived by her as a result of payment of those sums.

[17] In this regard Ms Fordyce referred to Gloag & Henderson, *The Law of Scotland*, paragraph 24.01, where the authors state that the authoritative formulation given by Lord Hope in *Dollar Land (Cumbernauld) Ltd* v *CIN Properties Ltd* 1999 SC (HL) 90 at 98H:

> "… identifies three elements in the cause of action in unjustified enrichment, namely: (1) the enrichment of the defender; (2) at the pursuer's expense; and (3) no legal justification for the enrichment…"

Ms Fordyce conceded that the first element was present in that the pursuer had pled that sums had been paid over to the defenders. She submitted however that there was a lack of specification in relation to the second element. Ms Fordyce pointed out that the pursuer had averred at Article 11 of Condescendence that she had "derived no advantage from the arrangement", but submitted that that was clearly incorrect, and in any event inconsistent with her acceptance on record that she had resided for a period of several months in the defenders' home. This was plainly a benefit to the pursuer, the value of which had to be more than zero, and which therefore must be taken into account in determining the extent to which the enrichment of the defenders had been at the pursuer's expense. That the pursuer had in fact moved into the house distinguished the case from the circumstances arising in *Shilliday* v *Smith*, where the parties' marriage was a situation which did not materialise. Accordingly, Ms Fordyce submitted, there ought to be some assessment of the value of the benefit to the pursuer, or accounting of it, and that this was for her to specify. Absent such specification, the claim for unjust enrichment should be dismissed, the pursuer's fourth plea in law repelled, and the sums sought as second craved should be dealt with as an aspect of the claim for breach of the accommodation contract.

[18] Ms Fordyce's third chapter related to the pursuer's averments in respect of the sum third craved in relation to the transport contract, at least insofar as this crave was based on a claim of breach of that contract. It was submitted that the pursuer had set out no good legal basis for her entitlement to damages in this regard. She was entitled to damages assessed on the basis of the compensatory principle only, not on the basis of restitution. Insofar as she sought damages on the latter basis, her claim was irrelevant. Insofar as she sought them on the former basis, her averments lacked specification. Either way, the breach of contract claim should not go to proof.

[19] In this regard Ms Fordyce drew my attention to the averments at article 9 of condescendence, in the following terms:

> "The defenders did not provide the transport agreed. The defenders failed to transport the pursuer to her various appointments. The pursuer required on several occasions to travel to her hospital and doctor appointments by bus or taxi. The defenders have breached the terms of the verbal contract between the parties. The pursuer is entitled to repayment of the sum paid under the contract."

There were no other averments bearing on quantification of loss. Accordingly, submitted Ms Fordyce, the pursuer had failed to specify any relevant loss for which she would be entitled to damages for breach of contract. If she established a breach, the general principle was that she would be entitled to be placed in the same position, so far as reasonably possible, as if the contract had been performed. Reference was made to *Houldsworth* v *Brand's Trustees* (1877) 4 R 369 per Lord Ormidale at 374. In other words, the pursuer would be entitled to damages only to the extent of compensating her for losses incurred due to the defenders' alleged failure to perform their obligations under the contract. In this case that could only amount to the cost of some bus and taxi fares resulting from her not being transported by the defenders, but not repayment of the cost to her of buying the cars for them, which was what was being sought by the averments in Article 9. On no proper view would performance of the contract have resulted in the return of the cars. Accordingly the pursuer was not entitled to damages for breach which would place her in that position.

[20] Therefore, submitted Ms Fordyce, the pursuer's averments in relation to breach of the transport contract in Article 9 should be deleted, and her sixth and seventh pleas in law should be repelled. That would have the result that the sums third craved would proceed only on the basis of a claim of unjust enrichment, in support of her eighth plea in law.

Submissions for the pursuer

[21] Mr Kelly, for the pursuer, moved me to refuse the defenders' motions in all respects, to repel their preliminary pleas numbers one, eight, nine and ten, and to allow a proof at large. In the event that some of these pleas were left standing he sought a proof before answer which, he indicated, had been offered when the Record was closed.

[22] By way of introduction, Mr Kelly referred me to a number of averments made by the pursuer setting out the background to the case, how it was that the pursuer came to live with the defenders, the terms of the parties' various agreements as she saw them, and the way in which she claims that the defenders broke those agreements. The pursuer's position was that the defenders had agreed to build in effect a self-contained 'granny flat' extension for her, at a cost of £70,000, which she would finance by selling her house. She would then live there indefinitely as a member of the defenders' family. Sale of her house having been effected, the defenders then asked the pursuer for nearly twice as much money for the extension works as previously (more than £128,000). They then did not build a granny flat, but instead added a conservatory to their house (which the pursuer did not have exclusive use of) and two attic bedrooms, which she could not use at all because of her mobility difficulties. The defenders' daughters therefore were given the attic bedrooms, while the pursuer was given the use of two small rooms on the first floor. Coupled with this, the defenders became aware that the pursuer was to receive an additional £59,000 from her late husband's estate. She avers that the defenders then persuaded her to give them a total of £37,000 to enable them to repay their personal debts, on the ground that it would be a good idea for the parties to start off life as a family with everyone debt free. Coupled with this, she agreed to buy the defenders cars in return for them agreeing to transport her, and also loaned the defenders money such that they could buy an item of jewellery. The basic

position, Mr Kelly submitted, was that the pursuer was treated by the defenders as a 'cash cow', allowed to come and stay with them until her money ran out, and then forced out.

[23] Against this background, Mr Kelly turned to address Ms Fordyce's first chapter of argument. He accepted that there was no case based on facility and circumvention or undue influence, and submitted that there never had been. There was, for example, no crave for reduction of the contract, nor averments to the effect that the pursuer's consent to the contracts was vitiated in some way. So why were the averments complained of on Record at all? Mr Kelly submitted that pleadings served two purposes, to state a relevant case, and to give fair notice of the evidence to be led. It was legitimate to lead evidence to explain, for example, why the pursuer moved into the defenders' house even after being told that no granny flat was to be built. The answer to that lay partly in her being faced with a *fait accompli*, having sold her house and parted with the proceeds, but also partly in her character. The averments complained of were made, in general terms, with a view to leading evidence about this by way of background.

[24] Turning to the particular averments complained of, Mr Kelly submitted that as regards those in Article 2 concerning Mr Stephen and his report (and also the related averments at Articles 11 and 12) the position was that the pursuer wanted to lead expert evidence that she was more suggestible and compliant in nature than the ordinary person, and that the defenders took advantage of that. The averments complained of were simply there to explain why things happened as they did, not to establish nor to undermine the terms of the contract. There was no bar to taking into account the pursuer's state of mind to explain why she reacted in the rather timid way that she did. Even if not essential to her claim for breach of contract, such evidence might go to her credibility, in the sense that the court might have some difficulty understanding the pursuer's behaviour.

[25] As for the particular averment regarding "Mrs Methven" in Article 2, Mr Kelly explained that she was a friend of the pursuer's. He submitted that the pursuer had been trying to see the defenders' building plans at one stage, and that Mrs Methven had been encouraging her to do so. It was said that the defenders had found out about this and that they reprimanded the pursuer and told her to stay away from Mrs Methven. This had, Mr Kelly accepted, nothing to do with the formation of the contract, but was background to the pursuer's position that she was not being allowed access to the building plans. Accordingly the averment should remain.

[26] As regards the averment in Article 3 regarding the pursuer being "persuaded" to obtain a Clydesdale Bank loan, Mr Kelly admitted that he was not greatly concerned about this. This loan related to funds for a deposit on part of the building works, which was payable prior to the funds becoming available from the sale of the pursuer's house. The position was that the defenders asked the pursuer to take out a loan and she did so. The word "persuaded" was not be used in any technical sense. It simply meant that the pursuer had agreed with the defenders that she would take out the loan.

[27] As for the averments complained of in Article 5, Mr Kelly submitted that the references to the pursuer not being "happy" with the accommodation which she was given was just another way of expressing her position that she considered that what she was being given by way of accommodation was not conform to the terms of the contract. He accepted that it might be regarded as rather loose pleading, but submitted that it was legitimate to tell a story, and not appropriate to delete such an averment on grounds of relevancy. To do so would be hair splitting, particularly where it was accepted that the averment had nothing to do with facility and circumvention.

[28] As regards the averments in Article 2 and 8 to the effect that the defenders "had the pursuer's full trust and confidence", Mr Kelly again submitted that this was really just background. The circumstances of the case were unusual, and such averments would enable evidence to be led from the pursuer to explain why she acted as she did.

[29] Turning to Ms Fordyce's second chapter of argument, Mr Kelly characterised this as being a submission that in making a claim for repayment based on unjust enrichment it was incumbent on a pursuer to specify the basis on which the payments unjustly enriched the defenders and that this had to take account of any benefit which the pursuer may have received. He submitted that this was entirely wrong. The pursuer had specified in detail in Article 8 the various amounts paid to the defenders, and the averment in Article 13 of "the amount paid to [the defenders] by the Pursuer" referred back to Article 8. There was no need for her to go any further than this and to take account of any benefit which she might have received. If the defenders considered that she had obtained a benefit, it was for them to aver and prove it.

[30] In any event, the pursuer's position was that she had not derived any benefit in this context. Mr Kelly did not accept that the pursuer's pleadings were inconsistent. He acknowledged that there was a reference in Article 11 to the pursuer having derived "no advantage" from occupancy of the defender's house, but submitted that this was in the context of the accommodation contract, not the sum second craved on grounds of unjust enrichment. The averments relating to this latter claim were solely in Articles 8 and 13, and were to the effect that the pursuer simply gave the defenders money which they were to use to pay their personal debts (or so they told her). There was no corresponding benefit to her from payment of this money. The claim was therefore distinct from money paid under the accommodation contract, and any benefit which she might or might not have obtained from

occupancy of the defenders' house under that contract. Even if he was wrong about this, the pursuer was still entitled to take the position that there was no benefit to her, and it was for the defenders to aver and try to prove otherwise if so advised.

[31] Expanding on his submissions, Mr Kelly took me back to paragraph 24.01 of *Gloag and Henderson* to which Ms Fordyce had made reference. He suggested that she had stopped consideration of the relevant passage a little too soon for present purposes. He pointed out that the authors continue as follows:

> "…(4) The fourth matter mentioned (the equity of the court compelling redress) is not an element in the cause of action (that is, a requirement which has to be proved affirmatively by the pursuer); rather demonstration of inequity is a defence."

It was clear from this, submitted Mr Kelly, that if the defenders considered that the pursuer had obtained a benefit such that it was inequitable for the court to order the redress sought, it was for them to raise it. Reference was also made in support of this proposition to *Morgan Guaranty Trust Company of New York* v *Lothian Regional Council* 1995 SC 151 at 165D – 166B per the Lord President (Hope):

> "… Once the pursuer has averred the necessary ingredients to show that *prima facie* he is entitled to the remedy, it is for the defender to raise the issues which may lead to a decision that the remedy should be refused on grounds of equity."

Reference was also made to page 172H/I – 173C per Lord Clyde. Although this was a case of a claim relating to a payment made by mistake (the *condictio indebiti*), it was submitted that the position was no different in relation to a claim regarding a payment made in expectation of receipt of a consideration which is not then provided (the *condictio causa data, causa non secuta*), as was apparent from *Compagnie Commerciale Andre SA* v *Artibell Shipping Company Ltd* 2001 SC 653 per Lord Macfadyen at paragraph 19, page 665B – D; paragraph 23, page 668G – 669B/C. Mr Kelly submitted therefore that all the pursuer had to aver in the

present case was enrichment of the defenders at her expense. That having been done, it was for the defenders to seek to establish what if any benefit the pursuer had derived from any payment made by her. That remained the case if, contrary to his position, there was thought to be some inconsistency in the pursuer's pleadings as between articles 11 and 13.

[32] Mr Kelly also submitted that it was not necessarily obvious that there would have been a benefit from occupation. In *Shilliday* v *Smith*, for example, where the pursuer had lived in the defender's house for more than a year in contemplation of marriage, no account was taken by the court of any benefit to her arising therefrom, in circumstances where the defender did not dispute that the cost to the pursuer was the true measure of the value of the benefit to him: see 1998 SC 725 at 728E. Indeed the very fact that the court had dealt with the matter in this way was a further indication that the onus of raising the matter lay with the defender. In all the circumstances Mr Kelly submitted that I should reject the defenders' arguments under this chapter and refuse their motion to exclude the pursuer's unjust enrichment claim in support of her second crave and fourth plea in law.

[33] Turning to Ms Fordyce's third chapter of argument, Mr Kelly did not dispute the general principle in relation to damages for breach of contract in *Houldsworth* v *Brand's Trustees*, although he pointed out that that had been a mercantile case. But in the present case, a payment had been made by the pursuer to enable the defenders to buy new cars in return for transportation services. A car had been traded in as well, explained Mr Kelly, but essentially the pursuer had paid to the vendor the balance due on two new cars, of nearly £31,000, and so financed the defenders' purchase of these cars. She did so the basis that the defenders would then "provide all her transport", as it is stated in Article 9. Accordingly although the pursuer had not paid the money directly to the defenders, she had paid it in advance for a service to be provided. That service was then not provided, and the payment

made by the pursuer was made in such a way that she cannot now get the money back from the person to whom it was paid. But the sum sought was the sum which she had paid, and which she was entitled to recover from the defenders.

[34] Mr Kelly acknowledged that it was a vexed question whether a party was entitled to recover an advance payment where the service contracted for was not then provided in breach of contract, and that the authorities on the matter were unclear. He referred to McBryde on *Contract* (3rd Edition), paragraphs 20.132 and 20.141 – 143. As the learned author notes, there is neither unanimity as to what the law is, nor as to what the law should be. Particular problems arise where the innocent party retains some benefit from the defective performance of contract. However that is not the present case, and the innocent party's claim is not troubled by any rule which bars action by a party in breach, rather:

> "The issue is whether the innocent party should always sue for damages for a breach, or whether there can be restitution of price or property or recompense for services, or other enrichment remedy."

Reference is made to a paper by Prof. MacQueen (*Contract, unjustified enrichment and concurrent liability: a Scots perspective*, 1997, Act Juridica 176), where the view is expressed that restitutionary remedies may be available, although it is queried whether his views represent Scots law:

> "A claim for damages might involve more than a return of the price, but also claims for inconvenience, loss of profit and other items. Is there a concurrent liability? Or is a claim for the price subsumed in a damages claim? Standing the decision in *Connelly* [*v Simpson* 1993 SC 391] and other cases, it seems that the present law is that the correct approach is to claim damages."

[35] Mr Kelly then turned to *Connelly* v *Simpson* directly. In this case, he reminded me, the pursuer ultimately sued on the basis of the *condictio causa data causa non secuta* but by a majority the Inner House refused his claim. Lords McCluskey and Sutherland held (Lord Brand dissenting) that the pursuer was not entitled to repayment of the purchase price of

shares for which he had paid in advance, but merely to damages for breach of contract by the director of the company who had both increased the company's share capital and then put it into voluntary liquidation, thereby greatly reducing the value of the pursuer's shares – which were in any event never transferred. Mr Kelly recognised that on one view *Connelly* might be thought to stand in the way of the pursuer's argument on this chapter, but submitted that properly understood it did not do so.

[36] Rather than engage in close criticism of the opinions in *Connelly* himself, Mr Kelly referred to the opinion of Lord Tyre in *Stork Technical Services (RBG) Ltd* v *Ross's Executor* 2015 SLT 160. Here, the pursuer had sought repayment of fees paid to an adjudicator following reduction of his decision in separate proceedings. The repayment claim, being a claim based on unjust enrichment, failed on the ground that the original contract for the provision of the adjudicator's services was with his employers, not the adjudicator personally. Nonetheless, Lord Tyre proceeded to express his views on the relevancy of the pursuer's claim for restitution, albeit *obiter*. Having reviewed the authorities and academic literature, and analysed *Connelly*, his Lordship concluded (i) that a party to a contract who has made payment in anticipation of a counterpart performance is entitled, under the law of contract, to the remedy of restitution of the price paid on the basis of the mutuality principle (paragraph 34), and (ii) that given the differing views of the judges in *Connelly* it was not binding authority to the contrary (paragraph 35). In these circumstances, Lord Tyre characterised the pursuer's claim in *Stork* as one for restitution based on the contract, not for unjust enrichment. The question of whether equitable considerations might have had any part to play in deciding whether to order repayment, and if so of how much, remained to be considered at another time. His Lordship also recognised that further consideration of the issues by the Inner House might be appropriate (paragraph 39). In summary, Mr Kelly

adopted Lord Tyre's analysis, and invited me to reach the same conclusions in the present case.

[37] Mr Kelly submitted that the pursuer's position accorded with common sense. Suppose, he suggested, that A contracts with B to build a fence for £1,000. A then pays the money in advance, and B, in breach of contract, fails to build the fence. A then sues B, but B produces evidence that the true cost of building the fence was only £500. On the compensatory approach, A would be entitled to damages of £500 only, this being the sum of money sufficient to put him in the same position as if the contract had been performed – that is, to pay another person to build the fence. Meantime, B would get to keep £500 of A's money, in effect, for doing nothing. That could not be right, submitted Mr Kelly. It was a 'rogue's charter'. If a person paid for a service and then did not get it, and then asked the man in the street what he should do about it, the answer would be obvious: that he should get his money back. That was what the pursuer was looking for in the present case.

[38] For all these reasons, Mr Kelly urged me to hold in the present case that the pursuer was entitled to proof on her claim for payment of a sum equivalent to the price paid to the vendor of the cars for the benefit of the defenders (in effect, recompense, for the reasons explained by the Lord President in *Shilliday* v *Smith* at 728A – C). If the defenders considered that there were equitable considerations why the full amount paid by the pursuer should not be repaid (for example, depreciation in the value of the cars) then this was for them to raise in the first instance, in a manner akin to that already discussed in relation to the defenders' second chapter of argument. At worst, submitted Mr Kelly, the law was in such a state of uncertainty that the matter should at least go to proof before answer. He submitted that pleas in law six and seven, although they referred to "damages" rather than "recompense", were sufficient to support the claim for payment sought under the

breach of contract claim. Mr Kelly accepted however, in the event that only compensatory damages were available in relation to the breach of contract claim, that the pursuer had made no attempt to quantify such damages, for example, by making averments as to the cost and frequency of taxi fares to hospital incurred by her as a result of not being transported by the defenders.

[39] Mr Kelly then turned to his own Rule 22 Note (number 32 of process) and advanced three positive criticisms of the defenders' pleadings. Firstly, he moved that certain of the defenders' averments should be deleted insofar as they were averments initially made in order to answer claims by the pursuer that were now no longer insisted in. Secondly, he sought deletion of averments regarding a medical report lodged by the defenders. He submitted that these were irrelevant because they went to show that the pursuer was emotionally and psychologically well when she entered the contract, when the pursuer was not claiming that she was not. Thirdly, he submitted that there were two *separatim* cases for the defenders pled at Answer 11 both of which were irrelevant and should be deleted. Mr Kelly accepted that he was not in this debate seeking a 'knockout blow', but merely to have certain of the defenders' averments in answer excluded from probation, essentially on the basis that even if they ever served any useful purpose they no longer did so.

[40] As regards his first submission Mr Kelly drew attention to the following averment at Answer 2 (page 15, line 12):

> "There was no agreement between the parties that the defenders would repay the pursuer for the funding that she provided";

to the averment at Answer 2 (page 15, line 21):

> "She was or ought to have been aware that the potential increase in value of the property would be less than the cost of her investment in same. She was or ought to have been aware that the defenders could not afford to re-mortgage even if there had been agreement to that effect (which is denied)";

and to the further averment at the end of Answer 4 (page 19, line 9):

> "at all times, the pursuer was aware that the defenders would not, and could not, refund any sums to her once the building works were commenced. The defenders had clearly stated to the pursuer that they could not afford the necessary building works and would not go into debt to finance the conversion works."

The point which Mr Kelly wished to make was that the pursuer had originally made a case that money had been loaned to the defenders to carry out the building works, and that they were due to repay it. She had also pled an alternative case of unjust enrichment in relation to the accommodation contract. Both of these grounds of action had however been deleted by amendment. The particular averments in the defenders' pleadings noted above had been made in answer to these grounds, but given the amendment had no further relevance and should be deleted. Mr Kelly confirmed that there was to be no attempt to seek restitutionary damages in relation to the breach of contract averred relative to crave one, which might otherwise have given some possible relevance to the defenders' averments.

[41] As regards his second submission, Mr Kelly drew attention to the averments in relation to the defenders' medical report at Answer 2 (page 16, line 7):

> "The pursuer was emotionally well when she did so. Reference is made to the psychiatric report of Dr Alexander Mitchell Stewart in respect of the pursuer dated 18 October 2016 produced herewith which is adopted and held to be incorporated herein *brevitatis causa*."

And the further averments at Answer 11 (page 37, line 30):

> "the pursuer was emotionally well when she did so. The pursuer suffered no pathological emotional vulnerability at the material time. The pursuer suffered from no specific form of mental illness at the material time. Reference is made to the report of Dr Stewart aforesaid."

Mr Kelly explained that he had expected the defenders to instruct a report to seek to answer Mr Stephen's report, but that Dr Stewart's report did not do so. Dr Stewart is said to be a

psychiatrist, not a psychologist. His report was apparently directed to establishing that the pursuer was emotionally well and suffering from no specific form or mental illness at the material time. However the pursuer did not suggest the contrary. She did not claim to suffer from mental illness. Accordingly while the averments regarding Mr Stephen should remain, those regarding Dr Stewart should be deleted. Mr Kelly accepted, however, that Dr Stewart's report also included reference to the pursuer not suffering from "pathological emotional vulnerability", which might appear to be in similar territory to the view attributed to Mr Stephen in the pursuer's pleadings that she was "significantly more suggestible and compliant". However ultimately his position was that the pursuer should be allowed to lead evidence from Mr Stephen, but that the defenders should not be allowed to lead evidence from Dr Stewart. He was unable to explain why, if Mr Stephen's evidence was not admissible by way of "background", Dr Stewart's should not be admissible likewise.

[42] In relation to his third submission, Mr Kelly drew attention to the defenders' averments at Answer 11 (page 38, from lines 5 – 30):

> "*Separatim*, *esto* there is any merit in the pursuer's averments regarding unjustified enrichment which is denied, it would be inequitable for the court to compel the defenders to pay any sums to the pursuer… [to] If they are required to repay the pursuer, they would require to sell their home. The defenders and their children would have nowhere to live."

He submitted that these averments were intended to address the pursuer's former alternative claim in support of the first crave based on unjust enrichment. They all related to the building work and hence the accommodation contract. The alternative claim had now been deleted, and the defender's averments, made in answer to it, were therefore now irrelevant and should be deleted.

[43] Next, Mr Kelly drew attention to a further averment by the defenders at Answer 11 (page 38, line 30 to page 39 line 8):

> "*Separatim*, the pursuer is personally barred from seeking repayment of the sums expended on the defender's property and the payment of the value of other items provided to the defenders… [to] …In the circumstances condescended upon, the pursuer is not entitled to now assert that she is entitled to seek repayment of the sums expended."

Insofar as these averments related to the previously stated claim for repayment of the sums given to the defenders by the pursuer in respect of the building works, Mr Kelly submitted that they were now irrelevant in the light of the deletion of that claim. There were no averments to the effect that the pursuer was somehow personally barred from seeking damages for breach of the accommodation contract. As regards the sums sought under craves three and four, in which there were still alternative claims based on unjust enrichment, the defenders' position was simply that these were gifts. They had averred this elsewhere, in answer to the averments specific to these craves. Given the presumption against donation, the onus would be on the defenders to prove gift. If they managed to do so, they would succeed in their defence to the claims. If not, the pursuer would succeed. No question of personal bar would arise in either event. The averments were accordingly irrelevant and should be deleted. Furthermore, in plea in law seven for the defenders the words "*et separatim* the pursuer by her actings being personally barred from seeking repayment" should also be deleted.

[44] Finally, Mr Kelly submitted that there was a substantial passage of duplication in the defenders' pleadings which could be deleted in the interests of shortening the Record. He pointed out that in Answer 12 (page 41, lines 4 to 30), the defenders aver that:

> "The pursuer was kept fully informed at all times… [to] The pursuer is a strong willed woman who is used to getting her own way."

He submitted that these same averments were also made at Answer 11 (page 37, lines 9 to 27, and line 34 to page 38 line 5). In the circumstances the averments at Answer 12 could

and should simply be deleted, and the defenders allowed to amend by inserting in their place the averment: "Reference is made to the averments at Answer 11". That would have the benefit of shortening the Record by almost a page.

Submissions for the defenders in reply

[45] In reply, Ms Fordyce addressed first the issues raised by Mr Kelly in his Note. As regards the averments noted at paragraph 40 above she was content that these now all be deleted in the light of Mr Kelly confirming that the pursuer would not be advancing any case to the effect that the pursuer loaned money to the defenders (there remained, as she pointed out, a reference to loan at Article 6), and also that no restitutionary payment would be sought in relation to the claim for breach of the accommodation contract. As regards the averments in relation to Dr Stewart's report (paragraph 41 above), she maintained her position that these stood or fell with the pursuer's averments regarding Mr Stephen. If the latter averments were excluded from probation, she was content that the former should be as well.

[46] As regards the defenders' averments noted at paragraph 42 above, Ms Fordyce submitted that these set out the defenders' position on equity and went to supporting the defenders' seventh plea in law in relation to the pursuer's remaining unjust enrichment claims. She recognised that these averments were in Answer 11, which relates to the accommodation contract, and crave one. However as she pointed out, this was simply a consequence of the fact that the pursuer initially pled an unjust enrichment claim as an alternative basis for this crave. The pursuer still maintained unjust enrichment claims in support of craves two, three and four, and the relevant averments regarding these craves were at Articles 13, 14 and 15. In answer to the averments in each of those Articles the

defenders, rather than repeating the averments *anent* equity in Answer 11, had simply referred back to them. So given the way the pleadings had developed it might be said that these averments were now in the "wrong place", but they remained relevant to the remaining unjust enrichment claims. Ms Fordyce was content, if thought necessary to tidy up the pleadings, that they could be removed from article 11 and added to articles 13, 14 and 15.

[47] Turning to the averments noted at paragraph 43 above *anent* personal bar, Ms Fordyce submitted that the defenders' primary position was that the sums concerned had been gifted to them by the pursuer. However in the event that this was not established, their position was that the pursuer was personally barred from seeking repayment on grounds of unjust enrichment on the basis that she had represented to the defenders that the sums were gifts. Ms Fordyce accepted that the assertion of gift was the only basis for the personal bar plea, and further accepted that the onus was on the defenders in either case, whether to establish personal bar or donation. I had some difficulty understanding her submissions, and I queried with Ms Fordyce both the competence of a plea to personal bar in the circumstances, but also whether in practical terms there was any good basis for such a plea. Ultimately, Ms Fordyce recognised that the defenders' claims of donation and personal bar in effect came to be two ways of saying the same thing, and so conceded that if their claim to donation failed there would be no good basis for a plea to personal bar.

[48] As regards the passages referred to by Mr Kelly at paragraph 44 above, Ms Fordyce was content that the duplicated averments at Article 12 could be deleted and the averments at Article 11 incorporated by reference, if that was necessary to tidy up and/or shorten the pleadings. She did point out, however, that Mr Kelly had taken issue with that very approach in relation to the averments *anent* equity at Answer 11, as already discussed above.

[49] Turning to address Mr Kelly's response to her own arguments, Ms Fordyce had little to add to her earlier submissions in relation to her first chapter. She accepted, in discussion, that her criticisms were strongest in relation to the averments regarding Mr Stephen and his report, and were perhaps weaker in relation to the isolated references to the pursuer's happiness or unhappiness with certain things which had happened. She did make the point that taking all the averments complained of together they did give the impression of the pursuer advancing a more substantial position in relation to her state of mind. However ultimately I understood her to accept that the deletion of the averments regarding Mr Stephen and his report, coupled with the positive disavowal by Mr Kelly of any substantive case based on the pursuer's state of mind, would have the effect of curing this impression.

[50] In relation to Mr Kelly's answer to her second chapter, Ms Fordyce queried whether or not the pursuer's averments in Article 11, that she had derived "no advantage", related solely to the accommodation contract and crave one, or to the sums of which repayment was sought under crave two. She remained concerned that there was some inconsistency, albeit that Mr Kelly interjected to clarify the pursuer's position that the averment only related to crave one. In relation to the more substantive point, however, Ms Fordyce maintained that it was for the pursuer in a claim for unjust enrichment to set out the extent to which the sums had been paid 'at her expense', and that this had to take account of any benefits received by her. She was best placed in practical terms to do this. It was for her to quantify the benefit to her as part of her *prima facie* case for repayment.

[51] In relation to her third chapter of argument, Ms Fordyce submitted that the starting point was the observation made by McBryde at paragraph 20.132 that contractual remedies should solve contractual problems. As Lord Tyre had confessed in *Stork*, he had found no reported Scottish case where the remedy now being sought by the pursuer had been

granted. The pursuer was seeking an exceptional remedy, otherwise there would be no point in advancing both a breach of contract claim and an alternative unjust enrichment claim. There were no circumstances founded on which suggested exceptionality, other than the pursuer trying to extract herself from a bad bargain. So it begged the question, in what sort case would restitutionary damages be excluded from a breach of contract claim? She submitted, in any event, that the pleadings and pleas in law for the pursuer were apt only to support a compensatory claim in support of the third crave. Something more than averments of mere loss would be required in order to give fair notice of a restitutionary claim, given that it may bring into play equitable defences. But no notice had been given of anything other than a compensatory claim. On the contrary the pursuer's averments of being required to take "journeys by other means" was indicative of a compensation claim. Specification of such a claim was lacking.

Discussion

[52] As regards the first chapter of argument advanced by the defenders, the starting point is the recognition that the pursuer is seeking to establish the existence and terms of the various contracts as a means to claiming damages for the defenders' alleged breaches of them. The pursuer is not claiming that the contracts are vitiated by facility and circumvention or undue influence such that they should be set aside on this basis. The terms of the contracts are to be determined objectively by reference to the parties' statements and actions alone, not what they may have been thinking at the time. Accordingly the averments as to the pursuer's state of mind, and in particular her claims to be 'emotionally vulnerable', or to be 'particularly susceptible' to persuasion, and thus to have been in effect 'taken advantage of' by the defenders, are irrelevant. Mr Kelly did not seriously dispute

these general propositions. His position was simply that the averments complained of should not be looked at too critically at this stage. They were the background to the unusual circumstances of the case, "just what happened", and so a means of enabling the pursuer to tell her story and explain why she acted as she did.

[53] The high point of the defenders' attack under this chapter is on the averments concerning Mr Stephen and his report. These averments are not mere background to the pursuer's claim. They are an attempt to be allowed to lead expert evidence to establish the pursuer's state of mind at the time she entered into the contract and after, and her level of suggestibility, by reference in particular to the Gudjonsson Scale. As Mr Kelly submitted in this context, it is indeed a function of pleadings to give fair notice of the evidence to be led, but that does not mean that the court will allow evidence to be led where it is clearly irrelevant as a matter of law to the claim being advanced. The two purposes of pleadings referred to by Mr Kelly are not separate or self-contained. If the court permitted evidence to be led from Mr Stephen, and it was satisfied, for example, that the pursuer was indeed more suggestible than the average person, that would not advance her case that there was a breach of contract nor, if there was, what her measure of damages should be. In these circumstances, time and expense at proof should not be taken up with hearing this evidence, and I am clear that all the various averments relating to Mr Stephen and his report should be deleted.

[54] The next group of averments attacked are those by which the pursuer seeks to establish that she had placed her 'full trust and confidence' in the defenders and that they had 'abused' this. Related to this is the averment to the effect that the defenders exercised such 'influence' over the pursuer that she broke contact with her friend Mrs Methven. Such averments might be thought to be particularly suggestive of a claim of undue influence, but

the pursuer is seeking to establish the existence of contracts and obtain damages for their breach, not reduction of them. These averments are therefore irrelevant. Even if the pursuer were to establish that the defenders agreed a contract with her which was greatly to their advantage and greatly to her disadvantage, there are no good grounds being advanced on which it is said that they were not entitled to do this. The law does not protect competent adults from making bad bargains. To return to Mr Kelly's general line of defence, I accept that the particular averments under consideration here may well represent the pursuer's feelings on the matter, and that this is liable to come out in the course of her evidence without greatly increasing the length or complexity of the proof. Nonetheless, it seems to me that they are irrelevant and if the same argument were made in response to objection in the course of the pursuer's examination in chief, the result would be the same. This group of averments will therefore be deleted.

[55] There are then the group of averments which are to the effect that the pursuer was or was not 'happy' about certain matters relative to the contract. I take Ms Fordyce's point that, taken alongside the other averments complained of in this context, these averments too might initially appear to support a broad attempt to inquire into the pursuer's state of mind. The majority of the other averments now having been deleted, however, and Mr Kelly having disavowed any intention by the pursuer to make such inquiry, this present group of averments can be seen for what they are, a rather loose and imprecise manner of expressing the point that the pursuer considered that certain matters were not conform to the contract. That is what she will no doubt say in her evidence at proof, and in the circumstances, and on the understanding that these averments go no further than I have just suggested, it is not necessary in my view to delete them at this stage. Similar considerations lead me to consider that it is not necessary to delete the averment that the pursuer was 'persuaded' to

take out a Clydesdale Bank loan. The presence of persuasion does not necessarily mean the absence of a free choice. Seen in isolation this is simply narrative. The point is that the pursuer did agree to take out the loan, not why she did, nor how she felt about it.

[56] Turning to Ms Fordyce's second chapter of argument, I consider that Mr Kelly's submissions are well founded, essentially for the reasons which he advanced. In the first place, I do not consider that there is any inconsistency in the pursuer's pleadings between whether she claims that she did or did not derive a benefit from residence in the defenders' house in the ten months or so that she was there. The crave to which the present argument relates is crave two, in respect of which the pursuer's principal position is that it relates to the money which she gave to the defenders because they asked for it in order that they could repay their personal debts. In other words the pursuer says that this claim is unrelated to the accommodation contract. Even if she did derive a benefit from residence in the pursuer's house, this benefit did not, she says, derive from the sums in respect of which repayment is sought under crave two. But even if there was some overlap, the pursuer is at least entitled to aver that she derived no benefit. The defenders might dispute that, and the court might reject the pursuer's position. But I am not prepared to say prior to proof that this is a position which she is not entitled to take, still less that it gives grounds to refuse to allow her claim for unjust enrichment to proceed.

[57] Leaving aside any question of inconsistency, I consider that the issue of whether the pursuer derived a reciprocal benefit from any payment made by her is best analysed as an aspect of whether it would now be equitable to order repayment of all or part of the sum paid. The pursuer's claim is that she paid a specified sum of money to the defenders in anticipation of living with them indefinitely in their house as part of their family. Although money was paid, she only lived there for around 10 months, and, she says, was not treated

as part of their family during this time. The pursuer's claim is therefore for repetition of the sum paid on the basis of the *condictio causa data causa non secuta*. All that she has to aver is that she paid the specified sum to the defenders – thus that *prima facie* they have been enriched by this amount at her expense – and that there is no legal justification for this enrichment. Any claim that the pursuer has herself derived some benefit from the payment made is for the defenders to make in the context of whether it would be equitable to order repayment. This appears to me to be consistent with the *dicta* of the Lord President in *Morgan Guaranty* cited by Mr Kelly, and like Lord Macfadyen in *Compagnie Commerciale*, I do not see that the position is any different in relation to the *condictio causa data causa non secuta*. But even if it might be possible to analyse the question of benefit to the pursuer as a defence to her claim, or as a counter-claim, or as a claim for set-off, in each case the onus would still be on the defenders to aver and plead such a position. In my view it is not a matter which has to be proved affirmatively by the pursuer in order to establish her expense.

[58] I also consider that this approach is consistent with *Shilliday* v *Smith*. In this case the court was apparently unconcerned by any question of whether the pursuer had derived some benefit from her occupancy of the defender's property. This was notwithstanding the undisputed fact that the pursuer had lived there for more than a year: see 1998 SC at 730F. On Ms Fordyce's argument the court would have been bound to at least take this into account. It would either have had to have dismissed the pursuer's case for failing to properly specify her claims to expense and enrichment, or at least to have made the assumption that there must have been some benefit arising from the pursuer's occupancy, and to have deducted the value of this from the pursuer's claims. However it did neither. The court was content to simply determine whether the pursuer was entitled to repayment of the sums which she had expended relative to that property, in circumstances where the

issue of any benefit to her from occupancy had apparently not been raised by the defender in the court below in answer to the claims.

[59] In these circumstances I will refuse Ms Fordyce's motion in relation to this chapter of argument, and allow the pursuer's fourth plea in law and the averments in support of it to go to proof.

[60] Ms Fordyce's third chapter throws into focus an issue which has caused some controversy among judges and academics in recent years. That controversy is outlined in McBryde on *Contract* at paragraphs 20.142 – 20.143. Can a party to a contract claim payment by way of restitution of price or property following a breach by the other party, or is he confined to a damages claim seeking compensation for loss arising from that breach? In this case the pursuer avers that there was a contract by which she agreed to pay a vendor the balance of the purchase price of a car for each of the defenders, in return for which they would then provide, in effect, a free taxi service for her for an indefinite period. She avers that she made payments to the vendor of more than £30,000, but that the defenders did not then provide the service contracted for. This is therefore a claim in recompense of a sum equal to payments made to a third party, in advance, for the benefit of the defenders, where no part of the service contracted for was provided (cf. the Lord President's classification in *Shilliday* v *Smith* 1998 SC at 728B – C). The pursuer's sixth and seventh pleas in law make clear that her primary position is that there has been a breach of contract and that she is entitled to the sum sought by way of "damages". Ms Fordyce asks me to repel those pleas. The pursuer's eighth plea however, in the alternative, is to the effect that she is entitled to payment in the same amount by way of unjust enrichment. This plea is accepted as being one appropriate for proof before answer.

[61] On one view it may seem surprising that a contractual claim for repayment should be controversial. In the first place, as Mr Kelly submitted, if one pays for goods or services in advance and then does not receive those goods or services, 'getting one's money back' would seem to be the most natural and obvious remedy. However to put the matter this way conceals the difficulty, which is the legal basis on which this result might be achieved. Does the entitlement to 'get one's money back' arise because the sum paid over in advance is the measure of the payer's loss (i.e. damages due by way of compensation), or because it is the measure of the payee's gain (i.e. repetition of the price paid by way of restitution)? Or can it arise both ways, with the payer entitled to choose which basis on which to make his claim, or to hedge his bets by making alternative claims? In many cases, of course, the payer's loss will be the same as, or will exceed, the price paid, so his claim will ordinarily be one for damages and the analytical difficulty need not arise. The distinction matters, however, in the case where the loss and the price are not the same, and in particular where the payer's loss is less than the price paid. As in Mr Kelly's fence-building example, noted above, this can arise where the payer has made a bad bargain, paying over the odds for the goods or services concerned, and so losing only the cost of paying the true value of a replacement. But assume instead that Mr Kelly's fence had been built conform to the parties' contract. Even if the buyer then found out, and could establish by evidence, that the true value of the builder's work was only £500, any claim by him for repayment of the other £500 would fail. He would be bound by the terms of the contract which he made, which was to pay £1,000. So why should the law protect the payer from making a bad bargain where the contract is not performed, when it would not protect him from making it if it was?

[62] There are however some well-known *dicta* which would seem to support the pursuer's argument. In *McCormick & Co* v *Rittmeyer & Co* (1869) 7 M 854 the purchaser

retained the goods, although they were dis-conform to contract, and sought to claim a payment calculated by reference to a reduction in the price paid. Accepting that the *actio quanti minoris* was not available, the pursuers were nevertheless found to be entitled to succeed under the particular terms of the parties' contract. In this context the Lord President (Inglis) observed (at page 858) that:

> "When a purchaser receives delivery of goods as in fulfilment of a contract of sale, and thereafter finds that the goods are not conform to order, his only remedy is to reject the goods and rescind the contract. If he has paid the price, his claim is for repayment of the price, tendering re-delivery of the goods. If he has granted bill for the price, his claim is for re-delivery of the bill in return for the offered re-delivery of the goods… The purchaser is not entitled to retain the goods and demand an abatement from the contract price corresponding to the disconformity of the goods to order…"

On the face of it this might suggest the existence of a distinct right to claim repayment of the contract price, irrespective of whether the purchaser's loss was greater or less than this amount. If so, however, it can be contrasted with Lord Kinloch's opinion, at page 857, that in such circumstances a purchaser's "only remedy is to reject and return the goods… He will then be entitled to claim damages from the seller for breach of contract…"

[63] Two years later, in *Watson* v *Shankland* (1871) 10 M 142, the question was whether an advance by the charterers of a ship to account of freight was recoverable from the ship owners on frustration of the contract through the loss of the ship and cargo. The case went from the sheriff court to the House of Lords, but in a well known passage from his opinion in the Inner House Lord President Inglis observed (at 152) that:

> "There is no rule of the civil law… better understood than this – that if money is advanced by one party to a mutual contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance, on the ground of failure of consideration. In the Roman system the demand for repayment took the form or a *condictio causa data causa non secuta*, or a *condictio since causa*, or a *condictio indebiti*, according to the particular circumstances. In our own practice these remedies are represented

> by the action of restitution and the action of repetition. And in all systems of jurisprudence there must be similar remedies, for the rule which they are intended to enforce is of universal application in mutual contracts.
>
> If a person contract to build me a house, and stipulate that I shall advance him a certain portion of the price before he begins to bring his materials to the ground, or to perform any part of the work, the money so advanced may certainly be recovered back it he never performs any part, or any available part, of his contract. No doubt, if he perform a part, and then fail in completing the contract, I shall be bound in equity to allow him credit to the extent to which I am *lucratus* by his materials and labour, but no further; and if I am not *lucratus* at all, I shall be entitled to repetition of the whole advance, however great his expenditure and consequent loss may have been."

These observations, *obiter* though they are, appear on their face to provide support the pursuer's position in the present case. It suggests that it is open to the innocent party to recover an advance payment where the other party has breached the contract by failing in whole or in part to perform his obligations under it. The Lord President does not say that in such a situation the innocent party's claim is confined to damages by way of compensation for loss arising from the breach, indeed his references to the *condictio* and to restitution and repetition seem to be inconsistent with such a suggestion.

[64] Lord President Inglis' *dicta* in *Watson* v *Shankland* were endorsed by the House of Lords in *The Cantiere San Rocco SA* v *The Clyde Shipbuilding and Engineering Company Ltd* 1923 SC (HL) 105, a case of a contract frustrated by war following the making of an advance payment. Lord Birkenhead described the passage quoted above as a "celebrated judgement which has since been regarded as an authoritative statement of the law" (page 111). Lord Shaw regarded it as "unquestioned authority" which had "never been doubted" (page 120). As Lord Dunedin observed, however (at page 125), the case before the House was not a claim for breach of contract: "If it were, [the pursuers] would be entitled not only to [their money back] but to damages as well." His Lordship therefore saw the claim as being one which "arises in connexion with the contract, but … not founded upon the

contract." This might suggest that the restitutionary right to repayment envisaged by the Lord President could form part of a claim based on a breach of contract, but need not necessarily comprise the whole claim.

[65] There is also learned academic writing in similar vein. In Gloag on *Contract* (2nd Edition, 1929, page 59 – 60), the author observes that:

> "In cases of breach of contract the party aggrieved has an action of damages, but *in addition to this, and whether damages have been suffered or not*, he is clearly entitled to recover any part of the price or other consideration which he may have paid." (emphasis added)

This too is supportive of the pursuer's claim in the present case. She does not make any averments of loss or damage arising from the alleged breach of contract, for example, the cost to her of paying for alternative modes of transport, or for inconvenience. But for Gloag, it seems, she nevertheless has a distinct right, not to damages for loss, but to recovery of sums paid under the contract in advance. However although *Watson* v *Shankland* and *Cantiere San Rocco SA* are discussed by Gloag elsewhere, the only Scottish authority footnoted in support of the passage just quoted is *Aird & Coghill* v *Pullan & Adam* 1904 7 F 258. But this is a case about whether the purchaser had timeously exercised its right to reject goods dis-conform to contract. In my view it does not properly support the proposition for which it is cited.

[66] In any event, before the decision in *Connelly* v *Simpson*, it appears to have been widely accepted that a buyer who rejected property (so that it remained with, or reverted to the seller) and rescinded a contract on material breach, was entitled to repayment of the price paid: see Scottish Law Commission Discussion Paper No. 109 *Remedies for Breach of Contract* (1999), paragraph 4.37. It was not thought that the buyer who had paid had to

quantify damages if all he sought was repayment of the price. And if the contract was rescinded without payment having been made, the payer could simply not pay it.

[67] In *Connelly* v *Simpson* the pursuer had contracted to buy shares in a company at a price of £16,000. He paid this sum, but asked that the transfer of the shares to him be delayed so as to minimize his assets for the purpose of more advantageously settling financial provision on his divorce. No transfer of shares was ever made. The company first increased its nominal share capital and then went into voluntary liquidation, thus greatly reducing the value of the shares. The pursuer sued for repayment of the price, based on the *condictio causa data causa non secuta*. He succeeded at first instance and the defender reclaimed. Lords McCluskey and Sutherland, while agreeing that the reclaiming motion should be allowed, and the defender assoilzied, gave separate and differing opinions for this conclusion. Lord Brand dissented.

[68] Lord McCluskey took the view (page 402) that the real issue of law at the root of the appeal was whether a party to a contract who had paid a price in advance was entitled to later rescind the contract and claim return of the price when the other party has become unable to perform his obligations under the contract. He noted that neither side had found a case where simple repayment, rather than damages, had been either granted or refused in such a situation. On his Lordship's analysis of the institutional writers, they did not support a claim for restitution where the contract had been breached, as opposed to it having 'failed' by some cause external to the parties (pages 403 – 404). Lord President Inglis' dicta in *Watson* v *Shankland*, for Lord McCluskey, had to be seen in context, and envisaged not payment of the price under the contract so much as an 'advance', akin to a loan credited to the payee, which was repayable if he did not do what was required of him (page 405). On analysis, *McCormick* v *Rittmeyer* should be understood as a case where the Lord President

was saying no more than that the amount of damages would be equal to the price paid, and he was not saying that repayment of the price was an alternative to claiming damages (page 406). *Cantiere San Rocco SA* was a clear frustration of contract case and the approval of the *dicta* from *Watson* v *Shankland* should be seen in that context. There had been no attempt by the Law Lords "…to enunciate any rule to the effect that where one party is in breach of contract he has any monetary remedy other than damages" (page 406).

[69] In all the circumstances Lord McCluskey could find nothing which was (page 407):

> "…explicit authority for the view that a person who has paid in advance of performance the sum of money which will be due in respect of performance but has agreed that there should be no performance until after a significant period of time, can claim anything other than damages when, the time for performance having arrived, the other party, in breach of contract, declines to perform or is unable to do so because, by his own actions, he has put it beyond his power to perform his part of the contract… the only remedy available to a person for breach of contract, if he seeks a monetary remedy, is to claim damages which will compensate him for his loss…"

And as for the case under consideration:

> "…the payment made was not of the nature of an advance or a type of conditional loan: repayment was never in either party's contemplation. What each party contemplated was that the defender would deliver certain shares when called upon to do so. At best for the pursuer … the defender was guilty of breach of contract… by failing to deliver the shares, or by having so acted as to render performance impossible. For such a breach the remedy is damages… I see no room, in a breach of contract case… for a remedy in the form of restitution of the price paid as such… In my opinion, the *condictio causa data causa non secuta* may be invoked by the creditor only when there has been no wilful breach of contract by the debtor giving rise to a claim for damages." (pages 408 – 409).

Accordingly, for Lord McCluskey, *Connelly* was a case where the pursuer had paid the money due under the contract, not a recoverable advance, and where there had then been, at best for him, a breach of contract. In such circumstances he was not entitled to repayment of the price paid. He could not invoke the *condictio*. His only monetary remedy was to claim damages for the breach of contract to compensate him for his loss.

[70] For Lord Sutherland, little assistance was to be gained from the institutional writers. He could not find in any of them a suggestion:

> "…that the *condictio* is appropriate for use in a situation where a completed contract has been entered into and ordinary remedies for breach of contract are available and appropriate, and if this were the position I would have expected there to have been some authority to support it." (page 411)

Therefore Lord Sutherland considered it clear that if the pursuer was to succeed he had to bring himself within the principle set out by Lord President Inglis in *Watson* v *Shankland* and affirmed in *Cantiere San Rocco SA* (page 411). However the "vital distinction" being made by the Lord President had been:

> "…between an advance on the one hand, which is recoverable on failure of consideration, and a payment or pre-payment on the other, which is not recoverable" (page 412).

And examination of the speeches in *Cantiere San Rocco SA* showed that this case was:

> "…ample authority for the proposition that money paid in advance may be recovered under the *condictio* where the reciprocal consideration is for some future event to be performed and that event, for whatever reason, never occurs." (page 414)

The particular passages quoted by Lord Sutherland from the Law Lords' speeches suggest to me that he did not mean 'whatever reason' to include wilful breach of contract, and that he was not taking issue with Lord McCluskey in this regard. The question for Lord Sutherland, then, having analysed these two key cases, was therefore:

> "…whether the payments made by the pursuer constituted payment of the price then due and payable under the contract, in which case they would not be recoverable, or merely an advance towards the price which would not be due and payable under the contract until delivery of the shares, in which case they would, in principle, be recoverable as delivery of the shares never occurred." (page 414)

On the facts of the agreement in question, his Lordship was satisfied that it was the former. The pursuer had paid for the right to have the shares transferred to him, a right which he

would have been entitled to then enforce, and his payment had been made in consideration of that right. Accordingly, for Lord Sutherland, there was:

> "no room for the application of the *condictio* and …the pursuer's only remedy would be an action for breach of contract…" (page 414).

The pursuer's only plea in law was that:

> "…having paid the price in terms of the said contract without performance by the defender is entitled to repayment of the price *causa data causa non secuta*." (page 409)

As the action was thus founded solely on restitution, Lord Sutherland was satisfied that the defender was entitled to be assoilzied (page 415).

[71] Lord Brand, in a short dissenting opinion, acknowledged that the "real issue of law" in the case was as Lord McCluskey had analysed it, and that the court had been referred to no case where a simple claim for repayment had been either sustained or refused in such circumstances. He did not find that surprising, because a claim for damages would generally be worth at least as much as a claim for restitution. For Lord Brand, it was

> "…no more than common sense that a vendor who has been fully paid but is unable to fulfil his obligation under the contract should be liable to make restitution of the price" (page 415).

His Lordship expressed himself content to adopt Lord McCluskey's summary of the cases and texts to which the court had been referred, but did not say why he disagreed with the resulting analysis, referring instead to an entry from Traynor's *Latin Maxims* as accurately stating the applicable law.

[72] As the Law Commission puts it at paragraph 4.40 of its 1999 Discussion Paper, there was:

> "…a poetic justice in the result in *Connelly* v *Simpson*. The pursuer's plan to make his assets seem less for the purpose of his divorce succeeded better than expected."

But the decision is criticised by the Commission as leading to a variety of arbitrary and incoherent results. It nevertheless expressed the "preliminary view" that the question of imbalances arising out of rescission could best be left to the law of unjust enrichment rather than by making statutory provision on remedies for breach of contract – "it being made clear that a claim for redress of unjustified enrichment is available to both parties on rescission notwithstanding the decision in *Simpson* v *Connolly*" (paragraph 4.47). I take this to be a recommendation that this matter *should* be made clear as a precursor to allowing the law to develop in this way, not that it *was* clear in the light of the Inner House's decision. In its subsequent Report, however the Commission noted (SLC Report no 174 (1999), paragraph 7.23) that the majority of respondents to the Discussion Paper had agreed with its preliminary view. It described *Connelly* as a "rather special case" which could "be left to be distinguished in subsequent cases", and that it was:

> "…unlikely that [it] will prevent development of the law in the direction of allowing economic imbalances which can arise from rescission of a contract from being remedied by resort to the law on unjustified enrichment."

The Law Commission was not alone in its criticism of *Connelly* v *Simpson*: see the discussion by Seller, Stair Memorial Encyclopaedia, *Obligations*, paragraphs 39 to 43, and various learned articles cited there.

[73] Notwithstanding the Law Commission's optimism, however, there appears to have been little development of the law since 1999. As far as I can tell it is only in *Stork Technical Services Ltd* v *Ross's Executor* that a senior court in Scotland has returned to directly confront the decision in *Connelly* v *Simpson*. Lord Tyre's decision in this case therefore requires close attention. In particular he noted that:

> "[33] Although there appears to be consensus among commentators that the remedy of restitution (in a non-technical sense) should be available, in addition to damages for any loss caused by the other party's breach of contract, to a

person who has made a payment in anticipation of a counterpart obligation which is never implemented, there is less consensus as to what the legal basis for that remedy ought to be…

[34] For the purposes of the present opinion, I am, of course, concerned with what is the law of Scotland is rather than what it ought to be. It can hardly be doubted that the law is still in the course of development. So far as I am aware, there has been no reported Scottish case in which a party to a contract who is made payment in anticipation of a counterpart performance which never occurs has been held entitled, under the law of contract, to the remedy of restitution of the price paid on the basis of the mutuality principle. I am, however, satisfied that the passages cited above from Bell's *Commentaries* and from Gloag on *Contract* provide sufficient authority for the proposition (i) that the remedy of restitution is available in such circumstances, and (ii) that the availability of restitution does not depend upon the application of the *condictio causa data causa non secuta*. These propositions obtain some further support from Lord Morison's obiter observations in *Zemhunt*."

[74] More particularly, the three authorities relied on by Lord Tyre are as follows:

(i) Bell's *Commentaries*, where at Vol. I, page 478, the author states:

"The claim of a buyer, then, to whom delivery is refused, is twofold: 1. For repayment of the price, already paid to the seller; and 2. For indemnification of the loss sustained by non-fulfilment."

(ii) the *obiter* observation of Lord Morison in *Zemhunt (Holdings) Ltd* v *Control Securities plc* 1992 SC 58 at 70, that:

"… a breach of contract by the payer of part of the price which is sought by him to be recovered, following rescission of the contract by the payee on the ground of that breach, does not per se affect the equity of the claim for restitution. This is because the ordinary remedies for breach of contract are available to the payee and the payer is already accountable for the breach by the operation of these remedies."

Zemhunt was a case where the party in breach of contract was seeking to recover a payment made for purchase of property at auction, but where the Inner House held that the payment was a non-returnable deposit.

(iii) Gloag on *Contract*, in particular the passage at pages 59 – 60 to which I have already referred above, and also the following:

> "It may also be taken as an illustration of the general rule that money may be recovered if the consideration has failed that if one party has the right to rescind a contract, it is a condition of the exercise of his right that any payments made by the other party must be restored."

Accordingly it is on the basis of these passages that Lord Tyre held that the law of Scotland permits the grant of a restitutionary remedy for breach of contract based on the mutuality principle instead of the *condictio*. No reliance is placed on *Watson* v *Shankland* or *Cantiere San Rocco SA*.

[75] However there remained the question of whether the decision in *Connelly* v *Simpson* required a different view to be taken. Lord Tyre took the view that it did not:

> "[35] I recognise that this analysis might not be regarded as consistent with the opinions of either of the members of the majority in *Connelly* v *Simpson*. The court in that case did not, however, address directly the question whether a remedy of restitution was available under the law of contract, as opposed the law of unjustified enrichment. There is no indication in the report of the case that the passage from Bell's *Commentaries* to which I have referred, which makes clear that the remedies of restitution and damages are not mutually exclusive, was cited. Lord McCluskey's analysis… that the claim for repayment of the price was a claim for damages was not adopted by the other two members of the court, and I would not have regarded it as binding upon me. Lord Sutherland's rejection of the pursuer's claim for repayment was dependent upon the somewhat unusual circumstances of the case. It respectfully appears to me that the dissenting opinion of Lord Brand's most consistent with the authorities to which I have referred; his description of restitution as "a claim of right and not an exceptional remedy dependent on equitable considerations" appears to me to confirm that he had in mind a remedy based on contract and not on unjustified enrichment."

This decision has been welcomed as offering "welcome clarity to a fundamental issue of obligations law which for too long has been mired in uncertainty" (Hogg, *Restitution following termination of contract: a contractual or enrichment remedy?* (2015) Edin LR 269 at 273).

[76] The starting point in the present case is that although the pursuer avers that she paid the sums concerned in fulfilment of her obligation under a contract, her claim is for

recompense, not repetition for, as Mr Kelly explained, the sums were paid not to the defenders but to a third party, the seller of the cars. This alone seems to me to place her claim on weaker ground than in any of the cases considered above. In particular, and as has been seen, all the passages cited from the authorities concern the possibility of a claim for repetition, that is, repayment of sums paid to the other party to the contract. I have been referred to no authority at all in support of the proposition that a party claiming breach of contract is entitled to payment in recompense from an alleged contract breaker in the same sum as that paid to a third party for their benefit, nor that a such a claim should be treated in the same way as claim for repetition by way of repayment of a sum paid to the defender, whether in payment of the price or as an advance. However even if no distinction falls to be drawn between repetition and recompense in this context, and differing in this respect from Lord Tyre, I consider that the *ratio* of the majority decision in *Connelly* v *Simpson* is sufficiently clear for present purposes, is binding on me, and precludes the pursuer from the remedy which she is seeking on the averments which she has made on this aspect of the case.

[77] In my view, although Lords McCluskey and Sutherland do not analyse the issues in the same way, there is common ground between them on key points. Critically, as can be seen from the passages from their opinions which I have quoted above, they both drew the distinction from the authorities between the case where a party to a contract has paid an 'advance', and the case where he has paid some or all of the contractual price. In my view both of their Lordships considered that only in the first case will that party be entitled to claim restitution by way of repayment of the sum paid in the event of a breach of contract through non-performance by the other party. Both considered that in the second case the innocent party's only remedy is via an action for breach of contract and – Lord McCluskey

expressly and Lord Sutherland implicitly – that this means obtaining damages, that is, compensation for loss arising from the breach. Turning to the circumstances of the case before them, both of their Lordships were clear that the money paid by the pursuer was a payment of the contractual price for the shares (or the right to demand transfer of the shares) and not a recoverable advance. Accordingly it was not repayable as such, either under the *condictio* or in an action founded on breach of contract. I therefore do not read Lord Sutherland's opinion as turning only on some peculiar facts of the case, nor as providing support for a proposition that repayment is not available where the pursuer has got what he contracted for, but could be available where he has not (cf. Hogg, *op. cit.* page 271).

[78] Applying this to the pursuer's averments in the present case it is in my view clear that the sums paid by her to the seller of the defenders' cars were paid in fulfilment of her obligation under the contract on which she seeks to found. There may be grounds to criticise the distinction between an 'advance' and a 'pre-payment', but in my view the sum paid by the pursuer in the present case cannot be regarded as an 'advance' in the sense described by Lords McCluskey and Sutherland. It was clearly the whole consideration, or price due, by the pursuer for the transport services which she claims were to be provided by the defenders. It seems to me that once these sums had been paid, the defenders were – on the pursuer's case – immediately obliged to provide her with transport services, an obligation which in principle could have been enforceable by an action for specific implement. But, the pursuer claims, the defenders failed to provide her with the services contracted for and are in breach of contract. That all being so, it is on my view clear from *Connelly* v *Simpson* that the only monetary remedy available to her is damages to compensate her for loss pursuant to an action for breach of contract. In such an action she is

not entitled to obtain restitutionary repayment of the sum paid by her nor, *a fortiori*, is she entitled to recompense.

[79] In these circumstances I consider that I am bound by *Connelly* v *Simpson* to hold that the pursuer's averments of loss in relation to her claim for breach of the transport contract are irrelevant and should be deleted. That being so, and there being no other averments quantifying any loss, I consider that it is appropriate, as invited by Ms Fordyce, to delete the pursuer's averments relating to the transport contract, to repel her sixth and seventh pleas in law and thus to dismiss her claim for the sum third craved insofar as it is founded on breach of contract. The pursuer does of course advance as an alternative a pure unjust enrichment claim in support of this same crave, in the event that it is found that there is no contract between the parties. Ms Fordyce did not suggest that this alternative claim was irrelevant, nor did she move me to delete it at this stage. However it should be apparent from my reading of *Connelly* that it will become so in the event that it is established that there was indeed a contract between the parties, thereby leaving no room for an unjust enrichment claim. With some hesitation, therefore, I will allow this claim to proceed to proof before answer.

[80] If I had not regarded *Connelly* as binding authority against the pursuer in relation to her breach of contract claim, I would still have had to consider whether her claim was well founded in law. In this regard, and with all respect to Lord Tyre (and to the learned academic authors who support his conclusion), it might be said that the authorities on which he relies in reaching his positive conclusion that the law does permit a restitutionary remedy for breach of contract are rather slender. The passage from Bell's *Commentaries*, while certainly supportive, stands in isolation from the other institutional writers considered by Lord McCluskey (1993 SC at 403 – 404). The passage from Gloag on *Contract*, as I have said

above, is footnoted to case authority which does not support it. Lord Morison's *obiter dicta* from *Zemhunt (Holdings) Ltd* is said in a different context (a claim by the contract breaker) and is not wholly unequivocal. And Lord Brand's short, dissenting, appeal to common sense, with respect, does not address the detailed legal analysis of the majority. It reads more as a plea to what the law should be, not necessarily what it is. So while I can well see that the law in this area is still in the course of development, and have some sympathy for the arguments as to why it should be as his Lordship suggested, I would have hesitated to agree with Lord Tyre that it has reached a stage sufficient for me to hold that the pursuer's claim in the present case is a valid one. Given the view I have taken of the *ratio* of *Connelly*, I do not need to express any concluded view on this beyond saying that I, like Lord Tyre, can see that further consideration of the issues by the Inner House may be appropriate.

[81] I did consider, as discussed in the course of the debate, whether it would be appropriate for me to allow the pursuer's sixth and seventh pleas to go to proof before answer, particularly in circumstances where the law was perhaps less clear than it might be and it was not being suggested that there should not be proof on her alternative plea of unjust enrichment. However I have had the benefit of hearing a substantial argument on the point, and am satisfied that I can and should make a decision on it at this stage, with the consequence that the breach of contract claim falls to be deleted. This is not to say that no relevant claim for breach of contract could have been pled. Given that the cars were purchased in around 2010, the pursuer has presumably had (on her account) seven years of paying for alternative transport, possibly with added inconvenience, and if so an attempt to quantify this cost of this might at least have been attempted. Indeed, if equitable factors (for example, depreciation in the value of the cars) were to reduce the quantum of the unjust enrichment claim, the final figures might not be so very different. However in the absence of

any attempt at such a quantification I will grant Ms Fordyce's motion in relation to the third chapter of her argument and delete the averments *anent* breach of contract and the pleas in law specified above.

[82] Turning finally then to Mr Kelly's attacks on the defenders' pleadings, a number of his points were conceded by Ms Fordyce in the course of the debate, as noted above. The pursuer does not now make any claim that any of the money she gave to the defenders was by way of a loan, so those of the defenders' averments made in answer to this claim, but which have no remaining relevance (as noted at paragraph 40 above), will be deleted.

[83] As for the averments in relation to Dr Stewart's report (paragraph 41 above), I agree with Ms Fordyce that these stand and fall with the pursuer's averments in relation to Mr Stephen's report. I have already deleted the averments in relation to Mr Stephen's report for the reasons set out above, and accept as well founded Ms Fordyce's concession that the averments in relation to Dr Stewart's report should therefore also be deleted.

[84] As regards the defenders' averments *anent* equity in Answer 11 (paragraph 42 above) I accept what was in effect the joint position that these averments were now 'in the wrong place', given the deletion of the unjust enrichment claim as an alternative to the claim for breach of the accommodation contract. They are however repeated *brevitatis causa* in relation to the defenders' answers to those other parts of the case where the pursuer maintains unjust enrichment claims. It would certainly be tidier and more logical for these averments to now be moved from Article 11, but I consider that it is not for me to carry out this exercise on counsel's behalf. I take the same view in relation to the duplicated averments referred to by Mr Kelly in Answers 11 and 12 (paragraph 44 above), albeit that, as I observed in the course of the debate, any steps to reduce the length of the pleadings would be welcomed.

[85] Finally, and as noted above, Ms Fordyce ultimately conceded that the defenders' averments and plea of personal bar in relation to the pursuer's unjust enrichment claim (paragraph 43 above) could be deleted. I accept that concession. I would acknowledge that in principle a party may plead personal bar in relation to a claim for unjust enrichment. And I also acknowledge that there may be a distinction between a party representing that she is making a gift, and actually making it. But in this case any such distinction will be vanishingly small, if it really exists at all. Standing the presumption against donation it will be for the defenders to establish that the sums in question were gifted to them, and if they cannot do that it is hard to see on what basis they could nevertheless establish that the pursuer made representations of gift sufficient for them to establish a claim to personal bar. In all the circumstances I will make the deletions to the defenders' pleadings and pleas in law as sought by Mr Kelly.

Conclusion

[86] For all these reasons I will sustain the first and eighth plea in law for the defenders, and the first plea in law for the pursuer, to the extent of excluding from probation the various averments, and deleting those pleas in law, as more particularly specified above. *Quoad ultra* I will allow parties a proof before answer, all other pleas standing, at a date to be afterwards fixed. Parties should liaise with the sheriff clerk in this regard.

Expenses

[87] Both Mr Kelly and Ms Fordyce moved me to certify the cause as suitable for the instruction of junior counsel. I am happy to do so as regards preparation for and appearance at the diet of debate on 16 November 2017. I heard no submissions on expenses.

If either party seeks a finding of expenses in relation to the debate the appropriate motion can be enrolled, and a hearing assigned if necessary.

The Record

[88] It is obviously necessary that the pursuer lodges an up to date Record at the earliest opportunity taking accurate account of the various deletions which I have made. Given the length and complexity of the pleadings it is also essential that this new Record be paginated, and if at all possible that marginal line numbering is also included. The absence of either proper page or line numbering in the copy of the Record available for the debate made navigation of the pleadings significantly more difficult than it should have been.