SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2020] EDIN 37

F353/16

JUDGMENT OF SHERIFF WILLIAM HOLLIGAN

in the cause

HAT

Pursuer

against

CW

Defender

Pursuer: Uttley; Beveridge and Kellas
Defender: Campbell; Russel and Aitken

Edinburgh, 10 February 2020

The sheriff having resumed consideration of the cause:

Finds in Fact

1. The pursuer (female) and the defender (male) resided together from 1993 until their separation on 23 April 2015.

2. There are three children of the relationship namely A (male) born 03 October 1999, B (male) born 01 December 2000 and C (female) born 07 August 2005.

3. During the whole of their cohabiting relationship, the parties lived together in the family home in Edinburgh.

4. The family home was purchased by the defender in his sole name in 1992 prior to the commencement of the parties' relationship. The defender purchased it for the sum of £46,000 with the assistance of a mortgage of £43,000.

5. The pursuer moved in approximately one year later, in 1993. At that time, the market value of the family home was £48,000. There was an outstanding mortgage balance of £43,000. Accordingly there was equity of £5,000.

6. In 2006, the family home was extended by purchasing the upstairs property. Title thereto was taken in the defender's sole name.

7. The upstairs property was purchased at a price of £119,000. The whole of the purchase price was raised by way of loans secured against the two properties. Part of the purchase price was raised by way of an interest-only mortgage loan of £95,000 secured against the upstairs property. The remaining £24,000 of the purchase price was raised by re-mortgaging the downstairs property with a new capital repayment mortgage loan of £81,000. The amount of the combined mortgages over both properties in 2006, immediately following the acquisition of the upstairs property, was £176,000. Of that amount £119,000 was used to buy the upstairs property; £43,000 redeemed the previous mortgage over the lower property; £4,000 was spent on legal costs and the remaining £10,000 was used towards the cost of converting both properties into one unit, including a new central heating system. The total renovation and conversion costs amounted to £23,000 (of which £10,000 was funded by the mortgage loans; the sum of £13,000 came from the surrender proceeds of an endowment policy in the defender's name.)

8. Immediately prior to the purchase of the upstairs property, there was equity of £82,000 in the downstairs property (the market value was £125,000 less the mortgage loan of £43,000). Immediately following the purchase of the upstairs property, the equity in the downstairs property fell to £44,000 (its market value was £125,000 but the mortgage loan had increased to £81,000)

9. Immediately following the purchase of the upstairs property, the equity in the upstairs property was £24,000, (the market value was the purchase price (£119,000) under deduction of a loan of £95,000).

10. The two properties have been renovated and combined to form a single-family home.

11. The endowment policy referred to in paragraph 7 above was in the defender's sole name. The defender started the policy in 1992 and paid equal monthly premiums for the whole of the period from 1992 until it was surrendered in 2006.

12. The defender undertook electrical work himself in connection with the renovation. This saved approximately £3000.

13. Following the conversion into one property, the value of the combined properties in 2006 was £ 240,000. It was subject to two mortgage accounts with a total outstanding balance of £176,000 at that time. The equity of the family home post-conversion was therefore £64,000.

14. The parties remained living there together, along with their three children, until the relationship ended on 23 April 2015. The pursuer then moved out. The defender remains living there with the three children. The middle child is largely absent on service. The older child is in employment and pays the sum of £300 to the defender towards the cost of living.

15. The monthly mortgage payment during the period from the purchase of the upstairs property in 2006 until the parties' separation in 23 April 2015 was approximately £897 per month.

16. As at the date of separation 23 April 2015, the market value of the family home was £275,000. The combined mortgage balance as at that date was £133,104 (comprising an

outstanding balance of £38,021 on one mortgage account, and £95,083 on the other mortgage account). Accordingly at the date of separation the family home had equity of £141,896.

17. The current market value of the family home is £290,000. The balance outstanding on the mortgage account for the upstairs property is £95,277 and the amount outstanding on the mortgage account for the lower property is £21,757. Accordingly, the family home currently has equity of £162,966.

18. From 1993 until 1999, the pursuer worked full-time as a wages clerk. In 1999, she was made redundant. A was born later that year. The pursuer was unemployed from 1999 until 2001.

19. From 2001 until 2004, the pursuer worked part-time at a bank as an administration clerk. The pursuer's mother travelled to the family home to look after the children when the pursuer was at work. That arrangement was not sustainable. The pursuer did not return to work after 2004 because the parties agreed she should remain at home and look after the children and the home. It would not have been financially worthwhile for the pursuer to have returned to work because of the cost of paid child care.

20. Thereafter the pursuer was unemployed from 2004 and for the remainder of the parties' relationship. The pursuer is currently employed as a carer working 40 hours per week. She lives in rented accommodation. Her net take home pay is approximately £1200 per month. Her rent is £700 per month.

21. The defender was continuously employed throughout the parties' relationship. From 1993 to 1995, the defender was employed as an electrician. From 1995 to 2000 the defender worked as a delivery driver/ warehouseman for his father. From around 2000 the defender worked and continues to work as a self-employed electrician.

22. Throughout the parties' relationship, the pursuer fulfilled the role of principal carer for the children. The pursuer looked after the family home. She undertook the family's grocery shopping, prepared the family's meals, did the family's laundry and ironing, tidied and cleaned the home. The defender fulfilled the role of main breadwinner.

23. The parties received Tax Credits of approximately £500 - £600 per month. The pursuer paid to the defender for an unspecified time the sum of £120 per month out of the account into which the Tax Credits were paid. The money was paid to help in the payment of family bills.

24. The parties kept only one joint into account into which Child Benefit was paid. The pursuer paid for groceries and other family expenses from an account operated by her.

25. The defender was solely responsible for making the monthly mortgage payments during the parties' relationship. The defender has been solely responsible for making the monthly mortgage payments since the parties' separation. On occasions the parties required financial help from their respective parents to pay the mortgage. The defender also paid and continues to pay the utility bills.

26. The parties pooled the family income and expenditure.

27. As at the date of the parties' separation in April 2015, the pursuer's only significant assets were her pension entitlements with a combined value £18,501.40. The pursuer has no savings.

28. Had the pursuer secured full time employment in a similar role to that she was working in until her redundancy in 1999, she would have earned around £13,667 gross per annum in 1999 rising to £16550 in 2010 and £19,011 in 2015. Had the pursuer been in such employment, her pension fund between 1999 and 2015 would have been worth £23,873. The pursuer's pension from her part time work amounts to a pension worth £7,254.

29. The three children have lived with the defender since the parties separated. From around June 2016 the children had residential contact with the pursuer every second weekend. Both boys have continued with this arrangement. C has chosen to have no contact with her mother since July 2018. C is in S3 at school. She may continue to attend school until S6.

30. The pursuer has made no payment of child support since the date of separation.

31. By agreement, the pursuer continued to receive the Child Benefit payments for the children since the separation until 21 May 2018, notwithstanding that the children resided with the defender. These payments amounted to £192.40 every four weeks. This was paid by the DWP into a joint account in the parties' name but was retained by the pursuer by mutual agreement. Between April 2015 and February 2016 the pursuer received at least one half of the Child Benefit payments (i.e. 10 months x £190, divided by 2 = £950). Between February 2016 and May 2018 the pursuer received the entire Child Benefit payments (27 months x £190 = £5,130). Accordingly, since the parties' separation the pursuer has received total Child Benefit of £6,080.

32. As at the date of the parties' separation in April 2015, the defender's only significant assets were the family home and a personal pension plan with a CETV value of £15,968. The defender has no savings.

Finds in Fact and in Law

1. The parties were cohabitants within the meaning of section 25 of the Family Law (Scotland) Act 2006.
2. The parties both live within the jurisdiction of this court. This court has jurisdiction.

3. The defender has derived economic advantage from contributions made by the pursuer and the pursuer has suffered economic disadvantage in the interests of the defender and three relevant children.
4. The economic disadvantage suffered by the pursuer in the interests of the pursuer and three relevant children is partly offset by the economic advantage the pursuer has derived from contributions made by the defender.

THEREFORE puts the matter out by order in order to determine further procedure and assigns 6 March 2020 at 9.30 am within the Sheriff Court. 27 Chambers Street as a diet therefor; reserves meantime all questions of expenses.

Note

[1] In this action the pursuer (female) seeks an order for payment by the defender (male) of a capital sum (£70,000) pursuant to section 28 of the Family Law (Scotland) Act 2006 ("the 2006 Act").

[2] I heard evidence from the parties and the pursuer's father. This is not a case in which there are any significant issues of credibility and reliability. Much the detailed evidence was set out in a joint minute (number 19 of process). As the bulk of the evidence came from the joint minute I have largely incorporated its terms into my findings in fact with a number of stylistic changes and the removal of unnecessary details. Where there are differences in the evidence of the parties I regard them as insignificant: the key issues are not in dispute. With all respect to the pursuer's father, I do not think he was able to give much evidence from his own knowledge which was of particular importance in resolving the issues in this case.

[3] There is no dispute that the parties were cohabitants within the meaning of section 25 of the 2006 Act and that the relationship endured from 1993 until the parties separated on 23 April 2015. There are three children of the relationship: A (male) aged 20; B (male) aged 19; C (female) aged 14. Throughout the relationship the parties lived in the same (later extended) house. The address of the house and the current addresses of the parties are all within the jurisdiction of the court. I will refer to the house as "the family home" which includes the later acquisition of the upstairs property. The defender and two of the children continue to reside there.

[4] The evidence falls into separate topics: employment history; children; income/benefits; savings; pension; family home.

Employment history

[5] Both parties began work immediately after leaving school. The defender qualified, and was employed as, an electrician, remaining with the same company from school until 1995. From 1995 to 2000, the defender was a delivery driver/warehouseman. In 2000, he then resumed work as an electrician. He is, and has since 2000, been self-employed. There was no evidence about his current income. The pursuer started work after school as a wages clerk where she remained until 1999. Between the period 2001 to 2004 the pursuer worked as an administration clerk in the banking sector for 20 hours a week between the hours of 8.00am to 12.00 noon. At that time the first two children were young. The pursuer stopped work in 2004. She is currently employed as a carer working 40 hours a week. When they began their relationship their respective incomes were similar. Her monthly net income is approximately £1200 per month with rent of £700 per month.

Children

[6] It is agreed in the joint minute that the pursuer was the principal carer of the children. During the period 2001 to 2004, when she was working part-time, she received help from her mother in looking after the two children. Her mother had to travel some distance across Edinburgh to arrive in time to enable the pursuer to leave for work where she started at 8.00am. From the defender's evidence, there were occasions when the pursuer's mother was held up, often by traffic. He was unable to leave for work until the pursuer's mother arrived and that he said caused him difficulties. He was then undertaking work which required him to travel throughout Scotland which obviously involved a great deal of travelling and a long day. At one point in the evidence there was a difference between the parties as to whether it was a joint decision that the pursuer should give up work or whether this was something initiated at the instance of the defender. The pursuer was asked why she did not return to work. As I understood her evidence she accepted that she had had conversations with the defender about her returning to work or retraining. The problem for the parties (which the defender accepted) was that a return to work would have involved paid child care and that came at a cost; the pursuer would have to earn more than the cost of child care to make it worthwhile. She did not return to work. At one point in their evidence both parties said that the decision that the pursuer should not return to work was a joint one – a decision which continued until separation. In essence, the arrangement settled upon by the parties was that the defender would be the main breadwinner and the pursuer would be the home keeper. This involved the pursuer shopping, preparing meals, washing, ironing and cleaning the home. After the date of separation, the three children remained resident with the defender. The oldest child and the younger child continue to reside with him. The oldest child is in employment and pays to the defender the sum of

£300 a month towards the cost of living. The youngest child is at school (S3) with the expectation that she has another three years to complete her schooling. What she will do thereafter is not yet settled. The middle child is now in the army and does not reside fulltime with the defender. As part of the initial arrangements, the older two boys had contact with the pursuer during alternate weekends; however, it is accepted this had not happened all of the time. It is also agreed, with the possible and limited exception of Child Benefit to which I will later refer, the pursuer has made no contribution to the cost of looking after the children since the date of separation. The youngest child does not have contact with the pursuer.

Income/benefits

[7] Child Benefit was payable in relation to the three children. The parties operated a joint bank account into which the Child Benefit was paid. That is the only joint account which they operated. In 2006, a successful application was made for the payment of Tax Credits. Entitlement is assessed on the joint income of the parties. The Tax Credits were paid into an account maintained by the purser. Tax Credits amounted to approximately £500-£600 per month. The pursuer retained the Tax Credits until separation. Out of that account the pursuer paid to the defender the sum of £120 per month (see number 5/3/1 of Process). The defender accepted that he received the sum of £120 per month. It was to assist the defender in paying the bills which he dealt with. Neither party was clear as to the precise duration of this arrangement. The parties arranged their finances so that the defender paid the mortgage and the utility bills from his account. The evidence from the parties is that the mortgage was approximately £1,200 per month although this clearly fluctuated. The pursuer paid for groceries and the like from her account and I assume that Child Benefit was

also used towards the general costs of the household. In common with many other couples, there were times when there were significant financial pressures on the household budget. The pursuer required to ask her parents and the defender's parents for financial assistance on occasions when there was not sufficient money to pay the mortgage. She asked her parents for assistance on approximately five or six occasions (in this she is supported by her father). The parties borrowed from the defender's parents on two to three occasions. From the evidence of the defender, he was unaware of this fact until the last couple of years. By agreement between the parties the pursuer continued to receive Child Benefit after separation in April 2015 until 21 May 2018. However, over the period April 2015 to February 2016 the pursuer received at least one-half of the Child Benefit payments. The pursuer's evidence was that she did recall giving some money towards the defender but, perhaps unsurprisingly, she was not certain how much she gave nor was the defender certain how much he received. The agreement between the parties is recorded in finding in fact 31. The total value of the Child Benefit received by the pursuer is agreed to amount to £6080. In summary, when the parties first began their relationship they were each working. After two of the children were born, the pursuer returned to work on a part-time basis for approximately three years but for the rest of the time she did not work. The defender remained in employment (as employee or self-employed) throughout. The pursuer is currently working as a carer.

Savings

[8] The parties have no savings. From the evidence concerning the family home, the defender at one point had an endowment policy, the proceeds of which he used to help with the renovation of the family home.

Pensions

[9] The position as agreed between the parties which I record in findings in fact 27 and 32 is to the effect that the value of the pursuer's pension entitlement is £18,501.40 and the value of the defender's pension is £15,968. It appears to me more probable than not that the pursuer must have made some contribution towards her pension when she was working part-time from 2001-2004. The defender has not made any contribution to a pension fund. His pension entitlement arises from the time that he was employed prior to 1995. It was a contracted out pension scheme. No detail as to the scheme was given. The parties agreed in the joint minute (finding in fact 28) that, had the pursuer secured full time employment in a similar role to that in which she was working until 1999, her pension fund would have been worth £23,873.

Family home

[10] The family home is the most contentious issue between the parties. There was not a great deal of evidence from the parties themselves as most of the detail is set out in the joint minute. Put broadly, the family home initially comprised a downstairs property with two bedrooms. With the arrival of the third child, accommodation was becoming cramped. The defender looked at other properties in the locality but soon concluded that they were too expensive for the parties to purchase. From the defender's point of view, the location of the family home was particularly beneficial because his parents lived very close by. The upstairs property became available for sale. The parties were able to arrange a private sale with the owner. In 2006 the upstairs property was acquired. It is important to the defender's case that he purchased the family home (then the lower property) before the

parties began their cohabitation; it was not a family home at that point. Title to what became the family home was taken in his sole name in 1992. The agreed position between the parties is that title to the family home, which now comprises the lower and upper properties, is in the sole name of the defender. The pursuer spoke to a conversation with the defender in which she suggested to him that title ought to have been taken in joint names of the parties. Her evidence is that the defender's reply was that he simply forgot. The defender's evidence is that he was advised by a financial adviser that the better thing to do was to put the title in the name of the defender only. A further variation in the evidence is that in 2006 title was taken in the name of the defender because he was the only person working at the relevant time and thus the only person who could apply for the mortgage. I do not think the reason why title was taken only by the defender is material. The rather complicated financial arrangements relating to the family home set out in the findings in fact derive from the joint minute. The key figures are as follows. The defender purchased the family home for the sum of £46,000, acquired with the assistance of a mortgage of £43,000. When the parties entered their relationship there was what was described by agents as equity in the property of approximately £5,000. The upstairs property was purchased at a price of £119,000, all of which was secured by a mortgage over both the downstairs and the upstairs properties. Prior to the purchase of the upstairs property, there was equity of £82,000 in the downstairs property – market value of £125,000 less £43,000 outstanding on the loan. That loan increased to £81,000, reducing the equity to £44,000. The equity in the upstairs property at the same point was £24,000 being the purchase price of £119,000 less £95,000 by way of loan. The defender surrendered a policy valued at £13,000, the premiums of which he paid, in order to have cash to pay towards the renovation and conversion of the properties. He carried out the electrical work valued at £3000. In 2006, the value of the

combined properties was £240,000. There were loans outstanding amounting to £176,000 leaving equity of £64,000. As at April 2015, the market value of the family home was £275,000 with an outstanding loan of £133,104 leaving equity of £141,896. The current valuation of the property is £290,000 with loans amounting to £95,277 for the upper property and £21,757 for the lower ground property. That leaves equity of £162,966. The defender's evidence was that the smaller of the mortgage accounts should be paid off in April 2020.

Submissions for the pursuer

[11] Mr Uttley lodged written submissions. He began by referring to section 28 and the cases of *Gow* v *Grant* 2013 SC (UKSC) 1 and *Whigham* v *Owen* 2013 SLT 483. If one starts by looking at the respective positions of the parties at the start of their relationship and compare them with the end of the relationship, the only significant asset at the end of the relationship for the pursuer is her pension entitlement amounting to £18,501.40. He was unable to lead evidence as to the exact portion of the pension entitlement at the start of the relationship although it is reasonable to assume that, at that point, it had some value. Concerning the defender, at the start of his relationship he had an interest in the family home, which amounted to some £5,000. The defender had a pension in the sum of £15,968 and it would appear that for at least two years of the relationship (1993-1995) there were still contributions made to that pension. At the end of the relationship in April 2015, his interest in the family home amounted to £141,896. The pursuer was allowed no interest in the family home. If the defender's pension is entirely disregarded, the defender has accrued £136,896 of equity in the family home (£5,000 being deducted for the value at the start of the relationship). If one then deducts from that the amount of the pursuer's pension a figure of £118,395.60 is arrived at.

[12] The next issue is one of economic advantage/disadvantage. The primary basis of the pursuer's claim is section 28(3) (a) being the economic advantage derived by the defender from the pursuer's contributions. The defender's economic advantage is the equity which he has accrued during the whole of the relationship, assuming that the court accepts the pursuer was making contributions directly or otherwise to the mortgage from the very beginning of the relationship. If the court limits its focus on the pursuer's non-economic contributions (principal carer for the children and the home) then the court should take into account the increase in the equity in the family home from 2006-2015. During that period mortgage repayments were being made using the family's income whilst the pursuer looked after the children and the home. It would be unfair for the pursuer to be given no share in the uplift of equity. Section 28(5) relates to offsetting: the economic advantage enjoyed by the defender may be offset by an economic disadvantage suffered by him. The defender did not have to give up work. He did not lose any equity in the family home which remained in his sole name even after the conversion. The repayment of the loans came from family income during which the pursuer cared for the family and the home while the defender continued in self-employment. It is accepted that the defender did some electrical work saving approximately £3,000 of costs. The policy of £13,000 was contributed to by the defender throughout the parties' cohabitating relationship. (See finding in fact 11.) The policy began in 1992 only one year before the relationship started and accordingly much of the policy's value accrued during the period when the pursuer was looking after the children in the home. The court should reject any submission that the defender has been financially disadvantaged by feeding/clothing/accommodating the pursuer and the children during the relationship. That was a natural consequence of the family arrangement, which the defender encouraged. The pursuer had a consistent history of full time employment and

would have been feeding/accommodating herself had she not been looking after the family. Mr Uttley accepted that there might be an argument the defender had suffered disadvantage as a consequence of him caring for the children after the parties' separation. However, that only relates to the youngest of the children. Her future is not clear.

[13] The pursuer has a further claim under section 28(3) (b) in the economic disadvantage suffered by her in the interests of the defender and the children. She gave up working and stopped contributing to her pension resulting in the loss of pension entitlement. As she said in evidence, if she had not had children, she would have returned to work and would have contributed to a pension. If that is the case, she has suffered pension loss (set out in finding in fact 28). That equates to a pension loss of £16,619 being £23,873 less £7,254.

[14] The court has a discretion as to the making of an award and the amount. The present case is similar to the case of *Whigham*. Like *Whigham,* this is a deserving case and a substantial award should be made. The figure of £70,000 is approximately half the equity which exists in the family home as at the end of the relationship. That current equity has now risen to £162,966. The defender ought to be able to raise money by re-mortgaging or restoring the property into two separate flats. Quantification of the section 28 claim is not a precise science. The court might consider, as did the Lord Ordinary in *Whigham*, that a particularly deserving case still only justifies an award of approximately one third of the amount of the award which might be £39,465.20 (one third of the £118,395.60).

[15] In his oral submission, Mr Uttley stressed that that the parties' relationship displayed an arrangement between them and that arrangement was that the pursuer did most of the domestic duties whilst the defender was the breadwinner; it continued throughout the relationship. In essence, the family income was pooled and shared. Tax Credits were put to the use of the family. The nature of the pursuer's contribution changed during the course of

the relationship. Up until 1999, there were no children. The pursuer's role changed after that point. Resources were not relevant to the making of an award.

Submissions for the defender

[16] Like Mr Uttley, Mr Campbell lodged written submissions, which I summarise as follows. In relation to the family home, the defender owned it prior to the relationship with the pursuer. Had parties been married this would not have constituted matrimonial property. No money from the pursuer was ever used in the purchase of either the downstairs or the upstairs properties. The loans for the family home were all paid by the defender from his bank account. In relation to the pursuer caring for the children, for three out of the 16 years, she did have part-time employment. During the periods when the pursuer was not working the defender continued supporting the pursuer and family. The defender had the responsibility of looking after the children from 2015 onwards. If the youngest child continues school until she is 18 that will amount to some nine years. There has been no payment of child support since 2015 by the pursuer. The defender did encourage the pursuer to seek employment after the youngest child started school but according to the defender, she chose not to do so. The pursuer had the benefit of Child Benefit payments from April 2015 to May 2018, which amount to at least £6,080. The defender has not contributed to a pension since the start of the relationship. Like Mr Uttley, Mr Campbell referred in detail to the cases of *Gow* v *Grant* and *Whigham* v *Owen*. When one looks at the increase in the equity of the family home, there is no contribution from the pursuer to any of the increase. The value rose because of market forces and not because of anything done by the pursuer. Mr Campbell accepted that there would have been childcare costs as a factor in the defender not going to work because it would not pay to do so. In any

event, given her part time work for three years the pursuer had not been the sole child carer for three out of the sixteen years. In relation to contributions to household/childcare, the non-financial contributions by the pursuer are offset by the fact that the defender financially supported the family. The parties did not have a joint account for many years and only ever had it for Child Benefit. The majority of the bills were paid by the defender, if the pursuer was the main carer for the children up to 2015 that burden then fell on the defender after 2015. Accordingly, things balanced out. The pursuer was the main carer and the defender was financially supporting the pursuer but that is not the situation now. The pursuer has received economic advantage from Child Benefit post-separation.

[17] Mr Campbell did not accept that the way to look at this matter is to compare the position of the parties before and after separation. One needs to look at the various claims. In the present case, one can quantify the absence of pension because of the pursuer looking after the children and not being able to pursue a career because of that. The same applies to an increase in property values, which can be calculated. As Lord Hope pointed out in *Gow* section 28 is not just a case of equalising assets. Fairness is exercised at the point of making an order; the order is a "compensatory award" (*Gow* [33]). Mr Campbell also referred to *M* v *S* 2018 Fam LR 26 in which the Lord Ordinary followed a similar approach to the one he was suggesting. The Lord Ordinary in *Whigham* suggested that awards in cohabitation cases should be lower than those in divorce cases. Although that was not the approach in *Gow* in Mr Campbell's submission there must be a causal link between the contribution of the pursuer and economic advantage to the defender. The pursuer has advanced a pension loss claim of approximately £16,000. That should be reduced by a half because there was a joint decision to have children. There would also be an offset involving Child Benefit (£6080). That the pursuer was not working and the defender was cancel each other out. Resources

are relevant to the question of fairness. The defender has no savings. He can only meet an award by re-mortgaging the family home.

Reply

[18] Mr Uttley adhered to his submission that the court should start by a comparison between the position of the parties at the start of the relationship and the position at the end. There have been indirect and non-financial contributions by the pursuer throughout the whole of the relationship. There does not need to be a causal connection in the way suggested by Mr Campbell. The mortgage was paid using family income and that family arrangement was jointly agreed. "Contribution" should be interpreted broadly. The reduction by half of the pursuer's pension loss should not be accepted. Also, Mr Uttley did not accept it necessarily follows that a cohabitation award should be less than financial provision on divorce. When asked to whom or to what the contribution related Mr Uttley suggested it was that of the relationship (Mr Campbell suggested it was to the other party or children of the relationship). If resources do have to be taken into account, the pursuer is in a low income job in rented accommodation. The defender is a self-employed electrician. There is a high equity in the property. Mr Uttley did not accept that the period during which the pursuer was the principal carer was limited to 13 years rather than 16 years.

Decision

[19] The starting point in this matter is section 28 of the 2006 Act the relevant parts of which provide as follows:

> "(1) Subsection (2) applies where cohabitants cease to cohabit otherwise than by reason of the death of one (or both) of them.

(2) On the application of a cohabitant (the "applicant"), the appropriate court may, after having regard to the matters mentioned in subsection (3) –

(a) make an order requiring the other cohabitant (the "defender") to pay a capital sum of an amount specified in the order to the applicant;

(b) make an order requiring the defender to pay such amount as may be specified in the order in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents;

(c) make such interim order as it thinks fit.

(3) Those matters are –

(a) whether (and, if so, to what extent) the defender has derived economic advantage from contributions made by the applicant; and

(b) whether (and if so to what extent) the applicant has suffered economic disadvantage in the interests of –

(i) the defender; or

(ii) any relevant child.

(4) When considering whether to make an order under subsection (2) (a), the appropriate court shall have regard to the matters mentioned in subsections (5) and (6).

(5) The first matter is the extent to which any economic advantage derived by the defender from contributions made by the applicant is offset by any economic disadvantage suffered by the defender in the interests of –

(a) the applicant; or

(b) any relevant child.

(6) The second matter is the extent to which any economic disadvantage suffered by the applicant in the interests of –

(a) the defender; or

(b) any relevant child

is offset by any economic advantage the applicant has derived from contributions made by the defender.

…

(9) In this section –

…

"contributions" includes indirect and non-financial contributions (and, in particular, any such contribution made by looking after any relevant child or any house in which they cohabited); and

"economic advantage" includes gains in –

(a) capital;

(b) income; and

(c) earning capacity; and

"economic disadvantage" shall be construed accordingly".

[20] It is common ground between the parties that neither section 28, nor such authorities as there are, gives clear guidance as to what the outcome in any given case may be. It seems to me that the facts in this case are a very good example of the issues which the section was

designed to address. Before turning to the section itself it is helpful to set out what I take to be the main guidance given by the Supreme Court in *Grant* v *Gow*. (1) Lord Hope and Lady Hale both suggest that the court should look at where the parties were at the start of the relationship and at the end of their relationship (paragraphs [40] and [54]). (2) The purpose of the exercise is fairness between both parties (paragraph [31]). (3) There is a rebuttable presumption that each party will retain his or her property (paragraph [32]). (4) Section 28 involves the assessment of compensation for contributions made, or economic advantage suffered, in the interests of a relationship (paragraph [33]). (5) Subsections (3), (5) and (6) should be read broadly not narrowly (paragraph [33]). (6) "in the interests of" relates to the effect of the transaction (paragraph [38]). (7) The court has a discretion as to whether to make an award, and if so, how much, but fairness is the overriding principle (paragraphs [40] and [42]).

[21] In my opinion, the key provision is section 28(3). It sets out the pre-eminent matters to which the court must have regard: economic advantage to the defender derived from contributions made by the applicant; economic disadvantage suffered by the applicant in the interests of the defender or a child. The word is "economic" not financial. In subsection (9), the definition of "contributions" refers to "non-financial contributions" which suggests to me a deliberate choice on the part of the draftsman to distinguish between economic and financial. Economic is broader than financial and encompasses material resources rather than just money. By specifically including within the definition non-financial matters (child care and home duties) the section makes clear that the factual enquiry is not limited solely to money. I asked agents to whom or to what a contribution is directed. They had slightly different answers. Mr Uttley was of the view that it related to the relationship; Mr Campbell to the defender or the children. The dictionary definition of

contribute is to give for a common purpose. Again, it seems to me that the draftsman has made a very specific choice of vocabulary. I am inclined to view the common purpose of the contribution as being the relationship between the parties which in this case includes the children. Furthermore, I note that the definition of "contributions" and of "economic advantage" in section 23(9) both use the word "includes" which suggests to me that a broad approach to the definition is appropriate.

[22] Section 23(3) (a) provides that the defender has "derived" economic advantage. It does not say, for example, "received". In my view, "derives" suggests something more expansive than simply receiving. It suggests a broad objective assessment of the economic position of the defender. The key provisions in section 28(3) are tempered by those in section 28(5) and (6). Given the language used in each subsection, section 28(5) would appear to be linked to section 28(3) (a) and section 28(6) to section 28(3) (b). I have to confess I find it somewhat difficult to construe these two provisions beyond the general injunction that the advantage in section 28(3) (a) and the disadvantage in section 28(3) (b) may be subject to offsetting. The offsetting provision seems to me to be part of the general process of fairness. In the course of the debate a hypothetical example was given. One party may realise a valuable asset in the interests of the relationship. That clearly leads to economic disadvantage on the part of the person realising the asset and economic advantage to the other. However, if the person deriving economic advantage by this transaction has similarly realised an asset belonging to him and done the same thing with it then the two fall to be offset against each other. It would not be fair to take one into account and ignore the other. The process of economic advantage/disadvantage and offset will vary from case to case. I do not think it is an exact process.

[23] With these observations in mind, I turn to the present case. I approach this matter in four stages: (a) a comparison between the position of the parties at the start and the end of the relationship; (b) the components relative to section 28 in the parties' relationship; (c) offsetting; (d) the award.

[24] Looking at the first stage, it seems to me that the initial exercise in identifying the economic position of each party before and after is contingent in the sense that it is largely arithmetical and says nothing as to how the assets came to be acquired. (For example, one party may have more by way of resources because of inheritance.) In the present case when the parties began their relationship in 1993 they each had some, unspecified and modest, interest in work related pensions. The defender had an interest in the family home amounting to £5,000. Neither had any other assets. By the time they separated, each party had a pension interest but again it was modest. Neither contributed to any material extent, if indeed at all, during the course of the relationship. As a matter of arithmetic, the pension interests were not dissimilar to each other. The defender has a much more substantial interest in the family home than he began with; £141,896 at the date of separation. In the present case, *prima facie*, at the end of the relationship the defender had an economic advantage.

[25] The next stage is to examine the relevant parts of the parties' relationship, both financial and otherwise in order to apply the section. As I have said, the definition of "contribution" is broader than just financial matters and I also have in mind the guidance of the Supreme Court to construe the relevant subsections broadly. In particular, so far as the interests of the defender are concerned one looks to effect not intention. I do not accept Mr Campbell's submission that there must be a causal link between the contribution and the advantage and in particular that the rise in the value of the house had nothing to do with the

pursuer. That is to read the statute too narrowly. The increase in value ran alongside the relationship and the continued payment of the mortgage.

[26] It seems to me that this was a family which operated as an ordinary family unit. The responsibilities of income generation and childcare were divided. At one point, the parties had assistance with childcare from the pursuer's mother but otherwise, by agreement, the pursuer undertook those duties whilst the defender worked. I do not consider there is any material issue as to the period during which the pursuer was working part time – Mr Campbell's point as to 13 years as opposed to 16 years. The income of the parties came from the defender's earnings, Child Benefit and Tax Credits. In whose name the bank account was held and who actually made the relevant payments seems to me to be immaterial. The payments were made to further the interests of the family as a unit. The money used can best be described as family money. I consider Mr Uttley is correct to describe what happened as a pooling of resources. In my opinion, neither party could do what they did without the other person doing what they did. By looking after the household and the children, the pursuer made a contribution from which the defender derived economic advantage and that includes the reduction in the mortgage. As I have said, "contributions" expressly includes contributions made by looking after children and the household. The economic disadvantage suffered by the pursuer was that she was unable to work with all the consequences which flowed from that.

[27] The third stage is one of offset. On the facts of this case, I am not inclined to say that there is an obvious case of offset during the relationship. In particular, the economic advantage of a more valuable family home (in which the pursuer has no share) is not obviously met by economic disadvantage suffered by the defender. On what little evidence there was on this issue, the income of the parties was, when they were both working, not

dissimilar. Neither has savings. Their respective pensions are similar. The benefit of payment of the mortgage to which they both effectively contributed has gone entirely to the defender. The more obvious case for economic disadvantage comes after the relationship ended in the sense that the defender had the care and cost of the children without any contributions from the pursuer. He continues to have a responsibility for the youngest child and it is a reasonable assumption that he will continue to do so until she finishes S6. Both parties are of the opinion that that is what she may well do. I was not addressed as to whether the offset provisions continue to apply post-separation. Both agents seem to have proceeded on the basis that they do and I shall do likewise. In any event, if I am wrong about that it is a factor to which I would have regard in the exercise of my discretion as to the making of an award.

[28] Having concluded that there has been net economic advantage/economic disadvantage, the final stage is the exercise of the discretion as to whether to make an award and, if so, the amount thereof. The Supreme Court has said that fairness is the key principle. The court went on to say that fairness in this context is related to the assessment of compensation for contributions made or economic advantage suffered in the interest of the relationship (paragraph [33]). In my opinion, fairness informs the exercise of the discretion. I do not think that, on this issue, reference to the Family Law (Scotland) Act 1985 Act ("the 1985 Act") is helpful. Section 28 is *sui generis* and does not, in terms of outcome, stand in a particular relationship to the 1985 Act. I note for example, that there is no provision equivalent to section 9(1) (a) which provides a presumption that fairness means equality. Parliament must be taken to have assumed that, applying the statutory tests, the court is able to reach a conclusion as to what is fair by way of outcome for a once cohabiting couple. The ingredients of the analysis of what is fair are not, as I have said, limited solely to

financial matters. The inquiry is broader than that. Nor is the final decision arithmetical. As the Supreme Court said, the court is dealing with non-commercial relationships which do not lend themselves to exact financial computation. The resources of the parties are relevant. In cases such as the present, granting redress to one party should not be done if the consequence is to render hardship to the other party, particularly if the paying party continues to have responsibilities which the parties once shared.

[29] In this case, the only asset of any substantial value is the family home which is now valued at £290,000 with equity of £162,966. As at the date of separation, the value was £141,896. Neither party has any savings and for all practical purposes no pension. The values of the pensions they do have largely cancel each other out. There is little evidence as to the earning potential of either party and any disparity; I proceed upon the basis that it is not relevant. The defender houses two children full time (albeit one is not a relevant child) one of whom is dependent upon him and for whom the pursuer does not make any provision. The pursuer had the use of Child Benefit for a reasonable period when she did not have the care of the children. Other than a limited contribution for a limited period she made no contribution to the cost of child care after separation. However, had she been in employment when she was on home duties she would have accrued pension benefits. That the family home would not have been considered matrimonial property for the purposes of section 9(1) (a) of the 1985 Act seems to me, on this point, to be irrelevant. The family home, before and after conversion, was a home the parties and the children shared throughout the relationship of 22 years. Taken in the round, I conclude that it would be fair for the pursuer to receive an award. Mr Uttley was correct when he said that there is no science in these matters. There is an element of the rough and ready in these matters (*Gow*, paragraph [36]) if for no other reason than the fact that the court is dealing with a mixture of arithmetic

(some specific, some not) and non-commercial actings which do not admit of pecuniary analysis. The sum craved is £70,000 which Mr Uttley explained is half the equity in the family home as at the date of separation. I regard that figure as being too high. It does not take into account the post 2015 events, the continuing responsibilities which the defender continues to have and the availability of resources with which to satisfy the only remedy I can grant. In my judgement, balancing matters as best I can, I am of the opinion that the pursuer should be entitled to an award of £35,000. As the defender does not have access to ready funds with which to satisfy such an award he will require to re-mortgage. I shall put the matter out by order for agents to address me on the form an order should take.

[30] I shall reserve all question of expenses.