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Restitution upon rescission for breach of contract, mutuality, and unjustified enrichment: *Lyle v Websters* [2019] SC DUN 2

A. INTRODUCTION

This case arose from cohabitation arrangements between a married couple and a widow. The cohabitation to which the arrangements led lasted for not quite a year. The widow contributed financially to improvements made to the couple's house to facilitate her moving in. The proceeds of the sale of her own home plus money from her late husband's estate were used for the purpose. She also claimed to have purchased two cars for the couple to be used to provide her with transport services (in effect free taxi services), paid some of their personal unsecured debts, and loaned the wife in the couple money to buy jewellery. The widow sought the return of her money by way of alternative claims: first, as damages for breach of three separate verbal (rather than implied) contracts in relation to, respectively, the accommodation, the transport services and the loan arrangement; second, if the contract claims failed, by way of unjustified enrichment.

The judgment of Sheriff S G Collins QC is concerned first to sort out the relevancy of the pursuer's pleadings, which had fallen into some confusion in the course of three years in court prior to his consideration of the case. This note will not consider the bulk of these points but focus rather on a single issue which led the sheriff into detailed discussion of a point of law of general importance, namely, whether the law on breach of contract allows the innocent party a remedy of restitution against the contract-breaker as well as damages. But, as Sheriff Collins points out, the case is also of general significance as an illustration of the continued importance of, not only unjustified enrichment, but also contract, in cohabitation cases falling outside the scope of sections 25 to 28 of the Family Law (Scotland) Act 2006.¹ Even in cases within the scope of the statute, it may suggest to practitioners a means of escaping the supposed subsidiarity, ie exclusion, of enrichment claims by

¹ *Lyle v Websters* [2019] SC DUN 2, para 1.

pleading contract ones instead.² But above all the case shows, as the sheriff says, “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.”³

B. THE CLAIM FOR RESTITUTION

The main issue addressed in this note is that of rights of restitution upon breach of contract, which arose with the alleged transport services contract. The widow claimed that, in breach of contract, the couple had never provided these services, and she was therefore entitled to restitution of the money she had expended on the two cars by which the services were to be provided. In rejecting this argument, Sheriff Collins analysed the authorities which had persuaded Lord Tyre in an earlier case to state obiter that such claims were permissible in contract (rather than unjustified enrichment) as an aspect of the principle of mutuality of contract.⁴ The sheriff found that the authorities cited by Lord Tyre did not support his conclusions,⁵ and went on to find that the Inner House decision in *Connelly v Simpson*,⁶ dismissed by Lord Tyre as not having addressed the issue directly, was actually authority against his view. Although the majority judges were not agreed on all points in the arguments, there was enough common ground between them to produce a *ratio* by which the sheriff was bound.⁷

² On the subsidiarity of enrichment see *Courtney’s Executors v Campbell* [2016] CSOH 36, 2017 SCLR 387; discussed critically by G Black and DJ Carr, “Cohabitants’ rights in conflict: the Family Law (Scotland) Act 2006 vs unjustified enrichment in *Courtney’s Executors v Campbell*” (2017) 21 Edinburgh LR 293 and HL MacQueen, “Cohabitants in the Scottish law of unjustified enrichment”, in H Scott (ed), *Private Law in a Changing World: Essays in Honour of Professor D P Visser* [2019 Acta Juridica], forthcoming.

³ *Lyle v Websters*, para 1.

⁴ See *Stork Technical Services (RBG) Ltd v Ross’ Executrix* [2015] CSOH 10A, 2015 SLT 160, commented upon favourably by MA Hogg, “Restitution following termination of contract: a contract or an enrichment remedy?”, (2015) 19 Edinburgh LR 269.

⁵ *Lyle v Websters*, para 80.

⁶ *Connelly v Simpson* 1993 SC 391.

⁷ *Lyle v Websters*, paras 76-79. Sheriff Collins dismisses this dissent thus: “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”, para 80. See however Lord Brand’s memoirs, *An*

As Sheriff Collins noted, the issue of restitution on breach of contract, and the case of *Connelly v Simpson* in particular, has produced a considerable volume of academic writing over the last quarter century as well as consideration by the Scottish Law Commission.⁸ It is perhaps unfortunate that more of this was not canvassed in the sheriff's judgment (it is not clear how much of it was used in what was obviously an extensive and ably argued debate). The decision certainly misses some significant points contained in these writings.

First, there is more authority than the sheriff recognizes for the proposition that mutual rights of restitution arise when a contract is terminated for material breach of contract. The everyday example is in sale of goods: when the buyer rejects the goods as unfit for purpose, they must be returned to the seller and the price repaid to the buyer. In the nineteenth century this was the situation which led to the distinction between restitution of the price and a claim for damages. The buyer could not make a damages claim until it had rejected the goods and reclaimed the price. The rejection had to be "timeous"; or, in modern terms, within a reasonable time of the contract being concluded and the goods delivered.⁹ This indeed remained the law at the time of *Connelly v Simpson*; it was however repealed by section 3 of the Contract (Scotland) Act 1997. The effect of that repeal however was to allow the claim of damages despite the buyer's retention of the goods; it said nothing about the buyer's claim to restitution of the price or, indeed, about the right to rescind or reject.

Connelly was a case about the sale, not of goods, but of company shares. But there seems little reason to doubt that the rule was (and insofar as it survives the 1997 Act, is) of general application in sales. It certainly applies in contracts for the sale of heritage that are rescinded for the seller's breach before any conveyance is carried through. And it also probably applies in cases where the seller of goods turns out to have no title to the goods, in which case the price must be repaid to the buyer no matter how long that party's possession of the goods in question. In similar cases involving heritage, there is a rule that the buyer recovers the value of the property at the date of eviction, whether that is more or less than the purchase price; but the rule

Advocate's Tale (1995), 90-92, for discussion of his dissent, apparently one of only two dissents in his entire career as an appellate judge in the Court of Session.

⁸ *Lyle v Websters*, para 60. For other references see further below.

⁹ See HL MacQueen, "Unjustified enrichment and breach of contract" 1994 *Jur Rev* 137, at 139.

has been criticized for its inflexibility. A better approach might be to allow the buyer to recover what it paid while also being subject to the true owner's claim for the value of the buyer's unauthorized use of the property. Where the property has increased in value since the sale, the buyer's claim to interest on the sums due to it may provide some form of compensation for its loss.¹⁰

That the rule of restitution upon rescission is of still more general application beyond sale is suggested by the argument that its basis is the doctrine of mutuality. Mutuality entails at least two inter-linked ideas: (1) if you fail to perform your side of our contract, I am entitled to withhold my performance; (2) if you are in breach of contract, you cannot compel me to perform.¹¹ But as Johann Dieckmann and Robin Evans-Jones argued when commenting on *Connelly v Simpson* in 1995, the principle should also apply where a party performs and is then confronted with a non-performance by the other party; and the way it can apply is through a claim to restitution of the performance already made but not reciprocated.¹² In *Lyle v Websters*, Sheriff Collins' point of departure was that it is not the job of contract law to relieve people from their bad bargains.¹³ While that is true, the question posed by Dieckmann and Evans-Jones also seems highly pertinent to the overall justice of the case:

[W]hy, if one party, by repudiating, chooses to ignore his primary obligations under the contract, should the innocent party remain bound to his transfer merely because he has paid in advance?¹⁴

The view of the law taken by Sheriff Collins would seem to encourage non-performance by a party who has received what was due to it under the contract and in

¹⁰ For all the foregoing see MacQueen, "Unjustified enrichment", 139-142. This does not mean, however, that I take the view that *Connelly v Simpson* was wrongly decided on its facts. It seems to me that Mr Connelly got exactly what he bargained for with his payment of £16,000, viz a right to the delivery of a quantity of shares at a time of his choosing, with the risk that the shares would meantime lose their value being on him. See further HL MacQueen, "Contract, unjustified enrichment and concurrent liability: a Scots perspective", [1997] *Acta Juridica* 176, at 195-196; HL MacQueen and J Thomson, *Contract Law in Scotland* (4th edn, 2016), para 5.55.

¹¹ W W McBryde, *The Law of Contract in Scotland* (3rd edn, 2007), para 20.47.

¹² JA Dieckmann and R Evans-Jones, "The dark side of *Connelly v Simpson*", 1995 *Jur Rev* 90, 93-94. See also MacQueen, "Unjustified enrichment", 143.

¹³ *Lyle v Websters*, paras 54, 61.

¹⁴ Dieckmann and Evans-Jones, "Dark side", 95. See also R Evans-Jones, *Unjustified Enrichment: Enrichment by Deliberate Transfer: Condictio* (2003), paras 6.97-6.123.

effect impose a form of forfeiture upon the innocent party. While of course the latter has a damages claim, that may not provide an adequate response, especially if, as Sheriff Collins seems to imply, the amount paid by the innocent party under the contract is not itself to be regarded as recoverable loss. Thus in the case before him he appears to say that the widow could only recover the taxi fares and the like that she was forced to pay by the couple's non-provision of the transport she needed.¹⁵ But while damages for breach of contract aim to put the innocent party in the position it would have enjoyed had the contract been fully performed, which must take account of the price that had to be paid under the contract for that performance, it does not follow that the loss involved in paying a price for which no return at all was ever received is irrecoverable or irrelevant. The innocent party can of course recover expenditure made necessary by the breach; but the difference in value between what was paid and what was received is also a possible measure of loss.¹⁶

C. THE SCOTTISH LAW COMMISSION'S REPORT ON CONTRACT LAW

There is naturally no reference in *Lyle v Websters*, which was decided on 12 February 2018, to the Scottish Law Commission's Report on Contract Law, published just over a month later. That Report recommended a statutory regime for restitution upon termination of contract, responding to a fairly general view on consultation that there should be such a remedy in the Scots law of contract.¹⁷ The draft Bill attached to the Report includes complex provisions which are based upon those in the Draft Common Frame of Reference, reflecting in turn a European view of what might be the "best rule" for contract law in cases of the relevant kind.¹⁸ It is an exercise of some interest to see how that Bill would deal with *Lyle v Websters*.

Assuming that the transport contract was lawfully rescinded by the widow, and that the couple had received a benefit (as was surely the case if the former had paid for their cars), that benefit would have to be returned to the widow unless it had been fully reciprocated by the couple's performance of their obligations under the contract. If the widow could recover the couple's benefit, she would concurrently

¹⁵ *Lyle v Websters*, para 81.

¹⁶ McBryde, *Contract*, paras 22.110, 22.112.

¹⁷ Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses (Scot Law Com No 252, March 2018), paras 10-12-10.27 and recommendation 32.

¹⁸ See Report, pp 230-234 (sections 18-21 of the draft Contract (Scotland) Bill).

have to return to the couple any benefit she had received from the latter's performance of their obligations. Insofar as the benefit was the payment of money, that sum would have to be returned. But, given that the widow had paid the vendor of the cars, the couple's benefit might be seen as non-money in nature; and in that case they would have to transfer the cars to the widow unless it was unreasonable or impracticable to do so. If that was the case, the couple would have to pay the widow the value of the cars or, if they had already been disposed of for an amount greater than their value, that greater amount.¹⁹ The benefit in such cases would be valued at the time of the widow's performance of her obligation, ie it is suggested, at the time when she completed the purchase of the cars.²⁰ The couple would have also to pay a reasonable amount for the use they had made of the cars.²¹ This would have extended over a period of some seven years: the transport arrangement was apparently made in 2010, some time before the cohabitation one, which began only in November 2011.²²

D. FURTHER THOUGHTS ON ENRICHMENT AND CONTRACT

The point about the possible non-money nature of the benefit conferred upon the couple by the widow is also of potential relevance to her claim in unjustified enrichment should it be found that there was no contract between the parties. Here, the widow entered a contract with the vendor of the cars, paid the price, and then presented the couple with the cars; or, perhaps, since Sheriff Collins also refers to her paying "the balance of the purchase price of a car for each of the defenders",²³ she actually discharged their pre-existing debts to the vendor. Either way, it would seem, if the parties mutually understood that the cars were to be used for the purpose of transporting the widow from place to place, restitution of their transfer to the couple fell to be made under the *condictio causa data causa non secuta*.²⁴ Even if the widow's payment discharged the couple's debt to the vendor, it was presumably with

¹⁹ For all this see section 18 of the draft Bill.

²⁰ Draft Bill, section 19(2).

²¹ Draft Bill, section 21(1).

²² *Lyle v Websters*, paras 1 and 81.

²³ *Lyle v Websters*, para 60.

²⁴ Evans-Jones, *Unjustified Enrichment: Deliberate Conferral*, chapter 4; paras 9.06-9.09, 9.20.

their knowledge and authorization; accordingly she could not recover from the couple what she had actually paid.²⁵

A further issue raised in the case was whether the couple had any claim against the widow in respect of her occupation and use of their property. It is suggested that the claim could not have been in unjustified enrichment. Liability for enrichment through the use of another's property can only arise if that use is unauthorized by the owner;²⁶ and it would seem clear that the widow was allowed to occupy the couple's property with their full knowledge and consent. That is why there was no such argument in *Shilliday v Smith*,²⁷ a point raised but not answered by Sheriff Collins.²⁸ In *Shilliday*, the parties cohabited in the defender's house by mutual consent while the pursuer paid for the improvements to the building. The pursuer was not unjustifiably enriched.

An alternative to an enrichment argument in *Lyle v Websters* might have been one for the implication of a contract from the parties' conduct. But such an argument would have been difficult to sustain against a background of other assertions that there were no express contracts between the parties, and would have also to take into account the fact that the widow had already paid substantial amounts of money to the couple, albeit for other purposes than the simple benefit of living in their house.

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²⁵ R Evans-Jones, *Unjustified Enrichment: Enrichment Acquired in Any Other Manner* (2013), chapter 6.

²⁶ Evans-Jones, *Unjustified Enrichment: Enrichment Acquired in Any Other Manner*, chapter 4.

²⁷ *Shilliday v Smith* 1998 SC 725.

²⁸ *Lyle v Websters*, para 58.