SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT FALKIRK

[2019] SC FAL 7

FAL/403/16

JUDGMENT OF SHERIFF SG COLLINS QC

in the cause

PHILIP JACKSON

Pursuer

against

CHRISTINE BURNS

Defender

Act: Berrill, Hill & Robb
Alt: Harris, Fraser Shepherd

Falkirk, 12 January 2018

The Sheriff, having resumed consideration of the cause,

FINDS IN FACT:

Introduction

1. The pursuer is Philip Jackson, whose date of birth is 21 May 1959. The defender is Christine Burns, whose date of birth is 28 March 1958. The parties first formed a relationship in around January 2002. They were both married at the time and they separated from their respective spouses in order to pursue their relationship.

2. The parties cohabited between around April 2003 and December 2015, when their relationship ended.

3. The parties both had children from their respective marriages, but none of these children lived with the parties during the period of their cohabitation. Nor did they have any children together.

4. Following separation from his wife, the pursuer moved into temporary, furnished, holiday let accommodation near Cupar, a location convenient for him in relation to his then employment. For this he had paid a rent of around £400 per month. Following separation from her husband the defender moved into a rented property near Stirling. In around April 2003 the pursuer was required to give up his holiday let. The parties accordingly agreed that he would move into the defender's tenancy and he did so. The tenancy remained in the defender's name and the pursuer paid to her an amount representing half of the household bills.

Kennedy Way

5. In August 2004 the defender purchased a house in Kennedy Way, Airth ("Kennedy Way"). The parties then both moved into this property and lived together there for the remaining 11 and half years of their relationship.

6. The defender purchased Kennedy Way for £105,000. It is a three bedroom detached house. The defender paid £35,000 of the purchase price from her share of the proceeds of her former matrimonial home, and took out a mortgage for the balance of £70,000. Both the title to Kennedy Way and the mortgage were in the defender's sole name. At no time was there any discussion between the parties about the pursuer becoming a joint owner of Kennedy Way.

7. The defender was solely responsible for paying the legal costs and outlays in relation to the purchase of Kennedy Way. She purchased all the white goods, which were not

included in the sale. She bought all the furniture and furnishings herself, with the exception of a sofa, to which the pursuer contributed part of the cost. She chose the décor.

8. Certain repair and improvement works were carried out at Kennedy Way over the period when the parties lived together there. In particular they shared equally the cost of carrying out necessary repairs to the eaves. The pursuer paid the whole cost of installing a new shower and a new towel rail in the *en suite* bathroom. Since the parties' separation the defender has replaced this shower again. The defender alone paid to add a conservatory to the house, at a cost to her of £10,000.

9. By the date of the parties' separation Kennedy Way was worth £165,000 and the balance of the mortgage was approximately £44,000. Accordingly the value of the house had increased by £60,000 and the defender's mortgage had reduced by around £26,000. Her equity in the property had therefore increased from £35,000 to around £121,000, thus by around £86,000. Should the defender have wished to realise this equity by sale there would have been costs to her in marketing etc., of around £5,000. Deducting also the £10,000 which the defender invested in the property by the purchase of the conservatory, the net increase in the value of the defender's interest in Kennedy Way was accordingly around £71,000 over the period when the parties lived there together.

10. Throughout the whole period when the parties lived together they kept their personal finances separate. At no time did they have a joint bank account. At no time did they make any joint savings or take out joint life insurance. They never made joint wills, nor did they make any other joint financial planning. They discussed the possibility of getting married but never made arrangements to do so.

11. The monthly housing costs for Kennedy Way were in the region of £700 per month over the whole period when the parties lived there. Of this, the mortgage payment was in

the region of £370 per month. The balance comprised the costs of the telephone, broadband, heating, lighting, gas, factors' fees, and council tax. All the relevant accounts were in the defender's sole name and were in the first instance paid by her from her bank account.

12. The parties agreed at the outset that the pursuer would pay £500 per month to the defender by way of contribution towards the said mortgage and other housing costs. Thereafter he made this monthly payment by bank transfer from his bank account to the defender's account. He did so every month throughout the whole of the period when the parties lived together at Kennedy Way (11 years and five months, thus 137 months). The total sum paid by the pursuer to the defender was therefore £68,500.

13. As a result of the pursuer living with the defender at Kennedy Way, however, certain of the said housing costs were higher than they would otherwise have been, in particular, the council tax, heating and lighting. The total increased cost was in the region of £100 per month.

14. Throughout the period when they lived together at Kennedy Way the pursuer and the defender split all joint expenditure – such as food, entertainment and holidays – equally between them. They would regularly go to the pub, eat out, and order take away food, often two to three times a week, and at total cost of between £100 and £150 per week. They took regular holidays every year, home and abroad, for example to Turkey. One year they went to Turkey three times, at a cost of £600 for each of them on each occasion, plus spending money. The pursuer's contribution to all this joint expenditure was additional to the £500 he was paying to the defender each month by way of his contribution towards the housing costs. Both parties chose to live this lifestyle and to incur their half share of the cost of paying for it.

15. The parties also split equally the costs of purchasing occasional items for Kennedy Way during the time when they lived there together, namely, a new washing machine, an audio/video entertainment system, a television for the parties' bedroom, and dining room furniture. Otherwise the defender purchased all the household goods herself.

16. The pursuer did most of the physical work of maintaining the garden at Kennedy Way when he lived there. The parties shared the domestic chores and cooking, although these were mostly done by the defender.

17. At no time did the defender give money to the pursuer to help support him as regards his living costs, personal or lifestyle expenditure.

The pursuer's personal finances

18. The pursuer has had a chequered employment history, regularly moving from job to job, at different salaries, interspersed with periods of unemployment. His net income from employment over the relevant period was as follows:

Tax Year	Net Annual Income	Net Monthly income
2001/2	16221	1351
2002/3	15550	1295
2003/4	10077	839
2004/5	3879	323
2005/6	6208	517
2006/7	17440	1453
2007/8	7364	613
2008/9	2903	241
2009/10	1649	137
2010/11	7273	606
2011/12	2196	183
2012/13	8994	749
2013/14	2793	232
2014/15	10378	864

In the tax year 2015/16 the pursuer was unemployed. He may have done some self-employed work, but had no regular or significant income during this period. Accordingly his average net income from employment over the whole period of the parties' cohabitation was in the region of £500 to £600 per month.

19. The pursuer claimed and received social security benefits on a number of occasions when not in employment between 2002 and 2015. The amounts received by him cannot be determined on the available evidence. The claims were in his own name, but he disclosed his relationship with the defender when making them. He is likely to have been eligible for benefit based on his national insurance contributions, rather than on the basis of a means test which would have included the defender's income.

20. Most of the income which the pursuer obtained in the period August 2004 to December 2015, whether from employment, self-employment or social security benefits, he spent in making the said £500 monthly contribution towards the housing costs at Kennedy Way and in paying his share of the parties' day to day living and lifestyle expenditure. Otherwise he spent some money on personal items, such as clothing, and on occasional visits to see his children. He did not save any of the income which he received during the parties' cohabitation.

21. When the parties started living together in 2003 the pursuer had no capital or financial assets. He and his former wife had been homeowners but he did not obtain any capital payment on his divorce.

22. Around the time the parties started their relationship the pursuer opened a new account with the Nationwide Building Society and by this means borrowed £12,000. He spent all of this sum on day to day living in the course of his relationship with the defender. The pursuer continued to have this debt until around 2012, when he inherited around

£19,000 following his father's death. This was sufficient to repay the sums then due leaving a balance of around £2,000.

23. The pursuer has three children by his former wife. Following their separation he was liable for child support in respect of them. He failed to pay the sums due and fell into arrears of unspecified amounts. In 2010 a court action was brought against him for these arrears. The pursuer's father gave him money to enable him to pay the sums due, which he did.

24. In around 2011 the pursuer ran up a debt of £12,500 when working as a sales agent for a company called Mecatech. He was required to pay for the product which he was trying to sell but got into debt through over spending on day to day living, poor financial management and cash flow problems. An unspecified amount of this debt remains outstanding.

25. The pursuer has had other debts over the period when he lived with the defender, for example car loans. His credit history and rating has been poor, in particular due to his said debts to Nationwide and Mecatech.

26. Although the pursuer had a company car when the parties began their relationship, he lost it when he lost the employment to which it was connected, perhaps around a year later. Thereafter, and on perhaps three occasions, the pursuer's parents gave him money sufficient to enable him to buy cars. The defender would only very occasionally drive the pursuer's car. For a short period he insured his car so that the defender's daughter could drive it.

27. On many occasions over the period of their cohabitation at Kennedy Way the pursuer did not have sufficient funds from employment, loans or benefits to pay the defender £500 at the end of each month in respect of his contribution to the housing costs, let

alone to pay his share of the parties' joint living expenses. On these occasions he would ask his parents for money and they would give it to him. Prior to his father's death in 2012 he would ask his father. Thereafter he would ask his mother. She is now 92 years old, and has lived in sheltered accommodation since around 2013. It is not possible on the available evidence to ascertain the total sum the pursuer received from his parents over the relevant period, but it must have been very substantial.

28. Had the pursuer not started cohabiting with the defender in April 2003, and had not moved with her to Kennedy Way in August 2004, he would have wished to purchase a house for himself. It is unlikely that he would have been able to do so. He would have struggled to obtain a mortgage in his own name, standing his employment position and his outstanding Nationwide loan. It is possible that his parents would have given him the money for a mortgage deposit. However even if with their assistance he had been able to obtain a mortgage and so purchase a house in his own name, he would not, given his very poor financial management skills, have been able to sustain it for any length of time. Nor would he have been able to build up any significant capital assets by this means. Accordingly, had the pursuer not cohabited with the defender, he would have lived in tenanted property, paying rent at a level consistent with his low and variable income.

The defender's personal finances

29. The defender's financial position was significantly stronger than that of the pursuer. Other than for a two week period in 2007 she was in paid employment or self-employment throughout the whole period of their cohabitation. Initially, she worked in sales for CR Smith. Thereafter she worked for Sky for about two years. She has worked in charity fundraising since around 2008. Since around 2009 the defender reduced her hours of work

in order to achieve a better work life balance, and so has worked for only four days per week, eight hours per day. However it was open to her to work overtime if she wanted to. Her employment income in the period during which the parties lived together was consistently in the region of £20,000 to £25,000 per year, giving her an average net monthly income of between around £1,400 and £1,650.

30. As at April 2004, the defender's capital and liabilities were as described in the report prepared for her mortgage application by her financial adviser, now lodged as production 6/1/7 of process. Although she had three children from her marriage, none of them was financially dependent on her. She had £2,000 in a Bank of Scotland current account. She held three joint life endowment policies with her ex-husband, her half share of the surrender values being around £9,500, which she was later paid. She had two loans outstanding totalling £10,000, one to be repaid in November 2006, and the other in March 2007. Her monthly repayments on these loans were £390. And as already noted, the defender received £35,000 from the sale of her former matrimonial home.

31. The defender did not have a credit card when the parties started living together. She got a credit card in around 2006. Thereafter she would obtain substantial amounts of credit by this means and would seek to change cards from time to time, paying off the balance on the old card, in order to take advantage of deals offering low or zero interest for a period on a new card. She was able to make the necessary monthly payments to service any credit card debt. She was able to manage and maintain this debt appropriately over the period when the parties lived together.

32. The defender owned various cars throughout the cohabitation, for which she paid the tax and insurance herself. She had a personal number plate, at a cost of £200. She

allowed the pursuer to use her car when he did not have a car himself, and he did so occasionally. He would put fuel into the car if he did so.

The parties' separation and after

33. In around 2007 the pursuer lost his then employment. For four months thereafter he did not tell the defender about this. Instead, he continued getting up in the morning, putting on a suit, and pretending to go to work. Thereafter he attempted suicide, taking an overdose of pills. The defender found him after he had done so, and took him to hospital. They discussed their relationship and she agreed that it would continue but only if he was more honest with her in future. In early 2015, however, the pursuer again lost his employment, and again deceived the defender into thinking that he had not.

34. Meantime, the pursuer had obtained his mother's bank debit card and pin number and so was able to access her savings account and withdraw money from it. Between November 2014 and December 2015 the pursuer withdrew in excess of £25,000 from his mother's account. He did this by making frequent withdrawals from cashpoints, typically of between £200 and £400 on each occasion. He made all these withdrawals without his mother's permission. She continued to receive and read her bank statements, so was aware of the pursuer's withdrawals, but took no action to prevent him from making them. By the end of December 2015 the pursuer's withdrawals had emptied his mother's bank account. As a result, she was unable to pay her rent and standing orders. On 31 December 2015 she contacted the pursuer's sister, Margaret Sandilands, and showed her the bank statements.

35. On the same date the pursuer again attempted suicide by taking an overdose of pills. The defender found him on the sofa at Kennedy Way when she returned from work. He admitted to her that he had lost his employment and had been pretending otherwise. The

defender took him to Forth Valley hospital, where he was admitted. The pursuer remained as an inpatient until 3 or 4 January 2016. Meantime the defender spoke to Mrs Sandilands on the telephone, telling her about the suicide attempt. Mrs Sandilands told the defender that the pursuer had emptied his mother's bank account. In the light of all this the defender ended the parties' relationship and told the pursuer that he must leave Kennedy Way. Mrs Sandilands subsequently took action to have her mother's bank card cancelled.

36. The said money taken by the pursuer from his mother's account in the course of 2014 and 2015 was largely spent by him on making his £500 monthly contribution to the Kennedy Way housing costs and his share of the parties' joint living expenses.

37. In 2008 the pursuer and Mrs Sandilands had been appointed joint attorneys under a continuing power of attorney for their mother. This power of attorney was never operated by either the pursuer or Mrs Sandilands. The pursuer's mother, while elderly and vulnerable, remained of sound mind and in a position to continue to manage her own finances. Following the discovery of the pursuer's unauthorised withdrawals from her account in December 2015, the pursuer's position as attorney was revoked, and Mrs Sandilands now remains as sole attorney. No civil or criminal proceedings have as yet been taken against the pursuer in connection with his withdrawal of money from his mother's bank account. Mrs Sandilands, as attorney, has the power to recover debts due to her mother.

38. Following his discharge from hospital in January 2016 and the ending of the parties' relationship, the pursuer went to the homeless persons' unit of Stirling Council seeking help with housing. He was placed in a number of temporary accommodations. He subsequently obtained the tenancy of a council house in Glassford, near to where his children live. The

pursuer qualified for a £500 welfare grant and so was able to obtain basic furnishings and white goods for his tenancy.

39. The pursuer left his relationship with the defender with his clothes and a few books. He has since obtained a few items from Kennedy Way, including garden tools, a lawn mower, a television which he had paid for himself, his own kitchen knives and some glasses. This was the product of a negotiated division of property between the parties.

40. The pursuer has not worked since the separation. He has been diagnosed as suffering from depression. He is in receipt of Employment and Support Allowance at the rate of £329 per fortnight plus housing benefit. He pays £24 per month towards water charges. He pays £30 to £40 per month on gas and electricity, and around £30 per week on food. He pays £7.50 per month for a mobile phone. He no longer pays child maintenance as his children are now grown up. He pays £45 per month for broadband and £50 per month to his Mecatech debt. The pursuer lives frugally. He does not have a credit card.

41. Neither Mrs Sandilands nor the pursuer's mother have spoken to him since 2015. He has sent occasional cards and flowers to his mother in the intervening period, but has not made any repayments to her of any the money which he took from her without permission.

42. The defender continues to live at Kennedy Way, which is her only capital asset. She continues to pay down the mortgage and has never missed a payment. Her equity in her house has continued to increase. The defender pays the other housing costs herself. As at the date of the proof, the defender had a single credit card, on which £7,000 is due, £5,000 of which was to pay legal fees, and £2,000 of which was in respect of a tax bill. She has no other debts. She continues to work four days a week in charity fundraising as before. Her present salary is around £12,500, although she earns the same amount again in commission, giving a total income of around £25,000. She can work overtime if she wants to. She lives a

more modest lifestyle than when she and the pursuer lived together. She still has the use of a car, which she leases.

FINDS IN FACT AND LAW

1. That the pursuer and defender cohabited together as if they were husband and wife between around April 2003 and 31 December 2015.

2. That the defender has derived economic advantage from contributions made by the pursuer, which are to some extent but not wholly offset by any economic disadvantage suffered by her in the interests of the pursuer.

3. That the pursuer has suffered economic disadvantage in the interests of the defender which is not offset by any economic advantage the pursuer has derived from contributions made by the defender.

4. That having regard to sections 28(3), (5) and (6) of the Family Law (Scotland) Act 2006, and to all other relevant circumstances, it is fair to make an order requiring the defender to pay a capital sum to the pursuer in the sum of £20,000 in terms of section 28(2)(a).

THEREFORE

1. Sustains the first plea in law for the pursuer and *quoad ultra* repels all pleas in law for both parties;

2. Makes an order in terms of section 28(2)(a) of the Family Law (Scotland) Act 2006 requiring the defender to pay to the pursuer the sum of £20,000 (TWENTY THOUSAND POUNDS STERLING);

3. Orders that the said capital sum shall be payable by the defender on or before 12 April 2018; with interest at the rate of 8 per centum per annum from this date until payment;

4. Finds no expenses due to or by either party; and decerns.

NOTE

Introduction

[1] The parties cohabited between around April 2003 and 31 December 2015. In this case the pursuer craves (i) an order for payment of a capital sum of £38,000 from the defender in terms of section 28(2) of the Family Law (Scotland) Act 2006 ("the 2006 Act"), and (ii) an order for delivery of half of certain household goods said to have been purchased jointly by the parties which failing a further order under section 28(2)(a) for payment of a capital sum of £1,000. The defender avers that no such order should be made. Further, she has tabled a preliminary plea as to the relevance of a particular aspect of the pursuer's case, that is, whether any sums paid to the defender in 2014 and 2015 from money dishonestly taken by the pursuer from his mother's bank account falls to be disregarded in relation to any possible section 28 award.

[2] I heard proof before answer on 11 and 13 September 2017. The pursuer and defender both gave evidence. The only other oral evidence was led by the defender from the pursuer's sister, Margaret Sandilands. A joint minute was lodged agreeing certain financial information. Parties subsequently put their respective submissions into writing and did not seek an oral hearing on these. Having considered the written submissions I made avizandum.

The law

[3] Section 28 of the 2006 Act has application in relation to "cohabitants", as defined in section 25. Cohabitants include either member of a couple consisting of "a man and a woman who are (or were) living together as if they were husband and wife", having regard to (a) the length of the period during which they were living together, (b) the nature of their relationship during that period, and (c) the nature and extent of any financial arrangements which subsisted during that period. Despite some hints of apparent reluctance by the defender to accept this, ultimately there was no dispute that the parties were cohabitants within the meaning of section 25, and that they lived together as if they were husband and wife for the period stated above.

[4] Given the terms of the pursuer's second crave it is appropriate to note first the terms of section 26 of the 2006 Act. This makes provision where any question arises as to the respective rights of ownership of cohabitants in certain household goods. In particular:

> "(2) It shall be presumed that each cohabitant has a right to an equal share in household goods acquired (other than by gift or succession from a third party) during the period of cohabitation."

"Household goods" are defined as meaning:

> "(4)…any goods (including decorative or ornamental goods) kept or used at any time during the cohabitation in any residence in which the cohabitants are (or were) cohabiting for their joint domestic purposes; but does not include (a) money; (b) securities; (c) any motorcar, caravan or other road vehicle; or (d) any domestic animal."

The effect of section 26 would therefore appear to be that on separation each party is presumed to be entitled to half of all relevant household goods or, the equal division of many such goods being impossible, to a sum representing half the value of them. However this presumption is rebuttable: see subsection (3). Therefore it remains open to either party

to seek to establish if disputed that any particular item of household goods is his or her sole property, and if so, to require its delivery, if retained by the other party, which failing payment of the value thereof.

[5] Insofar as material in the present case (there being no relevant child), section 28 of the 2006 Act provides as follows:

> "(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;…
>
> (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;…
>
> (4) In 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;…
>
> (6) The second matter is the extent to which any economic disadvantage suffered by the applicant in the interests of –
>
> (a) the defender…
>
> 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 contributions made by looking after... 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."

[6] Section 28 is complex in its drafting and its interpretation has given rise to considerable difficulty. The legislative approach taken is not to seek to define specified property as 'cohabitation property' and then set out principles and presumptions for its division, in a manner akin to the concept of 'matrimonial property' in the Family Law (Scotland) Act 1985. This difference in approach no doubt reflects a policy decision, namely the wish to continue to recognise that cohabitation is not the same nor as strong a legal relationship as marriage, and that parties should be free to live together without this giving rise to the same legal effects as regards their money and property. There might be said to be some tension in this approach, given that persons who live together will only be "cohabitants" for the purpose of the legislation if they live together "as if they were husband and wife". If the relationship is so close and committed as to properly attract this description, it is perhaps hard to understand why financial settlement on the termination of the relationship is not also dealt with by the law "as if they were husband and wife". If it was, however, there might be more focus and dispute in cases such as this in relation to whether parties are indeed truly 'cohabiting' within the meaning of section 25, rather than merely 'living together', reflecting the diversity of arrangements falling short of marriage which exist in modern society. There is certainly no shortage of cases from social security law on which to draw in order to understand and analyse these issues: see the line of authority running from *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498, and for a recent example see also *DK v Secretary of State for Work and Pensions* 2017 SC 176.

[7] Be that as it may, in seeking to maintain a difference in approach between cohabitation and marriage, but still to make provision for payment of compensation should cohabitation give rise to benefit to one party or loss to the other, the drafting of section 28

appears at first sight to invite the carrying out of something akin to an accounting exercise. In particular it makes no express reference to fairness or reasonableness in deciding whether to make an award. It therefore required a full exploration of the legislative background and Parliamentary materials by the Supreme Court, in *Gow v Grant* 2013 SC (UKSC) 1, to authoritatively identify the principle of fairness to both parties as lying at the heart of the award that the court is able to make under this section. As Lord Hope of Craighead observed:

> "(33)… What section 28 seeks to achieve is fairness in the assessment of compensation for contributions made or economic disadvantages suffered in the interests of the relationship. The wording of subsections (3), (5) and (6) should be read broadly rather than narrowly bearing in mind the point that the Scottish Law Commission made… that the principle in section 9(1)(b) of the [Family Law (Scotland) Act 1985] which these subsections adopt was designed to correct imbalances arising out of a non-commercial relationship where parties are quite likely to make contributions or sacrifices without counting the cost or bargaining for a return..."

Further, therefore:

> "(36)… It would be wrong to approach section 28 on the basis that it was intended simply to enable the court to correct any clear and quantifiable economic imbalance that may have resulted from the cohabitation. That is too narrow an approach. As the Commission observed… a claim based on contributions or sacrifices in non-commercial relationships of the kind that family law must deal with cannot be valued precisely. Section 9(1)(b) enables fair compensation to be awarded, on a rough and ready valuation, in cases where otherwise none could be claimed. Section 28 is designed to achieve the same effect."

[8] Accordingly, and more particularly, the phrase "in the interests of the defender" in section 28(3)(b) and (6) does not require that the applicant should have suffered economic disadvantage in a manner intended to benefit the defender, nor that the transaction in question must have been intended to be in that party's interests. Rather:

> "(38)… where the guiding principle is one of fairness its more natural meaning is directed to the effect of the transaction rather than the intention with which it was entered into. The reference to the defender at the end of the phrase does,

> of course, require that the disadvantage which the applicant suffered was in his interests. It does not say that it must have been in his interests only, or that the fact that it was in the applicant's interests also means that it must be left out of account. Still less does it say that "interests" have to be equated with economic advantage or benefit… Provided that disadvantage has been suffered in the interests of the defender to some extent, the door is open to an award of a capital sum even though it may also have been suffered in the interests of the applicant."

[9] On the facts of the case, the sheriff had found that Mrs Gow had sold her flat in order to cohabit with Mr Grant, obtaining substantial free sale proceeds. Roughly one half of this she used to pay her own debts and to loan money to her son. Ultimately the other half was put into the parties' relationship, in the form of contributions to their living costs and to joint purchases, including paintings, holidays and timeshares. At the end of the relationship, five years later, Mr Grant was able to continue to live in his own house, which had increased in value, while Mrs Gow did not have a home, and had lost the benefit of the increase in value of her flat. The sheriff made an award to her calculated by reference to the difference between the value of Mrs Gow's flat when she sold it, and its value at the date of the end of the cohabitation. Indeed she awarded her the whole of the difference in value, notwithstanding that half of the free sale proceeds had been applied for her sole benefit, and the other half for her joint benefit. Furthermore, the award was not calculated by reference to the increase in value of Mr Grant's house. Upholding this award, Lord Hope further observed that:

> "(40) …the Sheriff, for her part, accepted that Mrs Gow had had the benefit of a substantial amount of the sale proceeds. So she left the proceeds out of account in her assessment. But she had a discretion as to what order she should make. The overriding principle was one of fairness, rather than precise economic calculation – having regard, as Lady Hale puts it in paragraph 54, to where the parties were at the beginning of their cohabitation and where they were at the end. She was entitled to hold that the loss of the benefit of the increase in value was an economic disadvantage, and that it was suffered by Mrs Gow in the interests of her relationship with Mr Grant. As she noted in paragraph 66 of her note, when the cohabitation ended Mrs Gow did not have a home whereas

> Mr Grant still had a home which had increased in value. I do not think that conclusion that Mrs Gow should be compensated for that disadvantage can reasonably be criticised."

Additionally, the sheriff's decision to award Mrs Gow a further £1,500 calculated by reference to the greater amount which she had paid towards the parties' timeshares, was not disturbed by the Supreme Court, even where the funds to pay for this had ultimately come from the sale proceeds of her flat. All this suggests to me that, providing due regard is had to economic advantage and disadvantage and to offsetting by reference to the statutory provisions, the discretion conferred on the sheriff as to whether, how and to what extent an award should be made under section 28(2) is very broad indeed, and that the appeal courts will be reluctant to interfere with it.

[10] Lady Hale, giving the only other substantive speech in *Gow v Grant*, agreed that the appeal should be allowed for the reasons given by Lord Hope. Her observations were expressly made with a view to learning lessons as regards the rather different law applicable in England and Wales: see paragraph 44. They should be understood in this context. In particular her Ladyship observed that:

> "(54)… It is in most cases quite impracticable to work out who has paid for what and who has enjoyed what benefits in kind during the cohabitation. People do not keep such running accounts and the cost of working things out in detail is quite disproportionate to the task of doing justice between the parties… Who can say whether the non-financial contributions, or the sacrifices, made by one party were offset by the board and lodging paid for by the other? That is not what living together in an intimate relationship is all about. It is much more practicable to consider where they were at the beginning of their cohabitation and where they are at the end, and then to ask whether *either* the defender has derived net economic advantage from the contributions of the applicant *or* the applicant has suffered a net economic disadvantage in the interests of the defender or any relevant child. There is nothing in the Scottish legislation to preclude such an approach, as the court is bound to be assessing the respective economic advantage and disadvantage at the end of their relationship. The English proposals make it rather clearer.

> (55) Finally, the case illustrates that it may be unwise to be too prescriptive about the order which the court should make to address such advantage or disadvantage. In principle, if one party has derived a clear and quantifiable economic benefit from the economic contributions of the other, it may be fair to order what is in effect restitution of the value of that benefit. But sometimes the benefit will result from non-financial contributions or be very hard to quantify. Even more problematic are the cases where there is identifiable economic disadvantage, as here, without a corresponding economic advantage. In some cases it may be entirely fair to expect the better off partner to compensate the other in full for the losses she has sustained as a result of their relationship… In others, this may be impossible or quite unfair. Thus, it seems to me, the flexibility inherent in the Scottish provisions is preferable [to the proposals of the Law Commission in England and Wales]…"

Valuable and important although these observations are, I do not understand her Ladyship to be suggesting that the express provisions of the statute can somehow be disregarded, nor that the approach suggested in paragraph 54 will necessarily be the best or only permissible approach in every case. Lady Hale's reference to the Scottish legislation 'not precluding' such an approach is significant. In some cases parties to a cohabitation *do* keep something akin to running accounts, both as regards those areas of their financial lives which they have decided to intermingle, and those where they have maintained their financial independence. As her Ladyship recognises in paragraph 55, the economic benefit may be clear and quantifiable, in which case restitution of the relevant amount will be appropriate. Simply looking at their respective positions at the beginning and the end of the relationship therefore may be a useful cross check, but will not necessarily provide the answer in every case.

[11] The very breadth of the judicial discretion recognised in *Gow v Grant* has since been the subject of critical comment. In *Whigham v Owen* [2013] CSOH 29, Lord Drummond Young (who had given the Opinion of the Inner House in *Gow v Grant*) gave judgment in the Outer House after proof in a section 28 claim. Referring to the Supreme Court's decision he observed that:

> "(10) What seems to be envisaged, therefore, is a rough and ready calculation… The approach seems to be based on the proposition that it is difficult to establish precise causal relationships between contributions on the one hand and economic advantage or disadvantage on the other; consequently a broad discretion must be exercised in order to achieve overall "fairness". It is clear that most judges and sheriffs feel uncomfortable with the notion of a very broad discretion. I am bound to say that I share that unease. I also have difficulty with the notion of "fairness" in the absence of a proper economic context, but this is perhaps merely an aspect of the breadth of the discretion that the court must exercise."

And as Lord Drummond Young went on to then hold, the consequence is that precise evaluation or quantification of the pursuer's claim is unnecessary. Nor was it necessary, in the particular case, for the pursuer to establish that her contributions to the defender's business activities had actually increased the value of the business or its profitability, nor that there was any specific causal connection between the assets held by the defender at the cessation of cohabitation and the contributions made by her during the period of cohabitation. Nor was it necessary for the pursuer to establish what she might have done had she not formed a relationship with the defender. She had made substantial contributions to keeping the parties' house and raising their children. At the end of their 26 years together the defender had assets worth more than £700,000, while the pursuer had little more than she started with. In these circumstances an award of £250,000 was made.

[12] I was referred to a number of other authorities in the present case, all of which to a significant extent turn on their own – often convoluted and detailed – financial facts and circumstances. For this reason they are sometimes rather hard to read and analyse in search for points of principle. However they do at least illustrate a range of circumstances in which an award under section 28 might be made, and how the courts have approached these matters in the light of *Gow v Grant*. Thus in *Melvin v Christie* [2016] CSIH 43, the Inner House upheld the Sheriff Principal's decision to make an award to the pursuer representing

one half of the equity in the family home. This property was in the sole name of the defender, but it was apparent that given her income she could not have afforded the mortgage payments without a financial contribution from the pursuer. Both parties had contributed £10,000 towards the cost of their first house, and had made equal financial contributions to their general expenditure over the 15 years of their cohabitation. The Sheriff Principal held that in these circumstances he was entitled to conclude that the defender had derived an economic advantage from contributions made by the pursuer in terms of section 28(3)(a) of the 2006 Act, and to make the award which he did on a broad axe approach. No case for offsetting was before the court. In upholding the Sheriff Principal's decision, the Inner House agreed with his view that in order to make an award there did need to be a causal link between the contributions made and the economic advantage derived, albeit that some links will be closer than others. However the Inner House's decision makes clear that the Sheriff Principal was entitled, on the facts, to be satisfied that such a link did indeed exist, which suggests that this requirement too will be broadly judged.

[13] Although it predates the Supreme Court's decision, the pursuer drew my attention to the case of *EM v AI* (unreported) 20 February 2012, Stranraer Sheriff Court. In this case, two years into their cohabitation, the parties moved to a house which was bought in the name of the defender, over which a mortgage was taken, also in his name, and with the assistance of a deposit which he contributed having received it from his mother. Their arrangement was broadly that the defender paid the mortgage and associated housing costs, and the pursuer paid almost everything else. The sheriff found:

> "(24) As the house… has increased in value over the period of cohabitation the defender has enjoyed a capital gain in respect of the house. That gain has derived directly from his contributions in paying the instalments on the loan and the

> house insurance… In my view this economic advantage which the defender enjoyed during the cohabitation has derived to an extent from contributions made by the pursuer. The defender was only able to afford to make his contributions in respect of the house by reason of the pursuer meeting most of the remaining expenditure…
>
> …The extent of that advantage falls to be considered… In my view the distinguishing feature is the parties' arrangement whereby one paid the immediate housing costs while the other paid virtually all the other costs, resulting in one party being able to retain an asset rising in value while the other paid the remaining living costs which had no long-term financial return. Having regard to the parity which the party's financial arrangements sought to achieve, in my estimation the resulting economic imbalance would best be corrected by an award reflecting an equal sharing of the gain in value of the house to the extent to which the house was financed by the secured loan."

In making this award the Sheriff deducted the purchase price of the house from its value at the date of the proof, then further deducted the deposit exhibited by the defender. From this net capital gain to him (of £22,950) the Sheriff then made "some allowance for offsetting to take some account of the pursuer living in the house, to title being in the defender's name and for incidental costs were the equity to be realised." These allowances brought the pursuer's share down to £10,000, which was the award made. This case (unlike *Gow v Grant*) is therefore an example of a situation where the award was quantified by reference to the advantage to the defender from the increase in the equity value of the dwelling of the house in which the parties cohabited, referable to the mortgage, albeit that both house and mortgage were in the defender's sole name.

[14] It is also necessary to mention the case of *Saunders v Martin* 2014 Fam LR 86. Surprisingly perhaps, neither party's solicitor referred me to it, notwithstanding that it post-dates *Gow v Grant*, makes a number of observations which might be thought to have general application, and is a decision of the Sheriff Principal of this Sheriffdom, and therefore binding on me. The basic facts were that the defender sold her house ('house A') and gave £10,000 to the pursuer, which he used to exercise his right to buy the council house of which

he was a tenant ('house B'). The parties then lived in house B until the expiry of the discount period after which it was sold for £78,000. The pursuer then gave these sale proceeds to the defender who used them, along with a mortgage and £6,000 of her own savings, to buy house C, in her sole name, for £170,000. During the relationship the pursuer worked part-time. The defender worked full time, contributing around £80,000 in total to the parties' joint expenses. The Sheriff refused the pursuer a capital sum, but his appeal was allowed and an award of £10,000 was made. A number of points arose.

[15] Firstly, in the Sheriff Principal's opinion, even if the defender were not obliged to repay the free sale proceeds of house B (it having been suggested that this was a gift), the transfer of this money to her still amounted to a contribution by the pursuer for the purpose of section 28(3)(a) and (9). This was the case notwithstanding that it was the defender who had paid the whole cost of purchasing house B (in the pursuer's name) and had financed this from the proceeds of sale of (her own) house A. The pursuer's 'contribution' was not (as it might perhaps have been) analysed as being the amount of the discount on the purchase of house B which he alone was able to access *qua* tenant, nor the proportion of the free sale proceeds attributable to the amount of the discount. Rather it was accepted that the whole of the free sale proceeds of house B fell to be regarded as a contribution made by the pursuer.

[16] Secondly, "economic advantage", as defined in section 28(9) is not confined to gains in capital, income and earning capacity. It includes these matters, but must be given a broad interpretation. Accordingly living at another person's expense can support a case of economic advantage. This conclusion is unsurprising, standing the express terms of section 28(9).

[17] Thirdly, the Sheriff Principal acknowledged that it may be possible to categorise some payments either as a contribution from which an economic advantage is derived by the pursuer, or as evidence of economic disadvantage suffered in the interests of the other party. For example, it was possible to say both that the pursuer derived economic advantage because the defender paid for (most of) his living expenses, and also to say that the defender suffered economic disadvantage in the interests of the pursuer by making these payments. However subject to this last caveat the Sheriff Principal adhered to his analysis in the case of *Mitchell v Gibson* 2011 Fam LR 53 at paragraph 9, namely that the structure of section 28 requires that economic advantage to the defender for the purpose of section 28(3)(a) could only be offset by economic disadvantage to the defender under section 28(5), and that economic disadvantage to the applicant for the purposes of section 28(3)(b) could only be offset by economic advantage to the applicant under section 28(6). Therefore it was not permissible to seek to offset economic advantage to the defender by economic advantage to the applicant, nor to offset economic disadvantage to the applicant by economic disadvantage to the defender. In my view this makes it particularly important that parties carefully analyse whether any particular contribution founded on falls to be regarded as an economic advantage to the pursuer, or an economic disadvantage in the interests of the defender, or both. Focused averments and pleas in law are necessary here.

[18] Fourthly, the Sheriff Principal analysed the sheriff's decision to refuse an award as being based on his treatment of the transfer to the defender of the free sale proceeds of house B as an economic advantage to her in terms of section 28(3)(a), and not as an economic disadvantage to the pursuer in terms of section 28(3)(b). He had then offset the whole of the £80,000 which the defender had paid towards the parties' joint living costs under

section 28(5). It was conceded that the sheriff had been wrong to do so, in that at least some of this expenditure was not to the economic disadvantage of the defender insofar as she herself benefitted from it. Indeed (subject to one caveat not relevant for present purposes) the "only reasonable approach", according to the Sheriff Principal, was to assume that it benefitted each party equally. Accordingly the offset to be deducted from the pursuer's contribution to the defender of the free sale proceeds of house B was one half of her contribution to the parties' joint living expenses.

[19] Fifthly, having calculated the net extent of the defender's economic advantage by reference to section 28(3)(a) and (5), the Sheriff Principal turned to the question of whether, and if so to what extent, this imbalance should be compensated by awarding a capital sum. In this context he accepted counsel's concession that "broader considerations" could be brought to bear "given the objective of achieving fairness in the assessment of compensation coupled with the discretionary nature of the court's decision". In this context the Sheriff Principal took account of the fact that the pursuer had enjoyed rent-free accommodation, being a benefit over and above the benefit which he had from the defender's expenditure on the parties' living costs. He also took account at this stage of the fact that the defender had provided the funds which enabled the pursuer to purchase house B. He reasoned that but for the discount the free sale proceeds of the sale of house B would have been less than half the sum actually realised. Because both parties had depended on each other to cooperate in the purchase of house B so as to obtain the actual free sale proceeds, the Sheriff Principal concluded that it would be unfair were one party or the other to retain the full benefit of that elevated profit. Accordingly the discounted purchase price fell to be considered not as a "contribution" for the purpose of section 28(3), but could still be taken into account as part of the "overriding assessment of what is fair". An award of £10,000 was ultimately made.

[20] There is much of interest in the Sheriff Principal's analysis in *Saunders v Martin*, and as I have already observed, I am bound to follow it on points of principle. Ultimately however I am left with the feeling from the case that a close and conventional approach to statutory interpretation of section 28 may lead to needless, and indeed counter-productive, complexity. For example, and as the Sheriff Principal appears to recognise, detailed analysis of precisely what advantage or disadvantage to one party may be offset against what advantage or disadvantage to the other recedes significantly in importance where many contributions can be analysed either way. And it recedes yet further in circumstances where, even if not taken into account under sections 28(3), (5) or (6), such matters can still be brought back in – as with the issues of the pursuer's rent-free accommodation and council house purchase discount – at a later stage, as part of 'broader considerations' to which regard may be had in exercising the discretionary decision on whether to make an award of a capital sum, and if so in what amount. Indeed, given the broad interpretive approach which is now required in relation to section 28 generally, it must be arguable that these two matters just mentioned could in principle have been analysed in terms of economic advantage or disadvantage under section 28(3), and that the reason the Sheriff Principal did not do so was because of the way that the case had been presented both at first instance and to him. Ultimately, confusion arising from consideration of such matters runs the risk of distracting from the central objective of the provision, as outlined by Lord Hope and Lady Hale in *Gow v Grant*.

Submissions

[21] As noted above both parties lodged detailed written submissions and I have of course read them carefully. Full copies are of course in process and what follows is a summary only.

[22] As regards his first crave the pursuer submitted that he had suffered an economic disadvantage in the interests of the defender, and also that she had gained an economic advantage as a result of his contributions. He further submitted that there was no offsetting disadvantage or advantage in favour of either party. In other words the claim was presented under both section 28(3)(a) and (b) and it was argued that there was no offset under either section 28(5) nor (6).

[23] As regards economic advantage to the defender under section 28(3)(a), it was submitted that there was a clear advantage to her derived from the £500 monthly payment made to her by the pursuer. As a result of this (it was said) the defender received £72,000 over a 12 year period, giving her increased disposable income, a higher standard of living and paying for over two thirds of her housing costs associated with Kennedy Way. As a result of this the defender was able to enjoy a lavish lifestyle, with several foreign holidays a year. She also had the benefit of the certainty that enough money would be coming in each month to cover her entire mortgage. She was able to reduce her mortgage by nearly £26,000 over the relevant period, during which the net market value of Kennedy Way (after deduction of £10,000 which the defender paid for the conservatory) increased by £50,000. Additionally, the defender made contributions to Kennedy Way over and above his £500 monthly contribution, namely his contribution to the cost of improvements to the bathroom and repairs to the eaves. It was submitted that he also paid half of the cost of some white goods and dining room furniture, of which the defender retained the use. It was further

suggested that the defender derived an economic benefit from the pursuer's contributions when they lived together before they moved to Kennedy Way, but the monetary value of that contribution was not particularised. Overall, however, it was submitted that the defender's capital worth had increased by approximately £76,000 over the course of the cohabitation. There was a direct causal link between the pursuer's contributions and this increase, and at least half of it, being £38,000, was due to the contributions made by the pursuer, and was the sum craved.

[24] As to whether the defender had suffered any economic disadvantage in the interests of the pursuer which fell to be offset under section 28(5), the pursuer submitted that, other than his £500 monthly contribution, both parties met their own equal share of all living and lifestyle expenditure. The defender did not make any financial contributions to the pursuer in the course of the relationship, and therefore did not suffer any economic disadvantage in this regard. Both parties used each other's cars from time to time, and there was accordingly no net disadvantage to the defender from the pursuer's use of her car. It was acknowledged that the defender had said that her household bills had decreased by approximately £110 per month since the cohabitation ended. This was characterised as "anecdotal evidence". Even accepting it however, the defender derived a net benefit of approximately £400 per month from the pursuer's contributions.

[25] Turning to the question of economic disadvantage to the pursuer for the purpose of section 28(3)(b), it was submitted that the pursuer has been economically disadvantaged because he lost the opportunity to contribute financially towards his own capital over the time period of the cohabitation. I took this to mean that he would have purchased his own house. However, it was further submitted that even if he had not done so, he would have rented, and therefore would have a "fully set up home". He would not be starting again

with nothing in 2016, living in homeless persons' accommodation. Reference was again made to the occasional, un-costed, contributions made by the pursuer additional to his £500 monthly payment. It was submitted that the pursuer had been put under sustained pressure to meet his financial contributions towards Kennedy Way each month, which added to his anxiety and mental health problems. In any event he was in a worse position at the end of the cohabitation than he had been at the beginning.

[26] As to whether the pursuer had derived any economic advantage from contributions made by the defender which fell to be offset under section 28(6), it was submitted – as far as I could understand it – that there had been no such advantage. It was submitted that he had less security of tenure in respect of his residence at Kennedy Way than he would have done had he owned property or rented. At the end of the relationship he went from having a home one day, to being homeless the next. Had he been contributing to his own home over the relevant period he would have had a fully established home on 31 December 2015.

[27] The pursuer submitted that his second crave, that is, for delivery of "half the household items purchased jointly between the parties" which failing a further order under section 28(2)(a), should be granted as "being justified to offset the economic disadvantage suffered by the pursuer in the interests of the defender *et separatim* having gained an economic advantage as a result of the pursuer's contribution towards the parties' household goods." This was not elaborated on further. The crave for payment is in the sum of £1,000, but this is not further quantified in the light of the evidence led.

[28] In any event, the pursuer submitted that an award should be made under section 28(2)(a). A date for payment should be specified. There was no evidence to suggest that the defender would not be in a financial position to meet an award for payment, or would require the award to be by instalments.

[29] The defender submitted in the first place that the defender and Margaret Sandilands should be found to be credible and reliable witnesses. The pursuer, however, was neither credible nor reliable. His character was submitted to be "flawed with dishonesty and deceit", based on admitted lies and dishonest actions, in particular in relation to the unauthorised withdrawals from his mother's bank account.

[30] Addressing first the issues raised by section 28(3)(b) the defender submitted, as I understood it, that the pursuer had not suffered any economic disadvantage in the interests of the defender. He could not have obtained a mortgage in 2002 (I am unclear why this date was taken as the parties' cohabitation did not start until April 2003). He could not have obtained the deposit given his unsecured loan from Nationwide. However it was accepted that it was possible that his parents might have gifted him a deposit. Nonetheless, it was further submitted that he could not have sustained a mortgage in his sole name, given his inconsistent employment history and generally poor financial management. Had he not cohabited with the defender he would have rented a one or two bedroom property, and would have had to have paid a fair market rental of £450 per month. Instead he had the benefit of living in a comfortable three bedroomed property with a conservatory and, if needed, with use of the defender's car, all for £500 per month. It was further submitted that the defender would have had other ancillary costs in running Kennedy Way "which she had simply forgotten in evidence", a list of which was provided.

[31] Turning to the question of offset under section 28(6) it was submitted again that the pursuer had had the use of a well furnished, warm and comfortable three bedroomed property with a conservatory extension. He would not have been able to provide a property of that standard for himself. He had been advantaged by both financial and non-financial contributions by the defender.

[32] As to section 28(3)(a), it was submitted that the defender had not derived any economic advantage from contributions made by the pursuer. In that regard it was submitted that she had been able to obtain a mortgage in her sole name in 2004 without any input from him. She has continued to sustain a mortgage from 2004 until the date of the proof without any input from the pursuer. Further it was submitted that the defender had no disposable income each month out of the contributions made by the pursuer, and had made no savings from these. The undisputed evidence that the defender had received around £70,000 from the pursuer over the course of the cohabitation was not addressed.

[33] Although not expressly analysed in the defender's submissions by reference to section 28(5), it was submitted that the defender's cost of living had increased during the parties' relationship due to increased monthly household bills, car costs and lifestyle choices all of which had increased her spending. I took this to be a submission that the defender had suffered an economic disadvantage in the interests of the pursuer which should be offset against any economic advantage which she might be said to have obtained.

[34] Turning to the defender's preliminary plea, it was submitted that the court should find that all the contributions made by the pursuer to the defender in the period November 2014 to December 2015 (that is, 14 monthly payments of £500, thus £7,000 in total) were derived from unauthorised withdrawals from the pursuer's mother's bank account. The pursuer had therefore not been economically disadvantaged by this sum. It was his mother who had been so disadvantaged. Accordingly the preliminary plea for the defender should be upheld and any capital sum awarded should be reduced by £7,000.

[35] The defender did not directly address the different issues arising in relation to the pursuer's second crave regarding the household goods. In all the circumstances however it was submitted that no award under section 28(2) should be made in favour of the pursuer.

[36] In response to the defender's submissions on her preliminary plea, the pursuer submitted that this should be repelled. Although not specifically stated, I took his position to be that I should accept that only his monthly contributions from June to December 2015 should be taken as having been derived from unauthorised withdrawals from his mother's bank account (thus £3,500, not £7,000). Further and in any event, however, it was submitted that the pursuer was still economically disadvantaged by these contributions because he owes a debt to his mother for whatever sums he took without her permission. Furthermore, the defender still received £500 per month and so derived an economic benefit from the contributions made by the pursuer, even if they came from unauthorised withdrawals from his mother's account. Even if this was not accepted, a capital sum should still be made in the pursuer's favour albeit less the £3,500 contributions derived from unauthorised withdrawals.

The evidence

[37] The pursuer gave evidence at length about the history of the parties' relationship and their financial affairs over the years. His admittedly deceitful behaviour seriously undermines any claim to credibility and reliability. Although apparently candid and remorseful I was left with the impression that he was still not being wholly truthful, either with the Court, or with himself. In the circumstances, I was unwilling to accept the pursuer's evidence other than as is consistent with the findings in fact as set out above, and generally preferred the defender's evidence where there was dispute between them.

[38] In particular, the pursuer admitted lying to the defender over protracted periods in 2007 and 2015 by representing that he was still in employment when he was not. He appears to have maintained an elaborate charade over many months, getting up in the

morning and pretending to go to work each day. He also admitted failing to pay maintenance due in respect of his children, leading to his being pursued for debt by the child support agency. Yet although unwilling to provide financial support for his children, the pursuer nevertheless continued to take up to three foreign holidays a year and to lead an expensive social life on a regular basis. He also admitted to very poor money management skills, and in a real sense his whole approach to the financial side of the parties' relationship was based on deceiving himself, and the defender, that he could afford to make the payments to their housing and lifestyle costs which he did. It is clear from analysis of his average earnings from employment over the whole period that they would often have been quite inadequate to meet his level of expenditure.

[39] Most seriously, there is the issue of the pursuer's unauthorised withdrawals from his elderly mother's bank account. I was invited to give the pursuer a warning at the outset as to his right not to answer questions which might incriminate him in relation to this matter. I did so, but in any event he chose to answer most of the questions put to him by both his own solicitor and in cross examination. It is clear, from the statements produced, the joint minute, and from his own admissions, that between around November 2014 and December 2015 the pursuer made numerous cashpoint withdrawals from his mother's savings account using her bank card. These totalled (by my calculation) more than £25,000. The pursuer accepted that all the withdrawals from June or July 2015 onwards, totalling around £15,000, were made by him without his mother's permission, but maintained that he had had her permission to make all the earlier withdrawals. His mother did not give evidence, so I do not know her position on this. There was evidence that she had continued to receive and open her bank statements through 2015 and, although very elderly and vulnerable,

remained in charge of her own financial affairs. The pursuer's mother was reported as saying only that 'she didn't know why he did it to her'.

[40] On any view of matters, the pursuer's behaviour towards his mother was dishonest and contemptible. He accepted as much. However I also reject his evidence that it was only the withdrawals made after June or July 2015 which were without his mother's permission. True, there was no dispute that his parents had repeatedly given him money prior to 2015, and analysis of his finances suggests that the total sums of money must have been substantial. Further, it does appear that the pursuer's mother was likely to have been aware that the pursuer was taking money from her account through 2015, but took no steps to stop it. Ultimately however I do not think that the pursuer was being truthful. I think it telling that he was unable to say precisely how or when his supposed permission to take money from the account was received, nor how and when it supposedly ceased. Yet the bank statements show a consistent pattern of regular withdrawals throughout the whole period from November 2014. The sheer number of withdrawals makes it implausible that the pursuer sought his mother's permission on each occasion. Moreover I am unable to discern any legitimate use of his mother's bank card by him over the period to withdraw money for use in her interest. I am left with the impression that he persuaded her to give him her bank card sometime prior to November 2014 and thereafter abused her trust by taking money as and when it suited him. In other words, I conclude that the whole of the £25,000 which was taken by the pursuer from his mother's account between November 2014 and December 2015 was probably taken dishonestly and without her permission.

[41] The pursuer also suggested that he was motivated to make the present claim by the intention that if awarded a capital sum he would use it to repay his mother and so seek to repair his relationship with his family. Perhaps he has even persuaded himself of this to

some extent, but I considered that the suggestion was shot through with self-deception and self-pity and did not find it credible. In particular he has made no effort to repay his mother in the period since 2015, even by a small amount, and I could see no good explanation for this other than that, as before, he has put his own financial priorities above hers. I therefore accept that the pursuer to some extent feels guilty about his actions, and that in principle he owes his mother a debt, but not that he would if made an award necessarily use it to repay her. Neither his mother, nor Margaret Sandilands as her attorney, have as yet taken any steps to seek to recover the money from the pursuer by civil action.

[42] In a significant chapter of his evidence the pursuer sought to suggest that he had suffered economic disadvantage from the cohabitation because but for it he would, after his holiday let accommodation had ended in April 2003, have been able to buy a house himself and so have built up capital in it by paying a mortgage. He produced estate agency materials to seek to show the sort of houses which he could have afforded on his then income. Even if he had been unable to buy a property, however, his position was that he would have obtained a tenancy and would have lived a more frugal lifestyle than he did when with the defender, and so built up capital by this means. I did not accept his evidence on either matter.

[43] As to the first aspect of this chapter, I think that it is speculative, to say the least, to suggest that the pursuer would have been able to buy a house in 2003 or 2004. His financial position was not strong at that time. According to the agreed figures, his average monthly net income in the tax year from April 2003 was only £839. He seems to have lost employment around this time. Yet his approach was premised on him continuing to earn at the higher rates he had achieved in the preceding years. Moreover by 2003 he had a £12,000 debt to Nationwide and would have been unlikely to be able to borrow more for a mortgage

deposit. He had no other capital assets following the breakdown of his marriage. It is certainly possible that his parents might have given him money for a deposit, but I am not prepared to hold that it is likely that they would have done, nor how much they could or would then have given him, even if they had been willing and able to give him something. In my view there is insufficient evidence to make positive findings in this regard. But also implicit in the pursuer's position on this matter is the further proposition that the financial incompetence and dishonesty which he so obviously exhibited while with the defender would not have occurred had he remained single. I do not accept that for a moment. Even if he had been able to get a mortgage after 2003 I think it unlikely that he would have been able to properly manage and sustain it. Nor, in any event, do I think it likely that he would have built up equity capital in a house, as opposed to spending any such capital which he might have accrued. Overall it seems to me to be simply fanciful to suggest that but for his cohabitation with the defender the pursuer would by 2015 have been in possession of a valuable capital asset in the form of a house with significant equity.

[44] Nor do I accept the pursuer's evidence on the second aspect of this chapter. I do think it more likely that had he not cohabited with the defender the pursuer would have spent most if not all of the relevant period in rented accommodation. However I am not willing to accept that it is likely that he would have lived more frugally than he did. The pursuer suggested that he overspent on joint lifestyle expenditure because the defender wanted such a lifestyle, and that but for this he would not have pursued it himself. As to this, I can accept that the pursuer felt under pressure to maintain an appearance of having a level of income which he did not in fact have. However he was still an adult, fully capable of making the choice between meeting the cost of living a lifestyle which he could not afford, or of being honest with the defender that he could not do so, and living with the

consequence of that – including if need be the end of the relationship. Although couched in the language of self-deprecation ("I was too weak to resist", etc.), his evidence on this matter was really an attempt to blame the defender for his own failings, and in particular his chronic financial mismanagement. Further and in any event, however, it seems likely that much of the pursuer's lifestyle expenditure was in reality financed not by his own earnings, but by money given to him by his parents. Even if he had lived more frugally, therefore, it is therefore likely that the net result would have been not that he would have retained more of his earnings than he did, but rather than his parents would have had given him less than they did. In other words it is they who would likely have benefitted from any greater frugality on his part, not him.

[45] On one important matter I was largely prepared to accept the pursuer's evidence as credible and reliable, if then only because it was not seriously in dispute. This is that the pursuer agreed at the outset that he would pay £500 per month to the defender as his contribution to the £700 monthly housing costs of Kennedy Way, and that he then dutifully paid that sum until the end of the relationship 11 years and five months later. This was indeed his main financial contribution to the parties' relationship, and is at the heart of his present claim.

[46] Why did the pursuer agree to pay five sevenths of the total housing costs? The defender said that this was what they had agreed would be fair. Plainly she did not see 'fair' as equating to 'shared equally'. For the pursuer, it was an amount that he was prepared to pay in order 'to live with the woman I loved', and at a time when he was in relatively well paid employment. Why did he go on paying the full £500 every month, even during those not infrequent periods when he was unemployed or on low income, and so having to beg, borrow or steal money in order to do so? On this matter the defender said that she came to

regard the continuation of the parties' relationship, and thus the pursuer's continued residence at Kennedy Way, as directly dependent on him continuing to pay his £500 every month. Had he stopped paying, she would have asked him to leave. While this suggests that little if anything remained of any affection the defender had for the pursuer, he still thought himself in love with her, and so paid up because he did not want the relationship to end. All this really reflects, in my view, the substantially stronger financial and emotional position which the defender was in throughout much of the cohabitation, and the extent to which she was prepared to use this to drive and enforce a hard bargain on the pursuer to pay a substantially greater share of the housing costs.

[47] The defender also gave evidence at some length, and spoke to her own financial position before, during and after the relationship. Ultimately I thought her generally more credible and reliable than the pursuer, but I had concerns about some aspects of her evidence nonetheless.

[48] In the first place the defender came across as rather cold and bitter toward the pursuer, and this had the tendency to distort her evidence at times. While her attitude towards the pursuer might not seem entirely surprising, given his deceitful behaviour towards her and others, at times she seemed to want to go so far as to suggest that their relationship had always been more financial than romantic. Thus, for example, she suggested that £500 per month was a fair amount for the pursuer to pay to her housing costs because it reflected the market rent for a comparable property subject to tenancy. She seemed to want to say that he was little more than a tenant. Ultimately it was not submitted on her behalf that the parties had not cohabited as if man and wife, but at times I was left the impression that she accepted this only reluctantly.

[49] Furthermore, the defender was at times reluctant to make what I would have regarded as proper concessions. For example, only reluctantly did she accept that there was a direct connection between the pursuer's monthly payments to the defender and the decrease in her mortgage over the period of their cohabitation. She was also reluctant to accept that she had benefitted not only as regards the actual sums received from him, but also from the security of knowing that she had a guaranteed regular income every month sufficient to pay all of her mortgage and more. Both of these seemed to me to be rather obvious. Most significantly, the defender would not accept that the increase in the value of Kennedy Way was directly derived from both parties' financial contributions. Her response was that she would have paid the mortgage anyway, that she did not see why he should benefit when the agreement was just that he would pay £500 a month. Again the implication is that she wanted to represent their relationship as a purely commercial one. The defender was also asked whether it was fair that the pursuer was leaving the relationship with nothing, having paid nearly £70,000 towards her housing costs, while she was better off by almost exactly the same amount, due to the increase in the value of the house. She replied that "I do think that's fair. He should have been honest". The difficulty with that, of course, is that it conflates the rights and wrongs of the pursuer's behaviour towards her, and which led to the end of the relationship, with the question of compensation for economic advantage and disadvantage, which is the subject of a section 28 claim.

[50] I have already criticised the pursuer for his complaining that but for the defender's wish to spend more on lifestyle he would have spent less himself and so been financially better off. Predictably, perhaps, the defender made the same complaint about the pursuer, claiming that she felt much better off financially since the separation, even without the pursuer's contribution to her housing costs. In my view this complaint is open to the same

criticism as I made of the pursuer. Like him, she too was an adult, fully capable of assessing what she could afford to spend on her lifestyle and making her choices accordingly. Like him, she spent the money, enjoyed the holidays, ate the restaurant food, enjoyed the frequent nights out, etc. Like him, she therefore cannot now complain that her overspending was the other party's fault, nor that but for the relationship she would therefore have been better off. If there is one difference between the parties in this respect, however, it is as regards their ability to afford the lifestyle which they jointly chose to live. Albeit that the defender may at times have had to borrow on credit cards, she was always able to service and manage her debt, and indeed to do so notwithstanding that she was only generally working a four day week for much of the cohabitation. Unlike the pursuer, she did not have to rely on her parents or other third parties or unaffordable loans to bail her out on a regular basis. Put another way, and returning to a point already made, relatively speaking she was significantly better able to afford the parties' chosen lifestyle than the pursuer was.

[51] I was also rather unimpressed by the defender's evidence in relation to her claimed lack of knowledge about the real sources of the pursuer's income. I accept that on two occasions in particular he deceived her about losing his employment, but she is an intelligent woman and I think it implausible, to say the least, that she was not well aware that for substantial periods of their relationship he was either unemployed or on low income. She did not suggest that the pursuer squandered money on himself, or in any other way, i.e. that he did not put the great majority of such money as he had into the relationship. Therefore it seems to me likely that she would have known that the pursuer could only maintain his monthly payments towards the housing costs and meet his equal share of their lifestyle expenditure if he was obtaining significant amounts of money elsewhere. In

particular I think it likely that she knew, or at very least suspected, that much of the money that he had, both to pay his £500 monthly contribution to housing costs and his share of the parties' lifestyle expenditure, was coming from his parents. If she did not in fact know this, I think that it is only because she was content not to know – as long as the pursuer continued to pay his way every month. I also think that it is no coincidence that the parties' relationship ended when the pursuer's parents' money finally ran out.

[52] The defender accepted that she used credit cards in the course of the relationship, and indeed that on occasion she would take out substantial credit on a card and then transfer the balance to a new card in order to obtain a lower interest rate. She denied however, reasonably in my view, that by so doing she was abusing credit cards as the pursuer had suggested. She described it as "boxing clever". In my view there is something in that. Unlike the pursuer, it appeared that her credit rating was good and that by one means or another she was able to afford to meet the monthly payments due on her credit cards. While her reliance on unsecured credit suggests that she was to some extent living beyond her means, the evidence did not therefore suggest that she was unable to manage and so service the debt which she had taken on over the longer term. Again that is in marked contrast to the pursuer's position.

[53] The defender's position was that she did not become financially reliant on the £500 which she received from the pursuer. Her position was that it was simply there as an extra. I do not accept that. This payment was a constant element of her whole income over a long period of time. Necessarily she made choices about the level of her lifestyle and household expenditure and the hours of work necessary to fund it. Inevitably those choices were made in the light of the pursuer's financial contribution. This is not a situation where, for example, the defender received the pursuer's contributions and put some or all of them into

a separate savings account, drawing on them only for exceptional expenditure. His payments were part and parcel of her regular monthly income and were used by her over a long period as part of her regular monthly expenditure.

[54] The defender produced documentary evidence in relation to the cost of various rental properties in Kennedy Way, Airth, and local surrounding areas. The rental prices for properties in and around Kennedy Way were typically in the region of £650-£800 per calendar month. The rental prices for properties elsewhere, for example Alloa and Clackmannan, were lower, typically in the range of around £500 per calendar month. The intention of producing this evidence was to suggest that had the pursuer not been paying £500 to the defender, he would had to have paid at least that amount to a landlord by way of rent. However it seemed to me that this was not a fair comparison. All the properties produced by the defender were three-bedroom properties and I think it unlikely that the pursuer would have rented such a property had he not cohabited with the defender. He did not live in such a property prior to cohabiting with the defender, and I think it likely that he would have rented a smaller property, one or two bedrooms, and at a lower price. The fact that the defender was in a position to purchase a three-bedroom property in a good area, and that the parties agreed that the pursuer would cohabit there, does not of itself satisfy me that the pursuer would have paid for accommodation for himself comparable to Kennedy Way in size and cost, had the parties not cohabited.

[55] There is however one particular matter on which I would accept the defender's evidence. It was put to her that the pursuer was now in debt to his mother because of the money which he had taken from her, and that she, the defender, had benefitted from this money. The defender was prepared to accept this. It was also accepted, to some extent, that the defender had applied pressure to the pursuer to continue to make his monthly payments

of £500, on pain of her asking him to leave and ending the relationship. But as she said, and I accept, none of this made her responsible for the pursuer's actions in taking money from his mother without her permission in 2014 and 2015. His actions in this regard were as a result of his choices alone. Whether it is fair to take account of this money in any way in relation to the issues arising in this case is a matter to which I will return below.

[56] Margaret Sandilands, the pursuer's sister, gave evidence. She was aware of the circumstances of the parties' relationship. Since it had ended she had remained in contact with the defender, but had not spoken to the pursuer since January 2015. They were not close even prior to 2015, but they would often meet when both independently visiting their mother after her move to sheltered accommodation in around 2013.

[57] Mrs Sandilands said that she had never borrowed any money from her parents, and was not aware that they were giving money to the pursuer at any point between 2002 and 2015. She gave evidence that notwithstanding the joint power of attorney which her mother had signed she was still capable of managing her own affairs until relatively recently, and in any event throughout 2015. She said that the joint power of attorney had never been registered with any banks or financial institutions and was not operative at that time. So neither Miss Sandilands nor the pursuer was in a position to use the power of attorney to withdraw money belonging to their mother prior to the end of 2015. Miss Sandilands was not aware that the pursuer had had their mother's bank card. She did not herself have such a card. She was unable to shed any light on how the pursuer obtained the card, but did not dispute that she had capacity to give it to him should she have wished to, and indeed to have authorised him to withdraw money from the account. The pursuer's mother did not tell Mrs Sandilands that she had given the pursuer her bank card. Since 2016

Mrs Sandilands has had sole power of attorney and it has been registered with her mother's bank.

[58] Mrs Sandilands gave evidence that her mother had continued to receive the bank statements for her savings account throughout 2015, and it seems that she was therefore aware that the pursuer was taking money from it without her permission. However she did not tell Mrs Sandilands about this until 31 December 2015, when she showed her the bank statements. Mrs Sandilands said she was shocked to see that there was no money in the account. She said that her mother did not say directly whether or not she had allowed the pursuer to withdraw money from the account and if so how much. However she did say that she 'did not know how he could do it to her', which suggests that at least some of the withdrawals were unauthorised. She thought it likely that her mother would have allowed the pursuer to borrow some money from the account, but not all of it. Mrs Sandilands took steps to assist her mother in cancelling the cards, and asked her mother why she had not told her about what was going on. She did not tell her, nor did she say anything about speaking to the pursuer, or seeking to recover the money. They discussed getting the police involved, but the pursuer's mother said that she did not want that, so nor did Mrs Sandilands. She thought that it would be upsetting for her mother, and she was not sure that she would be able to speak to the police. Mrs Sandilands said that her mother was not aware of the present action. She did not want the court to require the defender to pay money to the pursuer, but she had not given any thought as to whether she, as her mother's attorney, should be taking civil action against the pursuer to recover any sums due, although as attorney she has the power to do so.

[59] I thought Mrs Sandilands to be a generally credible and reliable witness and accepted most of her evidence, albeit that she had limited knowledge of many of the main

issues for present purposes. For example the fact that she did not know that her parents had given the pursuer any money at all – when they must have given him substantial sums over many years – suggests that she may not have had their confidence or in any event was unaware of the true nature of their relationship with the pursuer. Mrs Sandilands was significantly distressed at points in her evidence, apparently overwhelmed by the circumstances of the pursuer's abusive and dishonest behaviour towards their mother. Understandably, she was particularly appalled by being told about the pursuer's evidence that he had intended to commit suicide in 2015 so that she would inherit the whole of her mother's estate, thus somehow repaying his debt. Mrs Sandilands said that as her mother's attorney she would accept on her behalf any money that he might wish to repay. However she confirmed that he had not sought to make any attempt to pay anything back to date.

The defender's preliminary plea

[60] The defender's preliminary plea is stated as a general plea to the relevancy of the pursuer's pleadings. I had understood her solicitor to suggest in the course of the proof that the point to be argued was that any money given by the pursuer to the defender in 2014 and 2015 by way of his monthly contributions to the household expenses, insofar as that money had in effect been unlawfully taken by him from his mother's account, was not as a matter of law to be regarded as being "contributions made by the applicant" for the purposes of section 28(3)(a) and (5) of the 2006 Act. In other words I had thought the point to be argued was to be that only lawfully acquired contributions could be taken into account for the purpose of this provision. I was told that neither side would be able to provide any authority bearing directly on this question.

[61] But as will be apparent from my summary of her written submissions set out above, in the event the defender's solicitor took a different line. In effect it was submitted that because the £500 which the pursuer gave to the defender each month from November 2014 was not his money, he suffered no economic disadvantage in the defender's interests by making these payments over this period. If anyone had been disadvantaged, it was the pursuer's mother, not him. Accordingly, it was submitted, any section 28 award should be reduced by this amount, that is, by a total of £7,000.

[62] I have some difficulty understanding this submission. If the pursuer has been shown to have suffered an economic disadvantage in the interests of the defender per section 28(3)(b), then that may be a positive reason for *making* him an award under section 28(2)(a). If however he has *not* suffered any economic disadvantage that is not a positive reason for *reducing* an award that might have otherwise been appropriate, for example because it has separately been determined that for some other unconnected reason the pursuer has established that he has suffered an economic disadvantage, or because the defender has been otherwise shown to have derived an economic advantage in term of section 28(3)(b). In other words I fail to see how the defender's submission, even if accepted, advanced her case. If the pursuer did not suffer any economic disadvantage because the money he gave to the defender every month from November 2014 was not his, that is not on the face of section 28(3) a reason why any award which might otherwise be made to him should be reduced.

[63] The pursuer's response, as outlined above, was that whether or not the money was taken without his mother's permission, he had still contributed it to the defender to her economic advantage under section 28(3)(a) and so it fell to be added to the other monthly sums which she had received from the pursuer since 2004. Additionally, the pursuer had in

fact suffered an economic disadvantage for the purpose of section 28(3)(b), because by taking the money from his mother he had incurred a debt to her. There was no offsetting in either case. The consequence was that the defender's preliminary plea should be repelled.

[64] In my view there is force in both the pursuer's submissions. If it is not to be argued (contrary to my initial impression as mentioned above) that an applicant cannot as a matter of law 'contribute' money which has been unlawfully obtained by him, then the source of the money used for the contribution is irrelevant for the purpose of section 28(3)(a). The only issue is whether the defender has derived economic benefit from the monthly payments of £500 which she undoubtedly received from the pursuer after November 2014. In other words those payments fall to be treated no differently from any payments made before that date, including those which can only have been made because the pursuer obtained money from his parents as a gift.

[65] As regards the pursuer's second submission, there is something unpalatable about the idea of the pursuer being able in effect to found on his dishonest appropriation of funds from a third party in order to support a claim for payment from the defender. However if he had borrowed money legitimately in order to make his monthly payments, and so incurred a debt, there would be no difficulty in categorising this debt as an economic disadvantage for the purpose of section 28(3)(b). Why should the position be any different because he took the money without permission? By his own admission he owes a debt to his mother. In my determination he owes her a debt of £25,000, £7,000 of which was paid to the defender in monthly instalments after November 2014. That element of the debt owed to his mother seems to me to constitute an economic disadvantage which the pursuer has "suffered" (however inappropriate the word appears in this context) in the interests of the defender, and falls to be considered under section 28(3)(b).

[66] For these reasons I will repel the defender's preliminary plea. The consequence is that in considering the pursuer's first crave for a section 28(2)(a) order it is not relevant that the money with which the pursuer made his monthly contributions to the defender from November 2014 was obtained by him without his mother's permission. If and insofar as the defender is determined to have derived economic advantage from these contributions under section 28(3)(a), the dishonest manner in which the pursuer obtained them does not provide a ground to hold that this advantage was less than it would otherwise have been. Further and in any event it will be appropriate to have regard to the fact that the pursuer has, in the interests of the defender, incurred a debt to his mother in the sum of £7,000, notwithstanding that this arose due to his dishonest appropriation of this sum.

[67] Leaving aside the issues arising under section 28(3)(a) and (b), I shall return below to whether the pursuer's dishonesty is a matter which should nevertheless be considered in relation to the ultimate exercise of my discretion in deciding whether to make an order under section 28(2)(a) and if so how much. It will also be necessary to consider whether, in any final reckoning, account should be taken of *both* the advantage to the defender from the money contributed by the pursuer and the disadvantage to the pursuer from the debt he incurred by making this contribution.

The pursuer's second crave

[68] The pursuer's second crave, as noted above, seeks an order for delivery of certain household goods, failing which a further order for payment of £1,000 under section 28(2)(a). Although this crave was insisted in, I took this to be solely in relation to the alternative remedy sought.

[69] In any event, there was no good basis on which an order for delivery of any item could be made. In order to make such an order, and having regard to section 26 of the 2006 Act, I consider that I would have had to be satisfied that certain specified and sufficiently identified items had been retained by the defender in Kennedy Way and were the sole property of the pursuer. However the evidence which I accepted was to the effect that the defender has not retained any item which is the pursuer's sole property. Certain household, gardening and personal items were returned to him prior to the proof by negotiation. Beyond this, all the evidence established is that at (unspecified) times during the period in which the parties cohabited in Kennedy Way the pursuer contributed half the (unspecified) purchase costs of a handful of household goods, namely a new washing machine, an audio/video entertainment system, a television for the parties' bedroom, and some dining room furniture. It was not even entirely clear to me which, if any, of these items were still retained by the defender following the separation. However I was satisfied that all the other household goods purchased for Kennedy Way and retained there by the defender were purchased by her and are her personal property. Accordingly even if the pursuer had been insisting on an order for delivery in terms of his second crave, I would have refused it.

[70] As far as I can tell what the pursuer really seeks by his second crave is a further order under section 28(2)(a), that is, for payment of a second capital sum. His argument is that his half share of the purchase costs of the above mentioned household goods is a contribution made by him from which the defender derived economic advantage for the purposes of section 28(3)(a) (i.e. he paid half the cost of the goods and she has gained in still having the use of them), or as an economic disadvantage which the pursuer has suffered in the interests of the defender for the purposes of section 28(3)(b) (i.e. he is poorer by the amount of money which he paid for goods which he bought for defender – as well as himself – to use and has

had to spend money to buy replacements). He asks the court to make an award on a rough and ready calculation.

[71] I think that there are problems of both law and fact in this argument. As to the law, I doubt the competency of seeking two section 28(2)(a) orders, whether in the same or different actions. Section 28 provides a remedy which is necessarily limited by the terms of the statute. It permits the court (a) to make "an order" for payment of a capital sum, (b) make "an order" requiring payment in respect of any economic burden of caring for a child of the cohabitants, and (c) to make "such interim order as it thinks fit". It does not, to my mind, permit the court to make more than one section 28(2)(a) order, whether in the same action or in subsequent actions. The intention must surely have been that the pursuer would make a single claim for a section 28(2)(a) order, and put in issue in that claim all relevant matters arising out of the cohabitation. However, even if I was wrong about that and it was competent to do so, I would not regard it as appropriate to crave the making of two section 28(2)(a) orders in the manner which has been done in this case, that is, one in relation to household goods and one in relation to everything else. The potential for further confusion in offsetting is obvious, as is the fact that at the end of the day the court will have to consider all relevant matters in exercising its discretion as to whether to make any award and if so the amount of it, whether one order is sought or two.

[72] As to the facts, and in any event, I think that the pursuer has not done enough to entitle himself to an award in relation to the household goods, even allowing for the possibility of a rough and ready calculation.

[73] Looked at from the perspective of economic gain to the defender in terms of section 28(3)(a), the claim is in reality based solely on a presumed benefit to the defender in retaining the above mentioned goods post cohabitation. Prior to that, any economic

advantage gained by the defender from the pursuer's contribution to the purchase (that is, in her having use of the goods), is offset by the economic disadvantage suffered by her in the interests of the pursuer (that is, in paying her half share of the purchase costs). This simply reflects the fact that both parties shared the costs of purchase and both parties gained the benefit of use during the cohabitation (the argument could actually be exactly reversed and made from the perspective of section 28(3)(b), although the pursuer has not chosen to do this, and in any event the net effect would be the same). In principle, however, if the defender has retained the goods for her own personal use post separation, then it may be said that there is an advantage to her or disadvantage to the pursuer which is not offset by his having the ability to make continued use of them.

[74] The question is then whether the pursuer has established by evidence what if any monetary value can and should be put on this advantage to the defender. In order to properly assess that, it seems to me, I would have to have some basis to put a value on the purchase cost of the items, to be clear that they were indeed retained by the defender at the date of separation, and also to be able to assess their residual value at that time. For example, if the parties had jointly purchased a new washing machine in 2005 for £300, but it had been replaced by the defender at her own expense in 2015, there would be no economic advantage to her after the date of separation, derived from the pursuer's contribution to the original purchase. Alternatively, even if the defender still had the machine at the date of separation, it would then have been a 10 year old machine with negligible value, indeed due for replacement. Again there would be no appreciable economic advantage to the defender from ongoing retention of the machine which would be appropriate to compensate by a section 28 award.

[75] Looked at from the perspective of economic disadvantage to the pursuer in terms of section 28(3)(b), similar considerations apply. The economic disadvantage claimed by the pursuer is the cost of having to pay for household items to replace those items which he jointly purchased with the defender during the cohabitation. In my view it will not do in the confines of the present argument to say, in general terms, that he had to buy further household goods in order to furnish a new and empty house. If he wishes an order based on specific items jointly purchased by him, as he does, then the only disadvantage which he can put in issue, in my view, is the disadvantage of not having the continued shared use of those particular items after separation, and thus of re-buying his half share of those items. Again, therefore, he would have to establish by evidence some basis on which to value that disadvantage, which again would on the face of it require at least evidence sufficient to show the cost of the original purchase, whether it had been retained by the parties at the date of separation, and what if any residual value it had at that time.

[76] In my view the pursuer has failed to lead evidence sufficient to satisfy me that the defender has derived appreciable or quantifiable economic advantage, or that he has suffered appreciable or quantifiable economic disadvantage, in relation to the particular household goods which parties purchased jointly in the course of the cohabitation. The evidence on this whole chapter was vague and insufficient for even a rough and ready calculation. In particular I do not know when any of the relevant items was bought, nor what the pursuer's total contribution to the cost of those items was at the time of purchase. I do not know whether they had any residual value at the end of the cohabitation, allowing for wear and tear and depreciation. I am not even clear that all of these items had been retained by parties by the end of the cohabitation. Looked at from the perspective of either

section 28(3)(a) or (b), therefore, I do not see a good basis for an award in relation to the pursuer's second crave.

[77] But even if I was wrong about that, there is another factor which I would take account of in this context. This factor could be analysed in terms of offsetting under either section 28(5) or (6), or in considering whether to exercise discretion in making a section 28(2) order, but the net effect is the same. It is that even accepting that the pursuer contributed to half the cost of the few specified household items mentioned above, I accept that the defender purchased all the other household items for Kennedy Way herself throughout the period of the cohabitation, and the pursuer had the benefit of the use of them throughout this period. Even without knowing the purchase prices of any particular items, etc., it is clear that the cost to the defender of furnishing the remainder of an entire house at her own expense will have dwarfed the expense to the pursuer of his share of the cost of the particular items put in issue by him in this claim. And looked at the other way, the benefit to the pursuer of living for more than 11 years in a fully furnished house will have dwarfed the cost to him of having to re-buy replacements for those particular items in his new accommodation.

[78] For all these reasons, I will refuse the pursuer's second crave, and repel his second plea in law.

The pursuer's first crave

[79] This is the principal remedy sought in this action, an award under section 28(2)(a) of the 2006 Act, in the sum of £38,000. There is no "relevant child" in the present case, which simplifies the questions raised by section 28 somewhat. In these circumstances, and having

regard to the case law discussed above, it seems to me that I require to address the following questions in the light of the evidence which I have accepted:

(a) Has the defender derived economic advantage from contributions made by the pursuer, and if so, to what extent (the section 28(3(a) question)?

(b) If the defender has derived economic advantage from the pursuer's contributions, to what extent is this advantage offset by any economic disadvantage suffered by the defender in the interests of the pursuer (the section 28(5) question)?

(c) Has the pursuer suffered economic disadvantage in the interests of the defender, and if so, to what extent (the section 28(3)(b) question)?

(d) If the pursuer has suffered economic disadvantage in the interests of the defender, to what extent is this disadvantage offset by any economic advantage the pursuer has derived from contributions made by the defender (the section 28(6) question)?

(e) Having regard to the answers to the above questions, and to any other relevant considerations, should the court in the exercise of its discretion make an award to the pursuer, and if so for how much (the section 28(2)(a) question)?

In approaching each of these questions it is clear from the case law that the statutory provisions must be approached broadly and with a view to achieving the paramount objective of this provision. This objective is to make such award (if any) as the court considers appropriate in order to fairly compensate the pursuer where in the course of the cohabitation either the defender has derived net economic advantage from contributions made by him, or he has suffered a net economic disadvantage in the interests of the defender. In making that assessment regard can be had to where each of the parties were in economic terms at the beginning of their cohabitation, and where they were at the end. If one party has derived a clear and quantifiable economic benefit from the economic

contributions of the other, it may be fair to order what is in effect restitution of the value of that benefit. If on the other hand if a claim cannot be valued precisely, as will often be the case in non-commercial relationships, it is permissible to make an award on the basis of a rough and ready assessment.

[80] In relation to the section 28(3)(a) question, I consider that it is clear that the defender has derived economic advantage from contributions made by the pursuer. It is not disputed that he paid her the sum of £500 every month throughout the time that they lived together in Kennedy Way. Given that they moved into Kennedy Way in around August 2004, and that the pursuer left at the end of December 2015, this means a period of 11 years and five months, thus 137 months. Accordingly he paid her a total sum of £68,500 over the relevant period (137 x £500). For the reasons already discussed in relation to the defender's preliminary plea, I do not consider that it is appropriate to disregard the £7,000 that the pursuer gave to her in the period in monthly payments from November 2014 to December 2015.

[81] It is important to recognise that this payment was made solely in respect of the pursuer's agreed contribution to the defender's housing costs, including her mortgage and other household bills, which totalled almost £700 per month. The pursuer therefore paid roughly five sevenths of these costs throughout. Beyond that, the parties effectively split all joint living and lifestyle expenditure equally between them, and each paid for their own personal expenditure. The defender did not make any significant payments to the pursuer at any point. On the face of it, therefore, the defender was simply £500 per month better off as a result of the pursuer's contributions, increasing her overall net income (of between around £1400 and £1650 per month) by around one third.

[82] It seems to me that in the light of this there is substance to the pursuer's submission that the defender derived economic benefit from the pursuer's contributions as regards an increase in the value of her capital in Kennedy Way. I agree that there is a causal link here. Over the period of the cohabitation the value of this house increased by £60,000 and the defender's mortgage decreased by around £26,000. Her equity in the property therefore increased from her initial £35,000 deposit to around £121,000, thus by around £86,000. She invested £10,000 in a new conservatory, and I also accepted that she would have costs of sale of around £5,000 should she wish to realise her capital by selling Kennedy Way. Deducting these two amounts means that the net increase in the value of the defender's interest in Kennedy Way was around £71,000. The defender was able to achieve this increase in value because she was able to maintain her mortgage payments while also paying the costs of living the lifestyle which she chose to live. I reject the submission that she is entitled to look back now and say that she would have lived a more frugal lifestyle if she had not been cohabiting with the pursuer. She spent what she spent on her lifestyle at the time. In significant measure she was able to maintain her mortgage payments, because five sevenths of her housing costs were being paid by the pursuer throughout.

[83] So to what extent can the increase in value of Kennedy Way be said to have derived from the pursuer's contributions? I think that it would be wrong to simply attribute five sevenths of the increase to his contributions, as that takes no account of the fact that the defender put £35,000 of her own capital into the purchase of the house. The pursuer was not in a financial position by August 2004 to contribute to the purchase, even had the defender wanted him to do so. So in my view a reasonable approach is to recognise that one third of the original purchase price of £105,000 was attributable to the defender's deposit alone, and that two thirds was attributable to the mortgage. The £71,000 net increase in value can then

be attributed to the deposit and the mortgage in the same proportions. Two thirds of £71,000 is £47,000. The pursuer contributed five sevenths of the mortgage, thus five sevenths of this increase in value attributable to the mortgage can on the face of it be said to have derived from his contributions, namely £33,000.

[84] However this calculation may be said to underestimate the account to be taken of the fact that but for the defender Kennedy Way could not have been purchased at all. She paid the purchase costs and outlays, and the majority of the costs of maintaining the house in good condition, thus likely contributing to the increase in its market value. Nor does it take account of the extent to which the defender's further investment in the house by the addition of the conservatory may have increased its value beyond the simple purchase cost of this item. Additionally, it is apparent that although the pursuer and his former wife had owned property, at the end of the marriage he had no equity. Given his record of financial mismanagement I am left with the impression that had the pursuer had access to the equity in Kennedy Way – for example had he been joint owner – he would have made demands on it, and the increase in its free sale value would therefore have been less. Put another way, the defender's position as sole owner coupled with her stronger economic position and better financial management may itself have contributed to the increase in value which occurred, that is, over and above the mere proportion in which she contributed to the mortgage. None of this can be precisely calculated. However these factors suggest to me that it is appropriate to adjust down somewhat the figure stated in the last paragraph. Overall I would assess the section 28(3)(a) economic advantage to the defender at £25,000.

[85] The pursuer also argued that the defender derived economic advantage from further particular contributions, namely that he paid for half the share of repairing the eaves and paid the whole cost of installing a new shower, etc., in the parties' *en suite* bathroom.

However the precise cost of these works and the pursuer's contribution to them was not brought out in the evidence. Nor was it made clear to me when these works were carried out, although the defender said (and I accepted) that she had replaced the new shower since separation. Therefore while there is likely to have been some benefit to the defender, in that she only had to pay for half the cost of the repairs to the eaves and had the use of a new shower, etc., for at least some period at no cost to herself, I do not feel able to provide even a rough and ready quantification of her economic advantage. If a party is seeking to found on specific items of expenditure which he claims to have made, he has to at least make some estimate of the cost of them. Otherwise he is in effect inviting the court to hazard a guess. But in any event it seems unlikely that the economic advantage to the defender would have been more than a few hundred pounds and in all the circumstances it seems to me that it can reasonably be left out of account.

[86] Turning to the section 28(5) question, the defender submitted that her cost of living increased during the parties' relationship due to increased monthly household bills, car costs, and lifestyle choices which increased her spending. No other economic disadvantage to the defender was suggested. Indeed even this submission was included in the defender's written submission under the heading of economic advantage to the pursuer (the section 28(6) question). However it is clearly referable to the section 28(5) question.

[87] For reasons already discussed, I reject the submission that the defender suffered economic disadvantage by choosing a more expensive lifestyle. This was a joint choice made by both parties, and both matched each other's lifestyle spending equally. I also reject the submission that the defender had increased car costs. The evidence on this was general and vague, but ultimately I agree with the pursuer's submission that it is likely that the use by each party of each other's cars from time to time likely cancels out any advantage or

disadvantage. In any event, even if there was any net economic disadvantage sustained by the defender in this regard I would not assess it as being of such economic significance as to justify an offset.

[88] As regards the question of increased household costs, however, I accepted the defender's evidence that these costs had decreased since the cohabitation had ceased. Her mortgage has stayed the same, but her council tax and bills have reduced by just over £100 per month. So if the pursuer had not been living with the defender her monthly housing costs would have been £600 per month, not £700 per month, of which £370 would still have been payable towards the mortgage. True, she would have had to have paid the whole of this amount, not the £200 per month which she in fact paid. But then the whole of the increase in value of Kennedy Way would have been attributable to her payments. Overall she has suffered some economic disadvantage in the pursuer's interests.

[89] How should that disadvantage be quantified, as against that part of the increase in the value of Kennedy Way attributable to the mortgage? The pursuer's position, if I understand his written submission correctly, was that if the defender's evidence as to the reduction in monthly costs was accepted it would be appropriate to reflect that by assuming a net monthly benefit to the defender from the pursuer's payments of £400 (£500 - £100). Accepting this approach, and while the calculation is most certainly rough and ready, it would seem reasonable that the share of the net value in increase in Kennedy Way derived from the pursuer's contributions as calculated above should be reduced by one fifth, that is, by £5,000 (£25,000 / 5). Accordingly that figure falls to be offset under section 28(5).

[90] Turning to the section 28(3)(b) question, the pursuer's position is that he was economically disadvantaged in the interests of the defender because had he not cohabited with her he could and would have established a home of his own, either by obtaining a

mortgage and purchasing a property, or at least by renting and furnishing a property of his own.

[91] I reject the pursuer's submissions in this regard and accept those of the defender, essentially for the reasons already discussed when considering the pursuer's evidence. To repeat, I do not accept that he has established that it is likely that he would have been able to obtain a mortgage in 2003. His employment position was precarious and he had a substantial unsecured loan to the Nationwide. He had no capital for a deposit. Even if he had been able to get a deposit from his parents and so got a mortgage and bought a property, I do not think it likely that he would have sustained it, nor that he would have built up any significant capital in it. His chequered employment history and his obvious and admitted record of poor financial management fly in the face of any contrary conclusion. Had he rented a property, however, he would likely have had to pay rent at around £400 - £450 or more per month, and to pay bills in addition. Even then there would have been a real question whether he could have sustained a tenancy any more than he could have sustained a mortgage, and for the same basic reasons. And in any event the pursuer's submission rather assumes that he would have rented long term in unfurnished accommodation, rather than in short term furnished lets (as he had in Cupar in 2002/3). In all the circumstances I consider that it is speculative to suggest that but for the cohabitation the pursuer would have had a 'fully set up home' at the end of 2015, as he submitted. I do not accept that he has established this.

[92] As also noted above, the pursuer sought to suggest in his submissions that the pressure of having to meet his £500 monthly payment had adversely affected his mental health. If by this it was meant that he had suffered economic disadvantage because his earning capacity had somehow been diminished because his mental health had suffered due

to the defender's financial demands on him, I reject this submission. There was no medical evidence led to this effect and the pursuer's own evidence did not justify such a finding. In all the circumstances I do not accept that the pursuer suffered economic disadvantage in the interest of the defender in this regard.

[93] As already discussed in relation to the defender's preliminary plea, I accept that the £7,000 which the pursuer took from his mother without her permission after November 2014 and gave to the defender in monthly payments is an amount which he is in principle liable to repay to her. Indeed he is liable for this sum as part of the larger sum of £25,000 which I am satisfied he took from her. There has been no demand for payment by or on behalf of his mother as yet, let alone any Court order, but the pursuer has publicly acknowledged that he owes her a debt. In my view he incurred the debt in the defender's interest. On the face of it therefore he has incurred an economic disadvantage in the sum of £7,000. A similar approach might have been taken in relation to the Nationwide and Mecatech loans, but no submission in relation to these matters was made by the pursuer and accordingly I take no account of them in this context.

[94] Turning to the section 28(6) question, the defender submitted that the pursuer had derived an economic advantage in that he had been able to live in Kennedy Way for 11 years, a house of a size and amenity greater than that which he would have been able to afford had he been living on his own. It was also submitted that he had derived economic advantage by living with the defender in her home "due to the contributions she made both financial and non-financial". These were not further specified and I am unclear what is being referred to.

[95] The pursuer submitted that there was no offset under section 28(6). It was pointed out that he had less security of tenure than if he had owned his own property or rented, and

that (latterly at least) his position was precarious in that the defender had made it clear that his continuing residence at Kennedy Way, and indeed the relationship, was dependent on his continuing to maintain his monthly payments. It was submitted that overall he had gained no economic advantage. He began the cohabitation with nothing and ended it with nothing.

[96] In my view there is no economic advantage to the pursuer which falls to be offset. As for him enjoying the greater amenity of a house which he could not have afforded himself, that is true, but he paid the greater share of the housing costs on Kennedy Way as between himself and the defender, and overall I consider that he paid for what he got. I reject the submission that he derived an advantage from unspecified 'financial and non-financial contributions from the defender'. The pursuer bore the greater share of the housing costs. They split all other joint expenses. The defender made no direct financial contributions to the pursuer. The defender may have done more of the domestic chores but both parties contributed in this regard, and the pursuer did most of the gardening.

[97] Turning then finally to the section 28(2)(a) question, the starting point is that having regard to sections 28(3), (5) and (6) the economic advantage to the defender I have calculated to be £25,000, which falls to be offset by £5,000 to reflect her economic disadvantage, thus £20,000. I have also calculated that there was an economic disadvantage to the pursuer in the defender's interest of £7,000, being the debt to his mother, against which no offset falls to be applied. That suggests that an award should be made to the pursuer under section 28(2)(a), and might suggest that it should be in the sum of £27,000. The question is whether there are any other relevant factors which mean that such an award should not be made, or not made in this particular amount.

[98] In the first place it seems to me clear that the £7,000 which I have assessed as being an economic disadvantage to the pursuer under section 28(3)(b) should not be awarded to him in addition to any award made by reference to the increase in the value of Kennedy Way derived from his contributions. That is because to do so would be to double count in this respect. In other words, it would not be appropriate to make an award to the pursuer based on an amount calculated by reference to the advantage to the defender of the £7,000 which she received from him, and then to also award him that same sum because he incurred a debt in order to make this payment. It seems to me that the economic advantage to her and the disadvantage to him are two sides of the same coin in this regard. He seeks an award quantified by reference to the defender's economic advantage from this particular contribution and in my view it would not be fair and reasonable to further take it into account by reference to the debt incurred in making it.

[99] In the second place, and more generally, I come back as promised to the issues canvassed in relation to the defender's preliminary plea, and also touched on in the defender's evidence as noted above. As noted the purpose of section 28 is to achieve fair compensation (if required) for economic imbalance resulting from the cohabitation. Accordingly the behaviour of the parties in the course of their relationship, towards each other or to third parties, and the reasons for the separation, are not directly relevant to what the court has to decide. This is thrown into sharp relief in this case given the pursuer's admitted dishonesty towards both the defender, and his unauthorised withdrawals from his mother's bank account.

[100] In relation to the pursuer's behaviour towards the defender – and to answer directly a point which the defender made in evidence and noted above – if there is economic imbalance between the parties at the end of the cohabitation justifying an award under

section 28, it is no answer to the pursuer's claim to point out that the relationship ended because of his dishonesty. That does not render a net economic imbalance fair where it otherwise would not be so. In relation to the pursuer's behaviour towards his mother, I have already repelled the defender's preliminary plea, but even at the stage of considering matters more broadly in the exercise of my discretion I am driven to the conclusion that it is ultimately not relevant to the issues which I have to decide in this case. I am not determining a civil action by the pursuer's mother against him for debt. Nor am I determining a criminal prosecution against him in relation to his conduct in this regard. Indeed I am not adjudicating on any legal issue between him and his mother, far less any moral one. Rather, section 28 requires me to determine a financial settlement between the pursuer and the defender only, in circumstances where it is accepted that the pursuer made contributions to the defender, and it is not argued that the fact that the funds to make them were dishonestly obtained by the pursuer in itself carries the consequence that they must be disregarded for the purposes of the statutory provisions. This concession seems to reflect the particular limited purpose of section 28. Any other financial claims which may arise against either the pursuer or the defender by third parties because of their conduct whilst they cohabited, are matters for those parties to make, if so advised, in other proceedings.

[101] For these reasons, other than insofar as it bears on his credibility and reliability, the pursuer's dishonest conduct towards the defender and towards his mother is in my view not relevant, and is not a matter which makes it appropriate to deny him an award under section 28(2), nor to reduce such an award where it would otherwise be appropriate.

[102] Thirdly, although the pursuer's case is principally based on his £500 monthly contributions to the defender, as seen above his approach has been to quantify his claim by reference to the extent to which these contributions are reflected in the increase in value of

the defender's house. This has led to the rather involved yet still rough and ready calculations as to the extent to which this increase can be said to have been derived from the pursuer's contributions. It did occur to me that there was a somewhat more straightforward way to approach and quantify his claim. Essentially, stripped of the peripheral issues in relation to household goods and relatively minor expenditure, the parties shared equally all their joint living and lifestyle expenses. Therefore the only real and substantial question is as to the imbalance arising from the pursuer's monthly contributions towards the Kennedy Way housing costs. Those costs were £700 a month, yet the pursuer paid the defender £500 a month. Had parties shared these costs equally too, as it might have been fairer for them to do, the pursuer would have paid only £350 a month. On this basis the defender was advantaged and the pursuer was disadvantaged by £150 a month for 137 months, a total of £20,550. That is a roughly the same figure which ultimately I have calculated by reference to the asset value of Kennedy Way, and provides a measure of comparison.

[103] Fourthly, and finally, I do think that this is a case where it is appropriate to carry out a cross check by reference to Lady Hale's observations at paragraph 54 of *Gow v Grant*. In doing so I note that at the outset of parties' cohabitation the pursuer had no capital assets and resources. He was effectively homeless (having been put out of temporary leased accommodation), and either already unemployed or about to be made unemployed. At the end of the cohabitation, more than 12 and a half years later, his financial situation was no better and was in some respects worse. He still had no assets, and was homeless and unemployed. He had in addition begged, borrowed and (in effect) stolen money in order to pay £500 per month to the defender toward her housing costs and to try to maintain his chosen lifestyle within the relationship. This left him with debts, some of which remain to be repaid. The defender on the other hand came to the cohabitation in a relatively strong

financial position, with substantial capital from her marriage and in relatively stable well paid employment. She was in rented accommodation, but only (as I understood it) pending settlement of her financial claims on divorce. At the end of the cohabitation she remains the owner of Kennedy Way and is still in stable, well paid employment. More than a third of her mortgage had been paid off and the value of her house had increased substantially. In these circumstances, standing back from the detail and taking a broad view of matters, it is clear that the defender derived a substantial net economic advantage from the contributions of the pursuer and that he suffered a net economic disadvantage in the interests of the defender.

[104] For all these reasons, having regard to section 28(3), (5) and (6), and to the other matters to which I have referred, I am satisfied that I should make an award under section 28(2) of the 2006 Act and that this should be in the sum of £20,000.

The date for payment

[105] Section 28(7) of the 2006 Act provides as follows:

> "(7) In making an order under paragraph (a) or (b) of subsection (2), the appropriate court may specify that the amount shall be payable –
> (a) on such date as may be specified;
> (b) in instalments."

The defender's only capital asset is her house. Nothing was put in evidence to suggest that she would not be able to re-mortgage in order to release equity sufficient to pay the order for payment which I have specified above. However it will plainly take time for her to take steps to do this and in these circumstances I consider it appropriate that I should specify 12 April 2018, being 3 months hence, as the date by which payment must be made.

[106] As for interest, this was craved from the date of citation. In my view, however, and for the reasons discussed in *Melvin v Christie* at paragraph 12, this is inappropriate. Normally interest would run from the date of decree. However in this case, given that I have set 12 April 2018 as the date by which payment should be made, I consider that it is appropriate that interest should run from that date only, at the judicial rate.

[107] Another consequence of my postponing the payment date (although not the reason for my doing so), is that it will give Mrs Sandilands, as attorney for her mother, the opportunity to take legal advice on whether to bring proceedings against the pursuer for recovery of the sums which he has admitted taking from her without her consent and, perhaps, to seek arrestment on the dependence of the section 28(2)(a) award in the hands of the defender's solicitors. However all this it is entirely a matter for Mrs Sandilands.

Expenses

[108] In their written submissions neither party sought an award of expenses, whatever the result. Both parties are legally aided with nil contributions. I will accordingly find no expenses due to or by either party.

Postscript

[109] I raised with parties' agents in the course of the proof the question of whether I should refer this judgment to the procurator fiscal in the light of the pursuer's admitted actions in taking money from his mother's account without her permission. Both parties made written submissions on the matter. Having considered these, and the whole circumstances, I have no doubt that it is appropriate to make such a reference and I will do so forthwith. I have recorded above Mrs Sandilands' views in relation to the possible

involvement of the police, and also her reports of the views of her mother on the matter. However I have heard evidence which indicates that a serious criminal offence may have been committed, and I consider that I would failing in my duty if I did not bring this to the attention of the prosecuting authorities. Whether the procurator fiscal considers that it is in the public interest to investigate and bring criminal proceedings against the pursuer will be for her to decide, not me.