



4 July 2012

## PRESS SUMMARY

### **Gow (FC) (Appellant) v Grant (Respondent) (Scotland) [2012] UKSC 29** *On appeal from the Second Division of the Inner House of the Court of Session*

**JUSTICES:** Lord Hope (Deputy President), Lady Hale, Lord Wilson, Lord Reed, Lord Carnwath

#### **BACKGROUND TO THE APPEALS**

This appeal is concerned with the meaning and effect of section 28 of the Family Law (Scotland) Act 2006 which, for the first time, enables a cohabitant to apply to the court for a financial provision where the cohabitation ends otherwise than by the death of one of the parties. The court may make an order for payment by the other cohabitant of a capital sum, having regard to whether that party (“the defender”) has derived economic advantage from contributions made by the applicant and whether the applicant has suffered economic disadvantage in the interests of the defender or any child. The court must then have regard to the extent to which any economic advantage derived by one party is offset by economic disadvantage suffered by that party, or economic disadvantage suffered by one party is offset by economic advantage derived by that party.

The Appellant, Mrs Gow, met the Respondent, Mr Grant in 2001, when she was about 64 years old and he was about 58. They commenced a relationship, and in about December 2002 Mr Grant asked Mrs Gow to move in with him at his home in Penicuik. Mrs Gow agreed to do so if they became engaged, which they then did. They lived together as husband and wife and engaged in an active social life together until January 2008, when their relationship came to an end. When the parties met Mrs Gow also owned a flat in Edinburgh. After the couple moved in together, Mr Grant strongly encouraged Mrs Gow to sell her property, which she did in June 2003. The sheriff held that there was no evidence that Mrs Gow was forced to sell the flat because she was in financial difficulties. Rather, she had sold the property in the interests of furthering her relationship with Mr Grant. The net proceeds of the sale had been used partly for her own purposes and partly for the couple’s living expenses. Mrs Gow continued to live in Mr Grant’s home until she obtained rented accommodation in June 2009. The sheriff found that the value in July 2009 of Mrs Grant’s former flat was £88,000. The difference between that figure and the price at which the flat was sold in June 2003 was £38,000. The sheriff also heard evidence that during their cohabitation the parties purchased two timeshare weeks in their joint names, each of which cost £7,000. Mrs Gow paid £1,500 towards the first week, and the whole price of the second week.

The sheriff recognised that the language of section 28 allowed her a discretion to make an order and that a precise calculation of loss, based on specific payments and receipts, did not require to be made. Her conclusion, having regard to the relevant matters, was that Mrs Gow had suffered a net economic disadvantage, and that she should be compensated in the sum of £39,500. Mr Grant’s appeal to the Inner House was allowed and the sheriff’s award of a capital sum to Mrs Gow was set aside.

#### **JUDGMENT**

The Supreme Court unanimously allows Mrs Gow’s appeal, overturns the decision of the Second Division, and affirms the sheriff’s finding that the Appellant has suffered economic disadvantage in the interests of the Respondent to the extent of £39,500. The leading judgment is given by Lord Hope, with whom Lady Hale, Lord Wilson, Lord Reed and Lord Carnwath agree. A concurring judgment is also given by Lady Hale, with whom Lord Wilson and Lord Carnwath also agree.

#### **REASONS FOR THE JUDGMENT**

Section 28 does not seek to replicate the arrangements that are available for financial provision on divorce or the termination of a civil partnership. For this reason it would not be right to adopt the same approach to the application of that section as would be appropriate if the exercise was being conducted under section 9 of the Family Law (Scotland) Act 1985. That would be to impose a regime of property sharing, and in some cases,

continuing financial support, on couples who might well have opted for cohabitation to avoid such consequences. But it is sufficiently clear from the background to the enactment of section 28 that in its case too the underlying principle is one of fairness. The section is designed to enable the court to correct imbalances arising out of a non-commercial relationship where parties are quite likely to have made contributions or sacrifices without counting the cost or bargaining for a return. The statutory purpose does no more than reflect the reality that cohabitation is a less formal, less structured and more flexible form of relationship than either marriage or civil partnership [35].

It would therefore 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. Section 9(1)(b) of the 1985 Act enables fair compensation to be awarded, on a rough and ready valuation, in cases where otherwise none could be claimed. Section 28 of the 2006 Act is designed to achieve that effect. So it may be helpful to refer to cases decided under section 9(1)(b) when the court is considering what might be taken to be an economic advantage, disadvantage or contribution for this purpose or how the economic burden of caring for a child is to be dealt with under section 28(2)(b). An assessment of what is in the interests of any relevant child cannot simply be reduced to purely financial factors [36].

The phrase ‘in the interests of the defender’ can be taken to mean ‘in a manner intended to benefit the defender’ as the Second Division indicated. But it does not compel that interpretation, and in the present context, 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. 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 [38]. The sheriff was therefore entitled to take the sale of the house into account, notwithstanding her findings that the proceeds were used by Mrs Gow for her own purposes or to meet the parties’ joint living expenses, that it was encouraged by Mr Grant and that it was in the interests of furthering the parties’ relationship [39]. The sheriff was also 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. When the cohabitation ended Mrs Gow did not have a home whereas Mr Grant still had a home which had increased in value. Mrs Gow should be compensated for that disadvantage [40]. In relation to the sums spent on acquisition of the timeshare, this was a matter for the discretion of the sheriff. Her note indicates that this part of her award was arrived at after carrying out a careful analysis of all the facts. The Second Division therefore had no proper basis for disturbing this part of the award [41-42].

Lady Hale states that there are lessons to be learned from this case in England and Wales. There is a need for some such remedy south of the border. Sufficient basis for changing the law has been amply provided by the long-standing judicial calls for reform; by the Law Commission’s analysis of the deficiencies in the present law and the injustices which can result; by the demographic trends towards cohabitation and births to cohabiting couples, which are even more marked south of the border than they are in Scotland; and by the widespread belief that cohabiting couples are already protected by something called ‘common law marriage’ which has never existed in the south [50]. The main lesson from this case, as also from the research carried out in Scotland and England to date, is that a remedy such as this is both practicable and fair, focusing on where parties were at the beginning of the relationship and where they are at the end. It does not impose upon unmarried couples the responsibilities of marriage but redresses the gains and losses flowing from their relationship [56].

*References in square brackets are to paragraphs in the judgment*

#### **NOTE**

**This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.**

**Judgments are public documents and are available at:**

[www.supremecourt.gov.uk/decided-cases/index.html](http://www.supremecourt.gov.uk/decided-cases/index.html)