
SCOTLAND / JUDGMENT

Walker v. Watson & Anor [2005] ScotSC 61 (26 August 2005)

[2005] ScotSC 61

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Walker v. Watson & Anor [2005] ScotSC 61 (26 August 2005)

A371/04.

Mrs. G J Walker &another as Executors of Thomas R Watson v Mrs. I Watson &another

KILMARNOCK

: 26

th

August 2005.

Sheriff C G McKay

The Sheriff, having resumed consideration of the cause, Repels the first pleas-in-law for each of the Defenders and, in respect that the Pursuers did not insist in same, repels the Pursuers' seventh plea-in-law; allows the Pursuers to amend the Record by the deletion in their second plea-in-law of the words "second named Defender" and the insertion in their place of the word "Defenders"; certifies the debate as suitable for the employment of Junior Counsel; finds the Defenders jointly and severally liable to the Pursuers in the expenses of the debate and appoints the Pursuers to lodge an account thereof and remits the same when lodged to the Auditor of Court to tax and to report; appoints the cause to the procedure roll of the Ordinary Court of 12

th

October, 2005 at 10.00.

Sheriff

NOTE

In this action the Pursuers, as executors nominate of Thomas Ramage Watson, seek, in three separate craves, an accounting from the Defenders in respect of alleged intromissions with two specified bank accounts and, in the case of the Second Defender only, the late Mr Thomas R Watson's state retirement pension. Both Defenders deny a liability to account. The Pursuer and both Defenders lodged Rule 22 Notes in respect of their Preliminary Pleas and I heard parties in debate on 18 May 2005 and at a further diet of 20 July when I made

avizandum

. In debate the Pursuers were represented by Mr Deutsch, Solicitor, Glasgow; the First Defender by Miss Jack, Advocate and the Second Defender by Mr Gallagher, Advocate.

At the start of the debate the Pursuers' solicitor informed me that the Pursuers did not intend to insist on their preliminary plea.

In the course of the debate I was referred to the following, cases.

In Re Bishop, National Provincial Bank Limited v Bishop (1965) Ch 450;

Forrest-Hamilton Trustees v Forrest Hamilton, 1970 SLT, 338;

Unigate Food Limited v Scottish Milk Marketing Board & Others, 1975, SC(HL)75;

Coxall v Stewart, 1976, SLT, 275;

Govan Old Vitulling Society Limited v Wagstaff (1906), 14, SLT, 716;

Smith v Smith 1993, SC 701;

Collins v EIS Financial Services Limited, 1995, SCLR, 628;

Extruded Welding Wire (Sales) Limited v McLauchlan & Brown, 1986, SLT, 314;

I was also referred to following textbooks.

Walker on the Law of Contracts (Third Edition),

Clive on Husband and Wife (Fourth Edition),

Walker on Civil Remedies,

Grier, The Law of Banking,

Crerar, Law of Banking, and

Stair Memorial Encyclopaedia

and to the following statutes,

Family Law (Scotland) Act 1985, and

Law Reform (Husband & Wife) (Scotland) Act 1984.

This action is framed as one for count reckoning and payment. The Pursuers are the executors nominate of Thomas Ramage Watson, who died, according to the certificate of confirmation incorporated within the pleadings, on 18 December 2003. The First Named Defender ("the First Defender") is the widow of the late Mr Watson. Although not a subject of averment on record, the Second Named Defender ("the Second Defender"), according to the power of attorney to which reference is made in the pleadings, is the daughter of the First Defender. The second named Defender is the attorney of the first named Defender, confirm to a power of attorney, dated 18 October and registered with the Office of the Public Guardian in terms of the Adults with Incapacity (Scotland) Act 2000 on 24 October both 2002.

In the first crave, the Pursuers seek an order against both Defenders for an accounting in respect of intromissions with a specified bank account in the name of the late Mr Watson and his wife, the First Defender. In the second crave the Pursuers seek an accounting from the Second Defender in respect of another specified bank account, again in the name of the late Mr Watson and the First Defender. Both craves seek payment of such sum as is found to be due. In the third crave the Pursuers seek an order for accounting against the Second Defender in respect of her intromissions with the late Mr Watson's state retired pension. Initially the Counsel for the Second Defender sought dismissal of the entire action, but, after hearing the Pursuers' answer, conceded that it would be appropriate to allow Proof or Proof Before Answer in respect of the third crave and the averments relating to it.

In Article 3 of Condescendence, the Pursuers aver that the late Mr Watson and his wife, the First Defender, held an account in their joint named with Lloyds TSB in Largs, number 06055792 (hereinafter "the First account"). They aver that 93.33% of the funds in that account were contributed by the late Mr Watson. In answer, both Defenders admit the existence of the account but deny that the deceased contributed 93.33% of the funds in the account. The First Defender

avers that the account was matrimonial property; that it was a joint account and that as such, either party, that is the late Mr Watson and the First Defender, was entitled to withdraw the funds therefrom. The First Defender denies that she has any duty to account to the Pursuers. She avers that she was entitled either personally or by the hand of her attorney to withdraw funds from the account. The Second Defender makes like averments in answer and also avers that in terms of the power of attorney she was entitled to make withdrawals from the account and denies any duty to account to the Pursuers. Both Defenders call upon the Pursuers to "verify" or "produce proper vouching" of the source of funds which they claim came from the late Mr. Watson. They also call upon the Pursuers to specify the basis for the duty to account to them which they aver exists on the part of each Defender.

In article 4 of the Condescendence the Pursuers aver that the First Defender withdrew £30000 from the First account on 14 October 2002 and transferred it into a bank account in the name of the Second Defender. The Pursuers aver that of the £30000, £28000 was the property of the deceased. Subsequently £14000 - apparently from the total of £30000 - was paid into an account with Lloyds TSB in Largs, leaving a balance of £16000 for which the Pursuers say the First Defender has not accounted. Notwithstanding this, the first crave is for an accounting in respect of £30000 but this may be due to the fact, if fact it be, that the £14000 delivered to the police, is not in an account under the control of the Pursuers. They aver the account in which this money was placed by the police has been frozen by the bank. In answer, the First Defender admits the withdrawal but says that the money withdrawn was kept in what was then presumably the marital home. The £14000 was apparently given to the police and has been credited to another account with Lloyds TSB in Largs, not the account from they were originally withdrawn. This last point is nit very clear in the pleadings but is not relevant to the issues in the debate. The First Defender also avers in answer to article 4 of Condescendence,

"the Defenders cannot account for £16000.00 of the withdrawn sum. This amount was kept in a writing bureau but has gone missing from the writing bureau following upon family members visiting the house".

Again in answer, the First Defender avers that the withdrawal from funds in a joint account which she maintained with the late Mr Watson was in accordance with the terms of the current account set up with Lloyds TSB Bank. The First Defender avers she was entitled to make withdrawals from that account either personally or by the hand of her attorney, the Second Defender. She avers she has no duty to account.

The answer for the Second Defender to the fourth article of Condescendence is generally in like terms to the First Defenders answer but with some differences. She avers that in terms of a mandate relating to this account (which mandate has not been produced) the First Defender was entitled to withdraw the money and that, again in terms of the mandate, the account was joint matrimonial property of the First Defender and the late Mr Watson. She makes like averments that the First Defender was entitled to withdraw money from the account either by her own hand or by the hand of her attorney and that the attorney, the Second Defender, has no duty to account to the Pursuers. There is a call by the Second Defender for a specification of the basis upon which

the Pursuers allege she has a duty to account to them.

Article 5 of the Condescendence relates to the second crave and another account with Lloyds TSB (number 430862000608)("hereinafter "the Second account"). This account is also said to be in the name of the late Mr Watson and his wife, the First Defender. The withdrawals in this case are said to have been made between 17 October 2002 and 3 January 2003 by the Second Defender and totalled £11000. The Pursuers aver that of the £11000, £10000 was the property of the late Mr Watson. In answer the First Defender acknowledges the existence of the account but denies that 90.9% of the funds were contributed by the late Mr Watson. She avers that the Second Defender acted in accordance with her powers in terms of the power of attorney. She avers that the monies withdrawn were used to pay bills for the late Mr Watson and the First Defender. There is a specification of the bills. There is, once again, an averment that the First Defender was entitled to make such withdrawals as she saw fit either personally or by the hand of her attorney and a denial of liability to account to the Pursuers. The Second Defender, in her answer, makes like admissions.

Finally, in article 6 of Condescendence and related answers there are averments concerning the late Mr Watson's weekly retirement pension, but in terms of the concession made by Counsel for the Second Defender - though not, as I recorded it, by Counsel for the First Defender - the Second Defender accepts a liability to account for these funds.

Finally, there are pleas-in-law for the Pursuers. In respect of the First bank account in crave one, the Pursuers plead,

"1. The Defenders having intromitted with the funds contained in Lloyds TSB account 06055792 are bound to account to the Pursuers for such intromissions"

and in respect of the Second bank account,

"3. The Second Defender having intromitted with the funds contained in Lloyds TSB account 430862000609 is bound to account to the Pursuers for such intromissions".

In the case of the Second Account the Pursuers incorporate the bank sort code within the account number.

There are 2 related pleas-in-law for the Pursuers for decree in terms of the alternatives in each of craves 1 and 2. At the close of the debate Counsel for the First Defender, having referred to the terms of the second plea-in-law for the Pursuers, which, in terms of the Record, was laid against only the Second Defender, sought dismissal of the action against the First Defender on the basis that there was no appropriate plea-in-law in respect of the claim for payment from the First Defender. It appeared to me that this point had been noted somewhat late in the day and the Pursuers' solicitors approach was that this was plainly a typographical error and should have been laid against both Defenders. He proposed an amendment to that effect at bar which was opposed. I shall deal with that matter in due course.

This was a debate on the basis of the first plea-in-law for each Defender in respect of which Rule 22 Notes had been lodged.

First Defender's Submission

The note for the basis of the First Defender's preliminary plea, her first plea-in-law is in the following terms.

- "1. The Pursuers allege a duty on the part of the First Defender to account to them in respect of funds withdrawn from the First Defender's bank account. The First Defender was entitled to draw monies from her account and give it to her daughter if she so chose. The Pursuers have not explained why the First Defender has a duty to account.
2. The provisions as to who may legitimately withdraw money from an account are determined by the originating bank mandate in relation to the account itself. The Pursuers have not produced said mandate.
3. The Second Defender's power of attorney expressly allows her to withdraw funds from the joint account. Accordingly the Pursuers claim repayment of monies which the first and Second Defender were entitled to withdraw from the bank.
4. The Pursuers have not demonstrated any interest in the sums withdrawn which were not part of the estate of the deceased at the time of his death.
5. The action as presently pled is irrelevant and lacking in specification."

In opening, Counsel for the First Defender reminded me of the circumstances as averred in the articles of condescendence. Under reference to

Crerar, Law of Banking,

(at page 151) she referred to the terms of a mandate for the opening of a joint account. The Pursuers did not suggest that the First Defender was acting unlawfully in withdrawing the money. In response to an enquiry from me she said that the Defenders were not aware of the precise terms of the mandate and could not produce it. She then referred me to the case

in *Re Bishop*

. This concerned a joint bank account opened by a husband and wife to which both had contributed but in unequal amounts from their own resources. It had not been opened for any specific purpose and monies were withdrawn by either spouse for their own purposes. The husband died and the trustees of his will took action to determine the extent of the widow's beneficial interest in investments purchased in the husband's name and in the wife's name with monies from the joint account and in the balance of the joint account at the time of the husband's death. In the English Chancery Court it had been held that where a joint account was opened in these terms then each spouse could draw not only for the benefit of both but also for his or her individual benefit and that accordingly investments in the name of one or the other belonged to the individual in whose name it had been purchased. It was also held that in the circumstances of

that case there were indications that it was intended that that should be the result in relation to investments and that finally, on the death of the husband, the money standing at credit of the joint account accrued beneficially to the wife. In the instant action no averments have been made by the Pursuers in relation to the mandate or about a pattern of withdrawals or about the use of the account or the use to which funds from the account had been put. Counsel for the First Defender accepted that the mere fact that the account was a joint account in name of the late Mr Watson and his wife was not conclusive as to ownership of the funds in it but submitted that the determination of the extent of the interest of each party in the funds would depend upon the history of the account, the manner of its operation, the uses to which account funds had been put and the intention of the parties putting funds into the account. In the absence of that information the Pursuers had failed to aver a relevant case in support of any obligation to account to them in respect of any withdrawal made on 14 October 2002. The Pursuers merely averred in article 3 of condescendence that the funds in the account which was the subject of the first crave "were contributed by the deceased" to the extent of 93.33%. She submitted that as at 14 October 2002 the First Defender was perfectly entitled to withdraw any sum or sums from the account and that what she did with the money thereafter was entirely a matter for her. She submitted that the Pursuers, as executors, had no interest in the money which was withdrawn on 14 October 2002 as it did not and could not form part of the estate of the late Mr Watson.

Even if the court did not accept this last proposition the Pursuers had still failed to aver a relevant case against the First Defender given what the Pursuers craved against the First Defender. The Pursuers relied solely on the simple averments in article 3 of condescendence. Under reference to

Walker on Civil Remedies

(page 304) she said that the starting point to determine whether or not the First Defender could be called upon to account was whether the Pursuers had a right to demand an accounting. The Pursuers failed to aver that they had such a right and in these circumstances there could be no liability to account. In support of that proposition she referred to the case,

Forrest-Hamilton's Trustees v Forrest-Hamilton

. Whilst not relying upon the actual outcome of that case she referred to the report, at page 339, as an example of a pursuer seeking declarator as a basis for an accounting for the Defender's intromissions. She also referred to the case,

Unigate Foods Ltd v The Scottish Milk Marketing Board

where once again the pursuer had contended for a declarator followed by an accounting. At page 77 the Lord Ordinary (Stott) observed,

"The first question to be determined is whether the Pursuers are entitled to an accounting. Count, reckoning and payment is an action "founded upon the relation of principal and agent, in which the principal, whether he be a partner, beneficiary, landlord or other principal, demands an account of his agent's intromissions" (

Maclaren, Court of Session Practice

, page 645;

Thomson & Middleton, Manual of Court of Session Procedure

, page 142;

Govan Old Victualling Society Ltd v Wagstaff

)."

No such relationship exists between the Pursuers and the Defenders.

And then at page 79,

"It was submitted by Counsel for the Pursuers that an accounting would assist in the elucidation of that aspect of the case, and that I think is true; but the competency of an accounting, as I understand it, does not depend on its being a convenient way of obtaining evidence on one side or another. It must depend on the existence of a duty to account arising out of the relationship between the parties. It cannot arise

ex post facto

, so to speak, from the nature of the defences to the action. In my opinion the conclusion for accounting is incompetent."

Counsel submitted that there was no relationship in this case between the Pursuers and the First Defender which would give the Pursuers a right to demand an accounting. The Pursuers had not sought declarator of such a right. In response to a question from me as to whether the late Mr Watson, if he was still alive, would have a right to demand such an accounting from the other joint holder, Counsel agreed that there would be such a right but it would depend on the terms upon which the account was held. No such terms were averred.

At this point Counsel sought to move on to the issue of specification but the Pursuers' solicitor objected on the basis there was no note of any lack of any specification in the rule 22 note. I allowed Counsel for the First Defender to proceed under reservation on the basis that there was a general reference to lack of specification in the rule 22 note and it might depend upon the extent to which the First Defender averred a lack of specification.

Counsel invited me to look at the record and in particular article 3. There, there was an averment only that 93.3% of the account was contributed by the deceased. There was nothing beyond that bare averment. She submitted it was for the pursuer to specify further the extent of the account and what amount or amounts had been in it. Otherwise it was open to suggestion that even if the

late Mr Watson had contributed 93.3%, the 6.67% might amount to £30,000 and have been contributed solely by the First Defender. There was no averment that the account formed part of the deceased's estate nor that the funds taken from it were part of the deceased's estate. There was insufficient specification of what the late Mr Watson's contribution was to the account.

In all these circumstances Counsel invited me to sustain the First Defender's first plea-in-law.

Second Defender's Submission

As I have earlier recorded Counsel for the Second Defender sought dismissal of the whole action but later conceded that the crave and relevant averments in relation to the retirement pension would require to go to proof. He submitted that the first plea-in-law for the Second Defender should be sustained to the extent of repelling the first four pleas-in-law for the pursuer so far as directed against the Second Defender. The submissions for the First Defender had focused on the first of the two joint accounts but the Second Defender was involved in both accounts. He adopted the submissions for the First Defender in relation to the First Defender's position on the first crave and proposed a similar line of attack in relation to the claims of the Second Defender in the second crave. In that connection he referred to the Second Defender's rule 22 note.

That note is in the following terms,

"1. The Pursuers allege a duty on the part of the First Defender to account to them in respect of funds withdrawn from the First Defender's bank account. The First Defender was entitled to withdraw monies from her account and give it to her daughter if she so chose.

2. The Pursuers have not explained why the First Defender has a duty to account.

The provisions as to who may legitimately withdraw money from an account are determined by the originating bank mandate in relation to the account itself. The Pursuers have not produced said mandate.

3. The Second Defender's power of attorney expressly allows her to withdraw funds from the joint account. Accordingly the Pursuers claim repayment of monies which the first and Second Defender were entitled to withdraw from the bank.

4. The Pursuers have not demonstrated any interest in the sums withdrawn which were not part of the estate of the deceased at the time of his death.

5. The action as presently pled is irrelevant and lacking in specification."

In relation to the first paragraph of the note Counsel submitted there were two points, the question of the relationship between the Pursuers and the joint account and, secondly, from the Second Defender's point of view, the lack of averment by the Pursuers from which intromissions from that account by the Second Defender could be inferred. In article 4 of condescendence the first sentence contained an averment of something done by the First Defender. Thereafter there followed a series of averments which meant that the terms of the transfer slip formed part of the pursuer's pleadings and the slip was item 3 of the Pursuers' production, 5/3 of process. The

Second Defender is Mrs Eileen Fryer. (Although her surname may be incorrectly spelled). The transfer slip was signed "IG Watson". That money was paid to an account "T Fryer". The Pursuers made no attempt to explain or set in context that patent contradiction. Although perhaps a small point that was in itself an aspect of the irrelevancy of the Pursuers' case because two different averments were made within one article of condescendence. Even if - a hypothesis - the slip showed a payment to the Second Defender that could not be treated as an intromission with the joint account by the Second Defender. The money has at that stage left the joint account.

The position for the Pursuers in relation to the second joint account was not quite so bad. In article 5 of condescendence the Pursuers averred that the deceased and the first named Defender held a specific joint name account of which 90.9% of the funds had been contributed by the deceased and from which account between two specified dates the Second Defender had withdrawn £11,000 which was, on averment, to the extent of £10,000 the property of the deceased. No averment was made as to how the Second Defender could withdraw money from an account to which she was not a party but the answer was to be found in the defences. She was acting as attorney of the First Defender and so, at best, the Pursuers can only demonstrate that the Second Defender was acting in a representative capacity in making withdrawals. She plainly had a duty as attorney to account to the First Defender but had no obligation to account to third parties such as the Pursuers.

Separately the Pursuers were demanding an accounting from the Second Defender. Even assuming they were entitled to one, the Second Defender sets out in answer 5, at page 16 of the Record onwards, that the whole books and records so far as in the possession of the Defenders were made over to solicitors then acting for the Pursuers. These had been acknowledged by formal receipt and it was averred for the Second Defender that,

"the Defenders have therefore accounted in respect of financial matters to the deceased's agent."

Thus, if the Pursuers were in possession of all books and papers, then any accounting by the Second Defender was unnecessary and she could not be expected to prepare one absent any papers relating to it. The Pursuers did not suggest that the Defenders or either of them acted unlawfully.

Counsel drew my attention to certain passages

in Re Bishop

and in particular page 458G,

"That case (

in

re Young

1885 (28CH. D.705)) seems to me to establish the principle that in the absence of some circumstances or some evidence of intention that the joint account was to have a limited operation or was set up and kept up for some special purpose, each spouse has power to draw on the joint account not only for the benefit of the spouses but for his or her own benefit. In the absence of some circumstances from which one avers an agreement to the contrary, one must treat the agreement as truly a joint account, a joint account in which each party has power to draw to take the money out of the ambit of the joint account and to employ it as he or she thinks fit either for his own purposes or not, and if he does draw money out and invests it in his own name I see no room for any inference that he holds that investment in trust for himself and his wife either in equal shares or in any other shares."

A like observation was to be found at page 163A and B. Thus when a case was dependant upon its own particular circumstances, before there could be proof, there must be relevant averments to give the other parties fair notice of what is to be proved. The present record was entirely lacking in this respect. Rather than dealing with it as a matter of inferences from facts and circumstances to be established at proof, the Pursuers say it can be done by a formula and that it is not necessary to say what the habits of parties were with reference to payments in and out of the account; as to how long it had been in existence; as to how these accounts stood in relation to the general assets of the parties or to the marriage as a whole. All this was necessary to determine the intention of the parties in the course of the marriage in relation to the two accounts. None of this appeared on the record.

Counsel also conceded, as had the First Defender, that the mere fact that the account was in joint names did not

per se

establish that it was owned in

pro indiviso

shares but to find out the extent of each party's share or interest in the account funds it was necessary for averments to be made by the Pursuers of the matters exemplified. In the absence of such averments it was not feasible to allow proof.

So far as paragraph 2 of the rule 22 note for the Second Defender was concerned the bank mandate was not in process and its terms were unknown. He did not insist in paragraph 3 or 4 of the note.

As to the issue of the executor standing in the shoes of the deceased and thus being entitled to demand an accounting, nowhere in the pleadings did it say that the withdrawals that were made - the £30,000 being withdrawn some 14 months before Mr Watson died - that they were made without the knowledge or the approval of the deceased. In article 5 of condescendence the Pursuers did aver that the deceased had through his then solicitors called upon the Second Defender to produce an accounting but that she refused or delayed in doing so. Irrespective of the truth or otherwise of that averment it was still not an averment that the withdrawals were

made without knowledge or approval of the deceased. To establish an entitlement to an accounting the Pursuers required to demonstrate that the person who had come into possession of their or their foresaids sums had an obligation to return them or that there was a right to recover it. In support of this proposition he referred to

Coxall v Stewart

. Under reference to that case he submitted that there were two essential elements to entitle a party to proceed by way of action of account, reckoning and payment, namely, possession of the assets or funds by the d defender and a right of recovery for the pursuer. The pursuer did not aver any right to recover the funds. In looking at the report (at page 276) there appeared also to be a third aspect to the entitlement to such an action, namely, that in some way the value of the claim depended upon intromissions by the Defender. He submitted that that was entirely different from a situation where cash was an issue. In the case of a business, as in

Coxall v Stewart

, recovery of assets might not necessarily reflect their true value. Either the Pursuers had right to recover the money or they did not. The action of count, reckoning and payment was not the right way to seek recovery and certainly not in the absence of any averments showing an entitlement to recovery.

In

Coxall

there was a reference both to

Unigate Food Ltd

(at page 277 in

Coxall

) and also to

Hutcheson & Co's Administrator

. The latter case was disposed of on the basis that there was no evidence of intromissions by the Defender and in the instant case, in so far as the Second Defender made any withdrawals, she did so as attorney for the First Defender in relation to the Second bank account. It was the First Defender as principal in the power of attorney who was entitled to seek an accounting from the attorney.

The

schema

of the pursuer's averments in relation to both bank accounts was the same, namely, that a certain percentage, over 90% in each case, of the funds in the accounts were contributed by the late Mr Watson. The Pursuers did translate that percentage into a sum of money, £28,000 of the £30,000 and £10,000 of the £11,000 which they averred was the property of the deceased. He submitted that such a bald averment did not have the necessary specification to make it relevant. He thought it surprising that there were no averments of the balance in the bank accounts now or when the withdrawals were made and thus no attempt to tie in the percentage that the sum withdrawn had to the balance immediately preceding withdrawal. In the absence of this information it was not possible to test how the withdrawals related to the deceased's contribution.

The Pursuers might argue that if £28,000 or £10,000, as the case may be, was the property of the deceased Mr Watson then there was a presumption against donation and thus attempt to put the onus on the Defenders to disprove this. However, before the presumption arises it has to be triggered by relevant and specific averments by the Pursuers which the Defenders would be required to answer. In this case there were no such averments. Thus dismissal of this action, as presently framed in so far as craves 1 and 2 are concerned would do no prejudice to the Pursuers' interests. Counsel finally referred to the observations of the Lord President in

Govan Old Victualling Society Ltd

at page 718.

At this stage in Counsel's submission he referred to the issue of the pension in crave 3 but in the end did not insist in respect of this plea.

Pursuers' Reply

For the Pursuers Mr Deutsch submitted that the Defenders' claim that once the money had been taken from the account it became the property effectively of the First Defender to dispose of as she saw fit was not the law of Scotland. Both Defenders relied upon the English case of

in Re Bishop

but Mr Deutsch suggested that the best treatment of the law in relation to bank accounts was to be found in

Clive

on

Husband and Wife

at paras 14.018 - 019. The learned author observes,

"The general rule is that marriage, as such, has no effect on property. During the marriage the spouses own, administer, acquire and transfer property just as if they were unmarried. Their matrimonial relationship is irrelevant."

The learned author referred to section 24 of the Family Law (Scotland) Act 1985.

The Pursuers had made clear averments that the deceased contributed the major part of the two bank accounts yet the Defenders both complained of lack of notice. Both Defenders appeared to want the Pursuers to plead evidence but it had to be remembered that the First Defender and, the Second Defender as her attorney, had access to both accounts. Neither Defender was prejudiced in her preparation for proof. Such records as were available had been obtained by the Pursuers and lodged. He suggested that the First Defender's submission in relation to specification was spurious as all the Pursuers had to prove was that these funds were substantially the property of the Pursuers and as such the Pursuers were entitled to an accounting. Ownership gives rise to a right to demand an accounting. In

Smith v Smith

the First Division confirmed that the presumption against donation applied as between spouses. The mere fact that the account stood in joint names did not prevent an attempt to recover funds belonging to the deceased. If the Defenders asserted donation to the First Defender then the onus of demonstrating that rested with the First Defender. Averments about the history of the account to demonstrate that required to be made by the First Defender.

Forrest Hamilton's Trustees v Forrest Hamilton

demonstrated this. So it was for the First Defender to aver the necessary circumstances.

Forrest Hamilton

was also an action of count, reckoning and payment brought by trustees under a trust, disposition and settlement. There had been intromissions and some had been for the benefit of the estate. Accordingly it was not simply a question of an action for payment. In

Clive's Husband & Wife

at paragraph 14.069 the learned author dealt with the issue of bank accounts in joint names. The name or names on which an account stands will not be conclusive as to the ownership of the money in it. The most likely effect of any presumptions was that the funds in such an account would be that one half of the money was the property of the deceased. Accordingly there was still an obligation to account on the basis that at the very least part of the money was the property of the deceased. As to the Pursuers, as executors, not having interest to pursue the matter

Smith v Smith

made it clear that a husband whose wife has used funds has a right to an accounting and such a right must pass to executors. The right to demand an accounting was an asset of the estate and that was reflected in the certificate of confirmation incorporated into the pleadings (item 5/1 of process).

Mr Deutsch accepted that the

Coxall

case was the most authoritative statement of the law of circumstances in which an action of count reckoning and payment may be brought in Scotland. He referred to the subsequent case of

Collins v EIS

which followed

Coxall

. As between the pursuer and both Defenders the first leg of the test set out in

Coxall

was met. If the funds in the first bank account were to any extent the property of the deceased then there could be no dispute that that property came into the possession of the First Defender and later into possession of the Second Defender. Counsel for the Second Defender made the point that the Second Defender did not accept this and referred to answer 4 for the Second Defender. He relied upon

Smith v Smith

as authority for the statement that the person to whom the assets belonged had a right to recover them. The

Coxall

test was whether or not the possessor had had any intromissions which might affect the extent of the fund and the Second Defender had made clear that she had had such intromissions and that with both funds. He referred to article 4 of condescendence (page 8 of the record), he submitted that the test set out in

Coxall

was clearly met by the Pursuers' pleadings. Ownership of the fund or of part of it led to a right of recovery and to a right to have an account of intromissions which may or may not have been for the benefit of the deceased. That right passed to the Pursuers as executors of the deceased.

The funds from the first account had been uplifted on 14 October 2002 and from the second in the period from 17 October 2002 to a date in January 2003. So far as the practicality of the Second Defender accounting for her intromissions was concerned and her reliance upon delivery of various items to the deceased's solicitors, having regard to the periods during which the funds were removed it was difficult to see from the terms of the receipt how they might touch upon the issue of any accounting. However, if they were necessary to any extent, it was a simple matter for the Defenders to call for them and it had no relevance to present issues.

As to the issue of where the funds removed from the first bank account ended up this could be a matter of proof if there was truly to be any suggestion that the slight confusion in names had any bearing upon the true merits of the case. It was within the knowledge of the Pursuers through their agents that Mrs Fryer's husband's first name was "Tommy" and that the bank account in question to which the transfer had been made was a joint account.

In relation to the second bank account, looking at the Second Defender's answers, there appeared to be an explicit acceptance that the funds came into the possession of the Second Defender. The Second Defender's stance that she was acting as attorney for the First Defender and thus in a representative capacity afforded her no protection. As between the two Defenders Mrs Fryer, the Second Defender, should suffer any loss or damage by reason of her acting as attorney then she may have a right of relief against her author, the First Defender but it was no answer to a civil wrong committed by the Second Defender to say that "I was doing it for someone else". If, in exercise of a power of attorney, the attorney interferes with the rights of a third party, in this case the Pursuers, then it cannot be the case that the attorney could escape liability merely by pleading that she acted as attorney. No authority for that proposition was advanced by the Second Defender. An attorney could not embark upon a course of defalcation and say that he or she was acting as an attorney as an answer to any claim.

The Second Defender also sought to suggest that in her capacity as an attorney for the First Defender her obligation to account was solely to the First Defender. Where an agent, such as an attorney, is expressly appointed - as was the case here - that agent may still be liable to third parties if he or she acts in excess of his or her authority, both in delict or in contract. If the Second Defender had exceeded her authority under the power of attorney, if, for example, her intromissions had not been for the benefit of the First Defender; or not for the benefit of the deceased, then the Second Defender was liable in damages not just to the First Defender in contract but in delict to the deceased or his representatives for intromitting with funds of the deceased to whatever extent the funds in those accounts belonged to the deceased. So if, as the Second Defender contended, the power of attorney was capable of giving her a protection against an action for an accounting it flies off in the event that she exceeds her authority. However, the Pursuers could not know if the Second Defender had exceeded her authority without first of all having an accounting in respect of her intromissions. The Pursuers' primary position was that whether or not the Second Defender had exceeded her authority as attorney for the First Defender was not the issue. The power of attorney merely regulated the relationship between the two Defenders. The fact that the Second Defender intromitted with funds belonging to the

deceased Mr Watson rendered her liable to account to the owner of those funds and his representatives now were the Pursuers as his executors.

He invited me to approach the case of

in *Re Bishop*

with some caution. The authorities were all English and the approach taken in England was very different from the authorities summaries by

Clive

at para 4.265 onwards rather than a presumption against donation the reverse appeared to be the case in England. Two questions required to be answered. Who provided the funds in the bank accounts and was there any evidence of donation. Neither of these questions appeared to feature as part of the discussion in the case of

in *Re Bishop*

. He suggested that the English authority took a different approach from the Scottish authority. It may be common that each case turns on its own facts and circumstances but that would require proof. It would appear from the terms of the report that

in *Re Bishop*

was after trial. He accepted that

Clive

referred to

Bishop

in a footnote but it was only for the proposition that in the case of such a joint account parties who created it would not have in contemplation that it would be later picked apart to discover the precise share belonging to each. Ownership of funds in a joint account is, according to

Clive

and

Bishop

, a question of fact. The Pursuers offered to prove that the deceased provided the majority of the funds in each joint account. There was no need for the Pursuers to aver any evidence about this and the proposal by Counsel for the Second Defender that the Pursuers require to state a factual matrix about the history and operation of these bank accounts was not necessary. There was a presumption against donation and so the onus was on the Defenders to make appropriate averments in that respect.

As to the Second Defender's answer that there was insufficient averment that the Pursuers had the same rights as the deceased and that any withdrawals might have had the deceased's approval missed the point. Even if withdrawals were made with the knowledge of the deceased the issue was how it was spent, that is to say, what did the First Defender do with the funds withdrawn.

The passage in

Coxall

upon which the Second Defender relied - a passage quoted at para 21.02 in

Macphail's Sheriff Court Practice

(2

nd

edition) - was a statement of the modern law of Scotland where actings of the Defenders affect the amount of money that was the subject of a claim for recovery then an action for accounting was appropriate. The suggestion by Counsel for the Second Defender that the fact that it was cash made it different and that the pursuer should merely seek payment was inappropriate. It may be that in an accounting everything the Second Defender had done was within her warrant as attorney and so far as the deceased was concerned was in accordance with the purposes of the joint account. That could not be determined without an accounting.

As to the Second Defender's complaint that there were no averments by the Pursuers as to the balances in the accounts after and before withdrawal this was within the direct knowledge of both Defenders. In any event that once again missed the point. The pursuer sought an accounting for intromissions with funds withdrawn from the two accounts. The balance was irrelevant to that right.

First Defender's Reply

In a brief reply Counsel for the First Defender reminded me that there was no averment that the First Defender's withdrawal was in some way illegal. The pursuer contended that the obligation to account arose from the averments of ownership of the funds in the account at the time of the withdrawal. Counsel maintained that this was simply incorrect. The First Defender had a mandate entitling her to withdraw funds from the account so unless it was averred that withdrawals were outwith the approval of the deceased then the pursuer was not entitled to an accounting. Any suggestion that the pursuer's right to demand an accounting arose from the certificate of confirmation was ill-conceived in that the author of the entry for the certificate of confirmation were the executors themselves.

At this stage Counsel for the First Defender remarked that there was no plea against the First Defender for payment.

Reply for Second Defender

In his reply Counsel for the Second Defender invited me to sustain the Second Defender's first plea-in-law to the effect of excluding from probation articles 3 - 5 inclusive. He invited me to repel the Pursuers' pleas-in-law numbers 1 - 4 inclusive and number 7 so far as directed against the Second Defender. Counsel submitted that the real issue was whether the Pursuers had articulated a proper legal basis for payment. If there was no good case for payment then it was unnecessary to consider issues regarding the accounting which were separate from the issue of recovery by the Pursuers. He submitted that the Pursuers' pleas-in-law articulated no legal basis for their claim and submitted that this was important having regard to the terms of

Coxall v Stewart

. He drew my attention to the observations of the Lord Ordinary at page 276 (right-hand column). The Pursuers had argued that there was no issue in whether the money was withdrawn with approval of the deceased or not but rather how the money was spent. Counsel's submission was that that was simply wrong. The true issue was whether the withdrawal was made in circumstances which gave the true owner a right of recovery. He submitted that the record was silent on any matters which might construct a basis for recovery. The claim for payment made in terms of craves 1 and 2 without any averments setting up a right to recover made the craves fundamentally irrelevant. The Pursuers appeared to think that all they required to prove was that a certain percentage of the funds were derived from the deceased. Counsel suggested that the proposition by the Pursuers that all they required to prove was that a certain percentage of the funds was legally inept. In what circumstances might such a claim arise? It could not be a claim for damages since there was no appropriate plea-in-law. It was not a claim based on breach of contract between the Second Defender and the Pursuers or the deceased. Accordingly, Counsel observed, the sole basis left was

quasi

contract. The only possible remedy in

quasi

contract for recovery of funds was restitution. Under reference to

Bell's Principles

at para 526 he submitted that there was no proper basis for an action for restitution. There was no suggestion that payment had been made in error and accordingly, again under reference to

Bell

, the basis remaining was payment "without his consent". The Pursuers did not aver that and indeed submitted that it did not matter whether or not the deceased consented. Counsel submitted that I should follow the line adopted by Professor Bell.

Accordingly for a relevant case the Pursuers had to show that the withdrawals were made without consent of the deceased and that was the case even if the Pursuers could show that the bulk of the funds in the account belonged to the deceased - which was not conceded. The Defenders aver that the money was withdrawn in terms of the bank mandate entitling the First Defender to withdraw funds. The withdrawals were made whilst the deceased was still alive and the accounts still open. If the Defenders proved that a mandate existed in terms permitting withdrawal at will by the First Defender then it would follow that such withdrawals as were made in terms of these arrangements to which the deceased had at least consented. There was no averment that the deceased sought to close the account or terminate the mandate. That being so, the Pursuers' point about the presumption against donation applying loses any force it might otherwise have had because, on that hypothesis, there were arrangements in place allowing the First Defender to operate in the account without restriction. According to

Clive

at para 14.29 the presumption against donation was not strong in a question between husband and wife. Even if the late Mr Watson was at the time living in a nursing home cohabitation was a wide enough term still to be applied to the relationship between the late Mr Watson and the First Defender. Furthermore the presumption against donation did not directly affect the Second Defender. A third party who comes into possession of funds in an agency relationship would need notice of any defect in the principal's title and it would need to be shown that she had such knowledge as would instruct bad faith on her part as an agent or at least conduct amounting to gross negligence as regards ownership of the funds. There was nothing on record to instruct any such case. In this connection Counsel referred to

Extruded Welding Wire (Sales) Ltd v McLachlan & Brown

and particularly drew my attention to the passage at page 316E and F. Accordingly, to found a claim on restitution, the Pursuers would have to go beyond merely averring that the money belonged to the deceased. There were, in any event, no averments by the Pursuers as to the purposes of the accounts.

The Pursuers sought to rely on

Smith v Smith

to bolster their argument in relation to the presumption against donation as between the deceased and the First Defender. It was however clear that this case turned on the issue of the

praepositura

. The case went back to 1933 and was of no relevance today since the

praepositura

was abolished by section 7 of the Law Reform (Husband & Wife) (Scotland) Act 1984. The Pursuers seemed to say that an accounting was required to determine whether or not some money was spent deliberately or otherwise. This was not what the record said. Looking at the craves for an accounting there was no attempt in the pleadings to explain what the Pursuers meant by the phrase "the true balance". On the basis of the record the case could not be about how the money was spent. The Pursuers' mission in support of his crave seemed to be for an investigation rather than a remedy.

Proposed amendment by Pursuers

At the close of submissions Mr Deutsch for the Pursuers sought leave to amend pleas-in-law 2 and 3 by deleting the reference to the "second named Defender" and substituting "the Defenders". Both Defenders opposed the proposed alteration. Counsel for the Second Defender submitted that it did not cure the irrelevancy of the action and rather pointed it up. There was no averment that the First Defender was in possession of any funds and if she was not a possessor on what basis did the Pursuers say they were entitled to restitution from her. She referred to

Walker

on

Contract

at para 35.2 and suggested that if this line was to be pursued it would require a full-scale minute of amendment because there were a number of factual and legal issues to be addressed.

For the Pursuers Mr Deutsch submitted that he was merely correcting an error in the record which must have been apparent to the Defenders from the outset. Indeed he suggested it was startling it had not been referred to in the notes of argument were it otherwise. Restitution was not the only ground on which the Pursuers might seek to recover and there was a colourable case for payment once an accounting had been given.

All parties were agreed that expenses should follow success. Both Defenders sought certification of the cause as suitable for the employment of Junior Counsel which was opposed by the solicitor for the Pursuers who suggested that the matter could have been dealt with by any competent solicitor. The Defenders were in receipt of legal aid whereas the Pursuers were not. He submitted that if there were any complications in the case, they had been introduced by the Defenders.

Decision

All parties agreed that the mere fact that both bank accounts were joint names accounts, from which either was entitled to withdraw, irrespective of the source of the funds, was not conclusively determinative of ownership of the funds at credit of the accounts at any one time. The Pursuers relied upon what was said in

Clive, Husband & Wife

(at page 223

et seq

and paras 14.018

et seq

)

and the authorities there cited along with section 24 of the Family Law (Scotland) Act 1985.

Both Defenders make averments as to the nature of the authority which enabled either Mr. or Mrs. Watson to withdraw funds from the two bank accounts. In Answer 3 the First Defender says,

"The said account which the First Named Defender maintained in said bank with the deceased was a joint account. It was matrimonial property. The said account was a joint account. As such either party was entitled to withdraw funds therefrom.";

and the Second named Defender in her Answer 3 says of the same account,

" The said account was a joint account in the names of the First named Defender and the deceased. As such either party was entitled to withdraw the funds thereon. In terms of the Power of Attorney hereinbefore condescended upon the Second Named Defender was entitled to make withdrawals from the said account".

The Pursuers do aver in Article 3 of Condescendence that "the deceased and First Named Defender held an account in their joint names" but otherwise deny the averments in answer of both Defenders "except in so far as coinciding herewith".

Then in answer 4 for the First Named Defender she avers,

"The withdrawal" (of £30000) " by the First named Defender from funds in a joint account she maintained with the said deceased Thomas Ramage Watson , was in accordance of (

sic

) the terms of the current account which had been set up with Lloyds TSB Bank..... The account referred to by the Pursuers was a joint account maintained by the First named Defender and her husband. As such she was entitled to make such withdrawals from the said account as she wished."

The Second named Defender in her Answer 4, in respect of this same withdrawal, avers,

"The said sum" (£30000) "was drawn from the said joint account she" (the First Defender) "maintained with the said deceased, her husband. In terms of a mandate in relation to this account the First Named Defender was entitled to withdraw the money. In terms of the said mandate the money in the account was the joint matrimonial property of the First Named Defender and the deceased.";

and later,

"The account referred to by the Pursuers was a joint account maintained by the First Named Defender and the deceased. As such the First Named Defender was entitled to make such withdrawals from said account as she wished, as she was entitled to do personally, or the Second named defender was entitled to do so in terms of the Power of Attorney..."

Once again, in Article 4 of Condescendence the pursuers appear to deal with these averments under their blanket denial. Only the Second Defender specifically mentions a "mandate". The Pursuers do not refer to it at all.

No written mandate has been produced. It was never made clear to me why this could not be done. I would have thought the First Defender, whether by herself or by her Attorney, could have asked the bank for a copy or indeed the Executors might themselves have done so. I

mention this point about the mandate because, on the face of the Record, the First Defender seems to aver that simply because it's a joint name account she has a right to withdraw. That may, in fact, be the case but it does not automatically follow from a simple averment that it's a joint names account. Again, on the face of the Record, the Pursuers, whilst acknowledging the existence of the joint names accounts, appear to deny, in so far as the Defenders' answers are inconsistent with the Pursuers' averments, the right on the part of the First Defender to make withdrawals. This is particularly true of Article 3 of Condescendence and the Answers thereto. Where there is reference to a mandate, as occurs in the answers for the Second Defender, once again, on the face of the Record, because of the use of the "catchall" denial in the Pursuers' averments, that appears to be denied. Indeed, on a strict reading of the Record, it appears to me, that the Pursuers deny the averments by the Defenders that they, the one as a joint account holder, the other as her attorney, had a right to withdraw from the accounts.

On the other hand, in the course of the debate, nobody appeared to me to challenge the existence of a mandate. Indeed, it would be surprising for there not to be such a mandate at the very least in the bank's standard form for joint accounts. The bank would be unlikely to allow such operations on a joint names account without an appropriate written mandate signed by both parties even in the simplest terms allowing either to withdraw. As I understood the submissions for all parties, it was accepted that such a mandate existed - its precise terms may not be known - but that, at the very least, it allowed either party to withdraw funds from the accounts. In particular, the Pursuers' solicitor did not appear to me to challenge, at any point, the right of the Defenders, or either of them, to make the withdrawals. Rather, the issue from the Pursuers' point

of view, was what had been done with the money. That being so, in my view, whether in written form or by way of a verbal instruction - the latter being an unlikely event for a Bank - both the First Defender and the late Mr. Watson were joint mandants, the bank being the mandatary. That is equivalent to saying that they were joint principals, the bank being their agent. Mandate is described in the institutional writers as a gratuitous form of the contract of agency though that seems an unlikely description of such a contract with a bank. Nonetheless the relationship between the late Mr. Watson and his wife on the one hand and Lloyds TSB on the other is clearly one of joint principals and agent. Indeed, even if I am wrong about the Pursuers' position in relation to the right of the First Defender and her attorney to make withdrawals, and they truly intended to deny that right, the Watsons would still be joint account holders and, in their relationship with the bank, would still be joint principals, the bank still being their agent.

In his text,

Civil Remedies

, at Chapter 17, Professor Walker describes the remedy of Count, reckoning and payment. He says, at page 304,

"The claim is accordingly appropriate against persons who have been legitimately intromitting with funds which ---should have been transferred to the pursuer. Thus it lies against executors, trustees, a trustee in bankruptcy....and against another partner and anyone acting in the capacity of an agent";

In relation to this statement, in so far as partners are concerned, he refers to

Smith v Barclay

1961 SC 1

as his authority. He goes on, at page 305, to say that,

"Title to sue is restricted to those persons who have a financial interest in the accuracy and honesty of the intromissions by the defenders.....(to) persons who are otherwise creditors of the fund in question." ;

and, in relation to the liability to account, he says, at the same page,

"A liability to account is owed by every person who pays and receives or otherwise intromits with money truly belonging in whole or in part to another, by such persons as agents of every kind, mandataries, partners.....and the like."

He quotes from

Hutcheson & Co's Administrator

(to which reference was made in the debate),

"A relevant action of accounting only emerges where it is alleged that the defender has, either by himself or by his agents, intromitted with estate to which the pursuer has right or in which he is interested." (

per Lord Morison)

.

The principal attack upon the Pursuers' case, as I understood the submissions of both Defenders, was that it did not fall within the type of case envisaged in

Coxall v Stewart

. This attack appears to be made as one based on relevancy whereas

Coxall

suggests the true plea in such a situation is one of competency. Be that as it may, since competency can be noticed by the Court without a specific plea in that regard, I have considered the submissions in that light. It is also true to say that the Defenders' attack was expressed in the form that there were no averments by the Pursuers relevant to the establishment of a relationship of the kind contemplated in

Coxall

. In particular, it was submitted that there was no relationship between the parties of a type that might give rise to a duty to account. The Pursuers accepted that

Coxall

- a case subsequent to the edition of

Civil Remedies

- was the most authoritative statement of the law in Scotland as to the circumstances in which an action of count, reckoning and payment was appropriate. The particular passage relied upon is at page 276,

"Where assets belonging to one person come into the possession of another and where the person to whom the assets belong has, broadly speaking, a right to recover those assets or their value from the possessor, but where the nature of the property, or the rights and obligations of the possessor, or both are such that the intromissions of the possessor may affect the precise extent or value of the owner's claim against him, at least in some cases our law provides the remedy of an action of count, reckoning and payment."

The most obvious example of a situation where such a liability can arise is between agent and principal as indeed was the situation with which

Coxall

was concerned, the specialities being that the "principal" firm had been dissolved and the "agent's" possession was "without authority". That was sufficient to repel the challenge to the particular remedy. In this case that relationship was between the Watsons and the bank.

What of the relationship between the Watsons ? As I have said they were joint mandants or more generally joint principals. Perhaps apt examples of joint principals are partners or parties in a joint venture. An example of partners being under a duty to account to each other is to be found in

Smith v Barclay

, which is the authority referred to by Professor Walker in

Civil Remedies

at page 304 (footnote 6). In the relationship of partnership or in a joint venture partners or joint venturers would have a duty to "account" to each other. How such an "accounting" would be made would depend upon the terms of the relationship. In the case of a general partnership it might be determined by the Partnership Act 1890 or by the terms of a written partnership agreement. Likewise the basis for an accounting among joint venturers might be found in the agreement constituting the relationship. Such an agreement would not require to be in writing, and might not be, particularly if it was in short compass or simple terms. In my view the same is true of the status in law of the Watsons when they each entered into the joint mandate or even just into the joint names account relationship with the bank. Accordingly, in so far as

Coxall

requires a legal relationship as a basis for a duty to account, the fact that the Watsons were joint mandants or joint account holders is sufficient to constitute such a relationship. Accordingly, in my view, the remedy sought by the Pursuers is competent and there are sufficient relevant averments to that effect.

Otherwise the situation in which the Pursuers find themselves seems to me to fit wholly within the description by the Lord Ordinary (Maxwell) in

Coxall

of the circumstances where this remedy can be used. The Pursuers' case is that "assets" - in the form of money - "belonging to one person" - the late Mr. Watson - came "into the possession of another" - the Defenders. The money belonged to the late Mr. Watson and thereby he, or his Executors as is the case here, have "a right to recover" it or its value. Furthermore, they recognise that "the rights and obligations of the possessor" may be such that "intrusions of the possessor may affect the precise extent .. of the owner's claim." And for that reason seek an accounting in the form of count, reckoning and payment. I have to say, it seems to me the Pursuers' averments

fit neatly into that scenario.

What title do the Pursuers have to call for an accounting from the Defenders ? The Pursuers are the Executors of the late Mr. Watson. In my view, as a matter of law, they step into his shoes and have the same right as he would have had, had he been alive, to call for an accounting from his wife. His right so to do did not appear to me to be challenged by the Defenders in their submissions.

Upon what basis is the First Defender to account ? What are the terms of the "agreement" between the late Mr. Watson and his wife ? Much was made in submissions for the Defenders of what Mr. Gallagher quite neatly called, "the factual matrix" of the account. By that phrase I understood him to mean what Counsel for the First Defender described as, "a pattern of withdrawals" or "the use of the account or the use to which funds from the account had been put"; and "that the determination of the extent of the interest of each party in the funds would depend upon the history of the account, the manner of its operation, the uses to which account funds had been put and the intention of the parties putting funds into the account."

In advancing this proposition Counsel for the First Defender referred to the English case, *In re Bishop*.

Now, I share the view of the solicitor for the Pursuers that English authority on this point needs to be approached with care but there is a useful summary there of what is required for a "factual matrix". At page 456C,

"Where a husband and wife open a joint account at a bank on terms that cheques may be drawn on the account by either of them, then, in my judgement, in the absence of facts and circumstances which indicate that the account was intended, or was kept, for some specific or limited purpose, each spouse can draw upon it not only for the benefit of both spouses but for his or her own benefit."

Again at page 458 G to 459 D, but particularly at 459D,

"On the other hand, the circumstances in relation to the joint account have to be regarded in order to ascertain the reason for its existence and to see whether it existed for some specific or limited purpose."

It is clear in

Forrest-Hamilton's Trustees

that evidence as to the circumstances of the setting up of joint accounts would have been relevant to determining the ownership of funds at the credit of the accounts. Likewise in

Smith v Smith

there is reference to "special contract or understanding" (at page 705) being relevant to such a determination but there the decision was affected by the former rule concerning a wife's praepositura.

Nonetheless, it still makes clear that the circumstances surrounding the use of the account by parties are relevant to the determination of ownership of funds.

In addition the issue of donation may arise. A number of cases address this particular point and the principles relevant to determining the ownership of funds on deposit receipt - whether joint with the depositor or solely in the name of the other party - appear to be equally relevant to joint accounts. (

Clive, Husband & Wife at pages 237 and 238, paras 14.065 to 14.069

) Example are

Graham's Trustees v Gillies and another 1956 SC 437

and

Boucher's Trustees v Boucher's Trustees and others (1907) 15 SLT 157

which appear on the Pursuer's list of authorities but were not referred to in the debate.

In so far as the funds were the property of the late Mr. Watson when he placed them in the accounts, the First Defender's intromissions with them - or those of her Attorney on her behalf - would require to be within the contemplated purposes of the parties, that is Mr. and Mrs. Watson, in relation to the joint accounts from which either might withdraw. Such purposes might be constituted by a written document - such as the mandate - or from the factual history of the operation of the account. It may be that whatever Mrs. Watson, or her Attorney on her behalf, did with the funds falls wholly within the contemplated purposes. These purposes will require to be established by evidence. In such a case, whilst there may require to be an accounting as a precursor to any demand for payment, no sums may actually be due to the estate if the Defenders, and in particular, the First Defender, demonstrate that their use of the funds - that is, how they were spent - was entirely consistent with the purposes of the joint accounts.

Upon whom lies the onus to set up the purposes of the joint accounts ? Both Defenders maintained it was for the Pursuers to aver the history of the account for the purposes of any accounting. I do not accept that proposition. It seems to me the onus is plainly on the First Defender. That was stated in relation to the issue of donation in

Forrest-Hamilton's Trustees

at page 340. I can see no basis for saying otherwise in relation to any claim by the First Defender - or by her Attorney or her behalf - that any expenditure, that is, how the funds withdrawn were used, fell within the contemplated purposes. The expenditure is peculiarly within the knowledge of the First Defender and, in so far as she withdrew funds and used them in accordance with her Power of Attorney or otherwise, peculiarly within the knowledge of the Second Defender. The Pursuers as Executors cannot be presumed to have such knowledge nor indeed, if Mr. Watson himself was seeking an accounting, would he have known whether expenditure fell within the contemplated purposes unless he knew what the expenditure was. Accordingly, in my view, it is for the First Defender to make the necessary averments about the contemplated purposes of these joint accounts. I do not think it is for the Second Defender to do this in her capacity as Attorney. However, in so far as she intromitted with funds, the ownership of which requires to be determined in accordance with whatever purposes may be established, she will require to aver how she used, i.e., spent, the money she withdrew. That is essential to the determination of its ownership and is a separate issue in a question with the Pursuers from the exercise of her powers as Attorney for the First Defender.

So far as the Second Defender is concerned, in my view, she also has a liability to account to the Pursuers for her own intromissions with the funds of the joint accounts even if it is the case that such intromissions were in accordance with the terms of the Power of Attorney - or at least apparently so. That is something which requires to be established against the "factual matrix" of the accounts and the nature of the actual expenditure. It may be that the expenditure of the Second Defender, as Attorney for the First Defender, does not fall within the contemplated purposes of the joint accounts. In that event, it seems to me, the Power of Attorney would not allow the Second Defender to escape liability in a question with the Pursuers. It may be she would have a claim for relief against the First Defender as her principal for a failure to advise the Second Defender of any restrictions which might arise by reason of the contemplated purposes of the account. Even if the Second Defender was acting in good faith in so far as relying upon her Power of attorney this would not in my view make any difference to her liability to account to the Pursuers. The basis for the action set out in

Coxall

makes no reference to whether funds came into the possession of another legitimately or otherwise.

Do the Pursuers need to aver the basis for the duty to account which is essential to their action as framed ? Both Defenders call upon the Pursuers to do this. In my view it is not necessary so to do for purposes of relevancy. The Pursuers do require to aver facts from which, if proved, a duty to account may be inferred. It seems to me the existence of a duty to account is a matter of law and as such does not require averment but must be supported by an appropriate plea-in-law. In my view the first and third pleas-in-law for the Pursuers are adequate for this purpose.

A related question is whether the Pursuers need to crave a declarator of a duty to account as suggested by Counsel for the First Defender under reference to

Forrest-Hamilton's Trustees

. In my view they do not. Declarator may be necessary to establish a right which is uncertain as to existence or extent. Thus if the existence of a partnership or joint venture was in issue it might be necessary to have a declaratory crave as a preliminary to the a claim for accounting. However, such a crave is unnecessary otherwise and examples of actions for accounting in cases of partnerships and joint ventures are to be found in such as

Dobie's Sheriff Court Styles

. None propose a declarator as a preliminary in such actions. In my view, the position in this case is the same. The case proceeds on the basis of joint accounts from which either party was entitled to withdraw in terms of a joint instruction - whether written or verbal - thus creating the relationship between the parties from which the duty to account arises.

I have recorded in paragraph 14 of this judgement my understanding of the response of Counsel for the First Defender to my question about the right of Mr. Watson, were he alive, to demand an accounting from his wife. Standing her answer I find it difficult to see the basis upon which the First Defender resists the demand for an accounting from the Executors who must stand in his place in relation to his estate. Counsel herself said the right would depend upon the terms upon which the account was held. That seems to me to be an admission that ownership of funds in the account would be determined by its established purposes, whatever they may be. Counsel, however, sought to suggest the onus fell upon the Pursuers to establish those purposes. I have already indicated I disagree with that and I find Counsel's stance difficult to follow in light of the observations about onus in

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, the case upon which she founded her submission.

Counsel for the First Defender also attacked the Pursuers' pleadings for lack of specification. Objection was taken to this for lack of notice in the Rule 22 Note. What is there stated is a bald repetition of the plea-in-law. There is no specific notice of the particular want of specification. The point made by Counsel under this head was very simple, namely, the Pursuers should specify further details of the amount of money in the joint accounts at the relevant dates because , lacking that information, it might be the case that even withdrawing £30000 might be less than 6.67%, i.e., the portion which might have been contributed by the First Defender. As to the Pursuers' objection, in the light of the relatively brief pleadings for the Pursuers and relatively simple point made, I will not exclude it. It might be different if there were substantial pleadings and alleged wants of specification which the Pursuers might have been able to remedy prior to debate. In any event, in this case, I do not think Counsel's point well taken. These accounts are, as has been averred by both Defenders, joint names accounts and the First Defender, on the face of

it, might be presumed to know more about the accounts than the Pursuers since she is one of the joint holders. At any rate, I do not think the First Defender can complain of lack of notice of funds at credit of her own joint name account at any particular time. A like point was made by Counsel for the Second Defender and my view is unchanged.

In his submissions for the Second Defender, Counsel suggested that the confusion created by the incorporation of the bank transfer slip - on which a different name appeared - into the Pursuers' pleadings in Article 4 of Condescendence was sufficient to create an irrelevancy. I do not share that view. The Pursuers have offered to prove that the funds in question, £30000, were paid into a bank account in the name of the Second Defender. In so far as any confusion arose from the inconsistency in names the Pursuer's solicitor made clear it was capable of simple explanation in evidence. The fact that the money has left the joint account in question prior to its credit to the Second Defender's account does not, in my view, prevent the Pursuers from seeking to trace it and ensure that its use is consistent with the purposes of the joint account. To the extent alone that the money is in the Second Defender's account is sufficient, in my view, for the Pursuers to aver she has intromitted with the funds.

As to the Second Defender's answer that she has complied with any duty to account by delivery of books etc. to the late Mr. Watson's solicitors, the answer is to be found in

Smith v Barclay

at page 9, per the Lord Justice Clerk (Thomson),

"...it is not the presence or absence of the books that is the vital thing but the presentation of an account of intromissions, and there may be ways and means of producing an account of the intromissions apart from the papers which have gone amissing."

Obviously if the Defenders require any of the papers etc. delivered to the solicitors for the late Mr. Watson it will be for the Executors to secure they are made available. They would otherwise be acting to frustrate their own claim.

As with the First Defender, Counsel for the Second Defender relied upon

in Re Bishop

to support his proposition that it was for the Pursuers to aver the circumstances from which the purposes of the accounts might be inferred. I reject that approach as earlier stated. It is for the Defenders, including the Second Defender, to account for what they used this money so that it can be determined, in an accounting, whether any of it still belongs to the estate of the late Mr. Watson. It is for the First Defender to aver the circumstances from which any purposes may be inferred but that does not mean the Second Defender does not have to account to the Pursuers separately from any duty to account to the First Defender in terms of the power of attorney.

It does not matter, in my view, whether the withdrawals were made with or without the knowledge and/or approval of the late Mr. Watson. What matters is how the funds were used. It may, of course, be relevant for the Defenders, either of them, to aver that any particular expenditure was made with the "approval" of the late Mr. Watson, since that would be a relevant factor in ascertaining the purpose or purposes of the accounts.

In so far as any right to recover is concerned that arises from the simple fact of ownership of the funds. The extent of the right to recover can only be assessed when the Defenders account for their intromissions. It makes no difference that the "asset" in question is cash. The total sums involved may or may not be due to the estate of the late Mr. Watson. That can only be determined once the Defenders have accounted for their intromissions. Nor, as I have said earlier, do I think the Pursuers need to aver that they have a right to recover". That is implicit in their averment of ownership of the funds in the account to the extent averred.

Nor do I think Counsel right to suggest that the Second Defender escapes any liability to account simply because she was acting as attorney for the First Defender. In this I share the views expressed by the solicitor for the Pursuers. It may be that the Second Defender has a right of relief against the First Defender but that does not elide her responsibility to account for her intromissions with the funds of a third party. Only when she does so will the Pursuers be able to determine whether they need to challenge the intromissions as not conform to the purposes, whatever they may be established to be, of the accounts and so seek decree for recovery.

I do not accept the analysis adopted by Counsel for the Second Defender in his reply. The issue is truly how the money was spent. How it was spent will require to be tested against the purposes of the accounts to determine to what extent, if at all, it is recoverable by the Pursuers. A very simple point demonstrates this in my view. It appears that some £30000 was withdrawn and kept in cash in a writing bureau. It might be difficult to demonstrate that was in accordance with the purposes of the accounts. Its withdrawal does not affect the ownership of those funds, only how it was spent, if it was spent. If it was not spent but "disappeared" then there may well be no proper basis upon which either Defender can escape liability to repay that money. It seems to me a nonsense to suggest that If I withdraw money from an account, that money being substantially the property of the other joint account holder, I escape liability to repay it simply because it has "disappeared". Restitution does not enter into this analysis. Equally I am not persuaded that a mandate in the simplest terms, one simply authorising a bank to permit withdrawals from the accounts by one or other party without the specific authority of the other, has any effect on the ownership of the funds in the account. The mandate might simply be an administrative convenience. As I have already made clear, in my view, the proposition that it is for the Pursuers to make averments about the purposes of the accounts or to elide donation is misconceived and none of the cases relied upon support that position.

In the end of the day I prefer the submissions of the Pursuers for the reasons stated. I accept the proposition that ownership of the funds gives rise to a right to demand an accounting where the nature of the expenditure is such that the exact amount, if any, due to the Pursuers may be affected by legitimate intromissions of the Defenders. This seems to me to fall squarely within the test set out in

Coxall

. I accept that the lack of specification point taken by both Defenders is not well founded in view of their relationship to the accounts in question, even if the Second Defender's relationship is effectively subsumed within that of the First Defender. I accept it is for the Defenders to make averments to set up the "factual matrix" for the operation of the accounts.

In all these circumstances I have repelled the preliminary pleas of the Defenders and appointed the cause to a procedure roll for the determination of further procedure. If I am right then the Defenders may feel it necessary to amend. If so, a proof may then be necessary to determine the purposes of the accounts as only then can any accounting be tested. However, these are matters which can be addressed at the next calling. I have appointed it to call in my next Ordinary Court which is some time ahead because of leave.

As to the Pursuers' motion at bar for amendment of the second plea-in-law, I have no hesitation in allowing that. It is, in my view, plainly a typographical mistake. The case to be answered by both Defenders is clear. Apart from that the point comes too late in the day. It's been there from the outset and could have been raised in the Rule 22 Note.

As to the motions for certification of for the employment of Junior Counsel, whilst, no doubt, a competent solicitor or solicitor advocate might well have been able to appear for the Defenders, I am not persuaded that the case was so simple as to justify the suggestion by Mr. Deutsch that it was the Defenders who introduced the complications. Accordingly, I have so certified the debate. In case it was intended that the motions for certification for the employment of counsel be for the cause to date, in my view, the pleadings, as they stand, would not justify that approach. I take a different view so far as the debate is concerned. The issues were quite complex.

Finally, as to expenses, parties agreed they should follow success. I have found the Defenders liable to the Pursuers in the expenses of the debate as taxed.

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Prepared on 28 October 2026 · Esheria