SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT FORFAR

[2020] SC FOR 08

FFR-A4/19

JUDGMENT OF SHERIFF SG COLLINS QC

in the cause

JOAN BRENCHLEY

Pursuer

against

DOUGLAS JAMES WHYTE

Defender

Act: Malcolm, Advocate; T Duncan & Co, Solicitors
Alt: Shewan, Advocate; Burness Paull, Solicitors

Forfar, 20 December 2019

The Sheriff, having resumed consideration of the cause, (i) refuses the defender's motion to dismiss the action pursuant to his first plea in law; (ii) appoints the cause to a proof before answer, all pleas standing, on a date to be afterwards fixed; (iii) certifies the debate as suitable for the employment of junior counsel; (iv) reserves questions of expenses arising from the debate on 11 October 2019 meantime.

NOTE

Introduction

[1] The pursuer and defender were formerly in a relationship. They had a son, born in January 1999. They then cohabited together at the defender's address in Laurencekirk from August 2000. In 2009 or 2010 their relationship broke down. The pursuer avers that the defender agreed (or alternatively promised) to purchase a house in Montrose for her and the

parties' son to occupy, to pay the mortgage secured over this house, to repay the mortgage in full as soon as practicable and, having done so, to then transfer title into her sole name. The defender accepts that he did purchase a house in 2010, that he permitted the pursuer and the parties' son to live there, and that he has thus far paid the mortgage. But he disputes that this was pursuant to a contract or promise in the terms claimed. The parties' son has now grown up, and the defender has raised proceedings to have the pursuer removed from the house. She accordingly seeks declarator and implement of the claimed contract or promise, together with alternative and ancillary remedies. The defender tabled a plea to the relevancy of the action, and I heard counsel in debate on this plea.

Submissions

[2] Ms Shewan submitted that the defender's primary position was that there was no contract between the parties at all. Nor was there any promise. Following the separation he had drafted a document proposing terms for agreement of various financial matters and contact with the parties' son, but the pursuer had not agreed to these terms, and neither party had signed the document. What the pursuer was now seeking to do was to establish and enforce a claimed contract or unilateral obligation for the transfer of a real right in land, namely the title to the Montrose house. A subscribed written document was required for the constitution of such a contract or obligation in terms of sections 1(2)(a)(i) and 2(1) of the Requirements of Writing (Scotland) Act 1995. The pursuer did not and could not aver that there existed such a document, the draft agreement having never been signed. There were other aspects to the claimed contract, but the claim as regards transfer was at the heart of it and what the present action was really about. Accordingly in the absence of formal writing to constitute the transfer the contract (or promise) was invalid and could not be founded on.

[3] *Esto* the contract or obligation was one to which section 1(2)(a)(i) of the 1995 Act applied, the pursuer's position was now that the defender was personally barred from withdrawing from the contract or promise or founding on the invalidity arising from a want of writing: sections 1(3) and 1(4). Ms Shewan submitted that there were four essential requirements to such a claim: (i) that the pursuer had acted or refrained from acting in reliance on the contract or promise, (ii) that this had been done with the knowledge and acquiescence of the defender, (iii) that as a result her position had been affected to a material extent, and (iv) that as a result of the defender withdrawing from the contract she would be adversely affected to a material extent. In order to be entitled to proof, the pursuer required to make relevant and specific averments on each and all of these four matters, but had not done so.

[4] As to the first requirement, the pursuer's pleadings disclosed that she did not at the time, having taken legal advice, regard the unsigned document as legally binding or enforceable. She herself described it in her pleadings as a "proposed agreement". Accordingly she could not sensibly be taken to have acted in reliance on it. A liberal approach to section 1(3) and 1(4) was not appropriate given the obvious importance of the legal acts concerned, and the defender only had herself to blame if having taken legal advice she did not constitute the claimed agreement by writing: reference was made to *The Advice Centre for Mortgages* v *McNicoll* 2006 SLT 591 per Lord Drummond Young, at paragraphs 16 and 33. The pursuer's actings, in living in a property while the defender paid the mortgage and their son's school fees, were not clearly referable to the claimed agreement. They were to her advantage in any event, and it could not follow that the pursuer acted as she did because she expected title to be transferred to her eventually. Had the pursuer been paying

the mortgage herself, for example, she could have argued that she had only done this in expectation of eventual transfer of title, but that was not what happened.

[5] As to the second requirement, Ms Shewan submitted that it was necessary for the pursuer to aver that the defender knew about the specific actings which she claimed to have made in reliance on the contract. It was not sufficient to offer to prove only that the defender knew generally that the pursuer was arranging her affairs in reliance on the contract. Reference was made to *Danish Dairy Co* v *Gillespie* 1922 SC 656 and to *George and Elizabeth Mitchell* v *Caversham Management Ltd.* [2009] CSOH 26 per Lord Bracadale at paragraphs 17 – 23. However although the pursuer averred that she was relying on the contract when she refused to pay rent to the defender in 2015, she did not seek to rely on this matter to establish her claim of personal bar. Her position was that the relevant actions were her refraining from looking for other accommodation, and giving up her right to bring proceedings as a former cohabitee under section 28 of the Family Law (Scotland) Act 2006. But it was not averred that the defender was aware of these two actings now founded upon.

[6] As to the third requirement, as just mentioned, the pursuer relied on averments that she took no steps to obtain local authority rented accommodation, and that she did not raise an action under section 28 of the 2006 Act within the time limit prescribed. As to the first of these, it was submitted this could not be said to have affected her to a material existent. She had had nine years of living rent free. On leaving the Montrose house she would be in a position to rent other property in the same way that she could have done had the defender not provided it for her. As to section 28, the pursuer had made no attempt to set out what basis she would have achieved an award for payment of a sum in excess of what she had already been paid by the defender. She made only the bald averment that financial provision "would have included payment of a capital sum" having regard to the economic

burden on the pursuer of caring for the parties' child. There were no averments regarding economic advantage or disadvantage, but in any event the parties' circumstances as pled disclosed that it was the pursuer who benefitted financially from the defender's contributions to the relationship. Moreover it was apparent that the defender had made substantial payments to support the parties' son, and in reality shouldered the majority of the economic burden of child care, including housing, school, transport and child maintenance. Overall, the position was that the pursuer had benefitted by receiving payments in supposed reliance on the contract, not by making them. The nature and extent of what was pled was insufficient to establish materiality for the purpose of this requirement. Reference was made to Reid & Blackie, *Personal Bar*, at paragraphs 7.28 – 7.30.

[7] As to the fourth and final requirement, the pursuer averred only that if the defender was entitled to withdraw from the contract or obligation she would be adversely affected because she would be rendered homeless. Accordingly she averred no more than that she would lose the anticipated benefit of the contract. That was not sufficient to establish that she would be adversely affected to a material extent by withdrawal from the contract by the defender. If it were, then this requirement would be established in almost every case where personal bar is relied upon under the 1995 Act. Reference was made to *Caterleisure Ltd* v *Glasgow International Prestwick Airport Ltd* 2005 SLT 1083 per Lord Emslie at paragraphs 9, 10 and 16. Accordingly this fourth requirement, as with the other three, could not properly be established on the pursuer's pleadings, and no case of statutory personal bar sufficient for proof had been advanced. The court should sustain the first plea in law for the defender and dismiss the action.

[8] In reply Ms Malcolm submitted that the contract or obligation founded on by the pursuer did not fall within the terms of section 1(2)(a)(i) of the 1995 Act. Accordingly it

could be constituted notwithstanding the absence of a subscribed written document. It was not a contract "for… transfer… of a real right in land", but was for other purposes, in relation to which the transfer of title to the Montrose house was but one aspect. Section 1(2)(a)(i) was about contracts such as missives and analogous agreements. Reference was made to *The Advice Centre for Mortgages* v *McNicoll* at paragraph 18. The pursuer's contract was wider than this, and the defender's own averments recognised this. Following the separation, the pursuer had financial claims against the defender in respect of herself and for maintenance of the parties' son, in particular under section 28 of the Family Law (Scotland) Act 2006. The agreement or promise on which she now founded was made to compromise and resolve these claims. It was not of itself intended to alter the rights of the parties in land.

[9] Although there had been no court action raised by the pursuer under section 28 of the 2006 Act, the agreement founded on by her had been made with a view to avoiding such an action. It was therefore akin to a compromise agreement reached in order to settle a court action. Such an agreement did not require to be in writing even where it related to heritable property. Reference was made to *Love* v *Marshall* (1872) 10 M 795 per Lord Kinloch at 796; *Torbat* v *Torbat's Trustees* 1907 SLT 830 per Lord Salvesen at 832; *McFarlane* v *McFarlane* [2007] CSOH 75 per Lord Menzies at paragraphs 41 and 42; and to the unreported sheriff court decision of *DWS* v *RMS* [2016] SC GRE 47 at paragraphs 16 to 29, where the decision in *Cook* v *Grubb* 1963 SC 1 had rightly been distinguished and section 1(2)(a)(i) held to not apply to a compromise agreement relating to heritable property. There was no good reason to not apply the same approach to the agreement in the present case.

[10] In the event that the agreement fell within the terms of section 1(2)(a)(i) of the 1995 Act, Ms Malcolm submitted that it created a personal obligation and, as explained in

The Advice Centre for Mortgages v *McNeill* at paragraph 18, so brought into play sections 1(3) and 1(4). If there was no agreement, the pursuer averred that there was in any event a promise. It was accepted that this was a unilateral obligation which would also fall within 1(2)(a)(i), but was again a personal right to which sections 1(3) and 1(4) could have application. It was accepted that the same issues applied in relation to these sections whether there was an agreement or promise, that they were the four issues described by Ms Shewan, and that in order to be entitled to proof the pursuer had to plead a relevant and specific case in relation to all of them. It was submitted that she had done so.

[11] In relation to section 1(4)(b), Ms Malcolm accepted that the pursuer's pleadings were not extensive, but submitted that there was a sufficiency for proof if one read the pleadings as a whole and in relation to both 1(4)(a) and (b). Reference was again made to *Caterleisure Ltd* at paragraphs 9, 10 and 16, where this approach had been taken. The pursuer's case on record was that everything that she had done had been in reliance on the contract. It had involved her moving to an area selected by the defender, in order that he could have contact with their son. But for the agreement she would have taken steps to find alternative accommodation in her own right. She had acted on the basis that she would have the mortgage met on the Montrose house, and ultimately paid off, and that she would retain the property as something on which she could rely for her future financial provision. The pursuer did not pursue any claim for payment of a capital sum under section 28 of the 2006 Act and had lost the right to do so by March 2011. That had affected her position. She had given up the right to claim any capital sum from the defender, and did so on the basis of the agreement or promise which she founded on. The claimed loss of the right itself was sufficient for present purposes, being a material effect on the pursuer's position, and she did

not need to aver more in relation to the merits of any such claim had it been made. That would lead to a proof within a proof.

[12] In relation to the issue of knowledge and acquiescence under section 1(3), it was submitted that the defender would more than likely have been aware of the personal circumstances of the pursuer and her affairs. They had been living together and were still living together when this agreement was entered into. So this was a situation where, although actual knowledge might be difficult to establish, it could be presumed or imputed. Reference was made to Reid & Blackie at paragraph 7.17. Each case should be considered on its own circumstances. In the present case there had been a long, intimate relationship between the parties. The defender acknowledged in his pleadings that he was concerned to ensure that the pursuer had a place to live with their son and that he could exercise regular contact. Accordingly there was already a state of knowledge on the part of the defender as to what was intended, and that the pursuer would be relying on the proposal that he put forward.

[13] As to the question of acting or refraining from acting in reliance on the contract, Ms Malcolm submitted that the pursuer did aver that she was doing so, in particular, when the defender sought rent from her in 2015. Even standing that declaration that she was relying on the agreement, the defender took no steps to suggest that the agreement did not apply until 2018. The pursuer also averred that the defender had himself relied on the agreement in August 2011 in respect of the arrangement for contact with the parties' son, and that she therefore had no reason to believe that all or part of the agreement would not be implemented. In these circumstances the pursuer had sufficient on record in relation to all four elements of sections 1(3) and 1(4) to entitle her to proof. Ms Malcolm referred to *Heather Capital Ltd (In Liquidation)* v *Levy & McRae* 2017 SLT 376 and in particular to

Lord Glennie's general observations (at paragraph 100) on the purpose and content of pleading and the need to avoid making what were effectively value judgments or assessments of the reasonableness of a party's conduct on the basis of pleadings alone. Given the personal relationship between the parties their state of knowledge could only truly be established by evidence.

[14] Responding to Ms Malcolm's submissions, Ms Shewan submitted that section 1(2)(a)(i) referred to a contract "for" the transfer of a real right in land, but did not require that it be "exclusively for" this purpose. It would be a contract for the transfer for a real right in land even where other matters were also dealt with. The classic example would be missives for sale of heritable property, which might well also deal with what movables would be included in the sale. So there was no necessity for the contract to be dealing only with the transfer of the real right in land. Section 1(2)(a)(i) contained a clear rule, and it clearly applied to the contract being relied on in the present case. Even if the question was the extent to which the contract related to transfer of a real right in land, the present action was in substance entirely about implement of a contractual obligation to which section 1(2)(a)(i) applied.

[15] Turning to Ms Malcolm's submissions on the compromise agreement, Ms Shewan submitted that all the cases referred to involved the compromise of ongoing litigation and could be distinguished on this basis. She was however unable to suggest any substantive, material difference from a situation where parties reached agreement in order to avoid litigation. But in any event it was submitted that the cases referred to did not support the pursuer's argument. *Cook* v *Grubb* was authoritative on the pre 1995 Act law, explaining and distinguishing *Love* v *Marshall*, disapproving *Torbat* v *Torbat's Trs.*, and making clear that if writing was required for a contract this was not avoided simply by virtue of being included

in an agreement to compromise litigation. Lord Menzies had proceeded in *McFarlane* v *McFarlane* on a concession wrongly made by counsel that formal writing was not required in relation to a compromise agreement relating to heritable property. Furthermore, no reference had been made to *Cook* v *Grubb*. In *DWS* v *RMS* the sheriff had been wrong to distinguish *Cook* v *Grubb* and to rely on *McFarlane* v *McFarlane*, and his decision that the compromise agreement did not require to be in writing by virtue of section 1(2)(a)(i) was incorrect. That a contract falling within this section is a personal right does not mean that it is not a contract for transfer of a real right in land. Reference was again made to *The Advice Centre for Mortgages* v *McNicoll* at paragraph 18, and to Anderson, *Compromise agreements and heritable property* 2016 SLT (News) 169.

Decision

[16] Section 1 of the Requirements of Writing (Scotland) Act 1995, insofar as material in the present case, provides as follows:

> "**1.— Writing required for certain contracts, obligations, trusts, conveyances and wills.**
>
> (1) Subject to subsection (2) below and any other enactment, writing shall not be required for the constitution of a contract, unilateral obligation or trust.
>
> (2) Subject to subsection (3) below, a written document which is a traditional document complying with section 2… shall be required for—
>
> (a) the constitution of—
> (i) a contract or unilateral obligation for the creation, transfer, variation or extinction of a real right in land;
>
> (ii) a gratuitous unilateral obligation except an obligation undertaken in the course of business; and
>
> (iii) a trust whereby a person declares himself to be sole trustee of his own property or any property which he may acquire;

(b) the creation, transfer, variation or extinction of a real right in land otherwise than by the operation of a court decree, enactment or rule of law; and

…

(3) Where a contract, obligation or trust mentioned in subsection (2)(a) above is not constituted in a document complying with section 2 … but one of the parties to the contract, a creditor in the obligation or a beneficiary under the trust ('the first person') has acted or refrained from acting in reliance on the contract, obligation or trust with the knowledge and acquiescence of the other party to the contract, the debtor in the obligation or the truster ('the second person')—

(a) the second person shall not be entitled to withdraw from the contract, obligation or trust; and

(b) the contract, obligation or trust shall not be regarded as invalid,

on the ground that it is not so constituted, if the condition set out in subsection (4) below is satisfied.

(4) The condition referred to in subsection (3) above is that the position of the first person—

(a) as a result of acting or refraining from acting as mentioned in that subsection has been affected to a material extent; and

(b) as a result of such a withdrawal as is mentioned in that subsection would be adversely affected to a material extent.

(5) In relation to the constitution of any contract, obligation or trust mentioned in subsection (2)(a) above, subsections (3) and (4) above replace the rules of law known as rei interventus and homologation.

…

(7) In this section *'real right in land'* means any real right in or over land, including any right to occupy or to use land or to restrict the occupation or use of land, but does not include—
(a) a tenancy;

(b) a right to occupy or use land; or

(c) a right to restrict the occupation or use of land,

if the tenancy or right is not granted for more than one year, unless the tenancy or right is for a recurring period or recurring periods and there is a gap of more than one year between the beginning of the first, and the end of the last, such period.

…

(8) For the purposes of subsection (7) above *'land'* does not include—

(a) growing crops; or

(b) a moveable building or other moveable structure."

The phrase "real right in land" was substituted for the phrase "interest in land" (as defined) by the Abolition of Feudal Tenure etc (Scotland) Act 2000.

[17] Section 2 provides as follows:

"**2.— Type of writing required for formal validity of certain traditional documents.**

(1) No traditional document required by section 1(2) of this Act shall be valid in respect of the formalities of execution unless it is subscribed by the granter of it or, if there is more than one granter, by each granter, but nothing apart from such subscription shall be required for the document to be valid as aforesaid.

(2) A contract mentioned in section 1(2)(a)(i) of this Act may be regarded as constituted or varied (as the case may be) if the offer is contained in one or more traditional documents and the acceptance is contained in another traditional document or other traditional documents, and such document is subscribed by the granter or granters thereof.

(3) Nothing in this section shall prevent a traditional document which has not been subscribed by the granter or granters of it from being used as evidence in relation to any right or obligation to which the document relates.

(4) This section is without prejudice to any other enactment which makes different provision in respect of the formalities of execution of a document to which this section applies."

[18] Although Ms Malcolm did not formulate the matter in this way, the principal submission for the pursuer was, in substance, that section 1(2)(a)(i) of the 1995 Act should be understood as only applying to those contracts whose sole or primary purpose is the creation etc of a real right in land. Accordingly if the parties' agreement when considered as a whole is primarily directed to some other purpose or made for some other reason, and an agreement to create etc. a real right in land is merely one aspect of it, then section 1(2)(a)(i)

will not apply. In such a case the contract will not be "for" the creation etc of a real right in land, but for some other purpose. On this approach the rule is therefore soft edged, requiring a judgment on the circumstances of each case, as a matter of fact and degree. In the present case, the submission for the pursuer was that the primary purpose of the agreement was the global settlement of all financial and other matters arising from the breakdown of the parties' relationship, and the transfer of title to the Montrose house was merely an aspect of this agreement. Accordingly the agreement was not one to which section 1(2)(a)(i) applied. The pursuer also avers that if there was no contract there was a promise, a unilateral obligation, but nothing turns on the distinction for present purposes.

[19] This approach is not without attraction, but I am satisfied that it is not what section 1(2)(a)(i) requires. Rather it is concerned with the legal categorisation of particular agreements by reference to their nature and effect, not the purposes or reasons for making them. Nor is it concerned with whether parties have at the same time made other agreements to which section 1(2)(a)(i) could never apply. In other words the rule is hard edged. The underlying intention is that contracts for the transaction of real rights in heritable property are by their nature simply too important, for individuals and society in general, to be constituted without writing. That is so whatever the reasons for, or context in which, the parties have agreed to such a transaction. While there might perhaps be a dispute about the precise legal classification of any particular agreement, once that is determined to be a contract for the creation etc of real right in land, writing is required in order to constitute it.

[20] And as Ms Shewan submitted, section 1(2)(a)(i) is not confined to contracts which are exclusively concerned with transfers etc of real rights in land. Had that been the intention, provision could have been made to this effect, but it was not. This is not surprising.

Missives for the sale and purchase of heritable property will fall within subsection 1(2)(a)(i) even if, as they typically do, they also include agreement as to movables or other ancillary matters, or are made in the context of financial provision on divorce or separation. It is therefore irrelevant that any agreement to transfer title to the Montrose house was made as part of a wider agreement to resolve financial and other issues arising out of the parties' relationship. The agreement to transfer title still fell within section 1(2)(a)(i), even if other matters on which they may have reached agreement at around the same time did not.

[21] But even if the pursuer's purposive approach to section 1(2)(a)(i) were sound in law, her submission would still fail on the facts. The pursuer's claim is that the defender agreed to give her title to property which in her alternative crave she values at £250,000. It is by far the largest financial element in the claimed contract. The agreement to transfer title was not merely an incidental element of the overall agreement, but was, on the pursuer's account, of central importance to it. And in reality, the transfer of title issue is what the present action is all about. Even if one were to consider the applicability of section 1(2)(a)(i) on the basis of the purpose of the wider agreement claimed, it would still be a contract a major part of which was for the transfer of the title to the Montrose house This is notwithstanding that there were other aspects to the claimed contract, and even accepting that the overall intention was to reach a settlement of the parties' affairs, financial and otherwise, arising out of their relationship. In other words, it would still be a contract properly to be described as being one "for the transfer of a real right in land".

[22] The second strand to the pursuer's submission in relation to section 1(2)(a)(i) was that the claimed agreement to transfer title to the Montrose house was made for the purpose of settlement of her claim for financial provision under section 28 of the 2006 Act. It was made in order to avoid litigating a claim under this section. Accordingly, it was argued, the

parties' agreement was akin to an agreement to compromise litigation. Because agreements for this purpose do not require to be in writing, even where they involve the transfer etc of a real right in land which would otherwise fall within section 1(2)(a)(i), no writing was required in relation to the agreement to transfer title in the present case.

[23] The defender's first response to this argument was to submit, in effect, that the contract could not be a compromise agreement, nor akin to one, because there had been no court action. I reject that submission. There are of course some practical and procedural differences between agreeing settlement of a claim prior to litigation, and reaching an agreement to settle an ongoing litigation. But there is no substantive difference which is relevant for present purposes, and neither counsel was able to suggest one. Indeed *Cook* v *Grubb*, to which both counsel referred, is itself a case where the disputed compromise agreement was made to avoid litigation, not to settle it, and there was no suggestion that this made any substantive difference when considering its nature and effect. Fundamentally, what is being compromised in a compromise agreement is a party's underlying legal claim. Agreement as to the disposal of any court action in which such a claim is being ventilated is ancillary to this.

[24] But even accepting that the contract argued for by the pursuer can properly be described as a compromise agreement, I do not accept that it follows that section 1(2)(a)(i) does not apply to it. The short answer is that section 1(2)(a)(i) applies to contracts generally, without relevant qualification. An agreement to compromise a claim is a contract by another name. If it is a contract for the creation etc of a real right in land it will fall within section 1(2)(a)(i), and therefore must be in writing. No exception is made in section 1(2)(a)(i) for compromise agreements. Nor is there any warrant to read in such an exception. If Parliament had intended that compromise agreements which were for the creation etc of a

real right in land did not have to be in writing it could, and no doubt would, have said so. The underlying rationale for requiring there to be writing to constitute such an agreement – the importance of the nature of the transaction – is still applicable. The rule is still hard edged, not purposive, even if the purpose of the agreement is to avoid, or resolve, litigation.

[25] Given the clear terms of the 1995 Act, the pre-existing case law in relation to compromise agreements is a potentially confusing but ultimately irrelevant distraction. A contract to compromise a claim which involves an agreement to transfer title to heritable property does now require to be in writing, even if prior to the 1995 Act it did not. But whether that was indeed the position is unclear, at least on the authorities to which I was referred. Two matters about the pre-1995 Act position can be stated with confidence. First, it is clear that a compromise agreement did not, in principle, require to be in formal writing. Such an agreement could be – and often was – constituted informally, and could be proved by reference to parole evidence and/or informal writing. Second, it is equally clear that if a right required formal writing for its constitution and proof, this requirement was not avoided simply because the right was included within a compromise agreement itself. Accordingly if a compromise agreement was made without probative writing, a right included in it which would otherwise have required such writing could not be proved nor enforced.

[26] But there is a third matter which is less clear. That is whether writing was required to prove a compromise agreement which did not itself embody the right which required writing, but merely obliged a party to take steps to create etc that right, that is, by later executing the formal writing necessary for the purpose. If writing for such an agreement was not required, it would follow that a failure by the relevant party to execute the necessary writing could itself be the subject of enforcement action. In such an action the

terms of the compromise agreement could be proved by parole evidence and/or informal writing. And if the action was successful, an order could be obtained ordaining the party concerned to execute the formal writing so as to create the right which was the subject of the compromise agreement.

[27] *Cook* v *Grubb* provides clear authority for the first two matters just referred to. In this case the pursuer was injured in the course of his employment and ceased working. He made a claim for damages for personal injury against his employer. As noted, no court action was raised. The parties and their solicitors had a meeting, and made a verbal agreement under which, according to the pursuer, it was agreed that damages would be paid and that he would be re-employed indefinitely. The intention had been that this agreement would be reduced to writing, but the solicitors were unable to agree terms. Meantime the pursuer returned to work with the defender but soon afterwards was dismissed. He then brought an action for breach of contract by wrongful dismissal. The defender argued that the contract averred by the pursuer was a contract of service for more than a year, and so could only be constituted and proved by probative writing. The pursuer responded that the contract founded on was the compromise agreement itself, and so did not require writing. The Court, having reviewed the authorities, rejected the pursuer's argument and dismissed the action.

[28] The Lord President (Clyde), sitting in the Outer House, observed that:

> "It is well settled that the fact that an action has been compromised can be proved by parole evidence, with the result of terminating further procedure in the action… But… proof that the action has been settled or compromised does not determine any question of the enforceability of the compromise, which is quite a different question. If therefore writing is necessary for the constitution of a right which one party seeks to enforce, that right must still be constituted by writ. In the present case, the pursuer is not merely seeking to establish that his claim for damages was compromised: he is seeking to enforce a resulting contract of service for a period of years. The fact that it arose out of a compromise of claims is irrelevant."

So far so good. But what if the pursuer, instead of bringing an action on the basis that his contract of employment was embodied in the compromise agreement, had brought an action for declarator of the terms of that agreement, and sought an order ordaining the defender to execute and provide him with the desired contract of employment in probative form? Would the Court have allowed the pursuer to prove by parole evidence or informal writing the terms of the employment contract to which he claimed to be entitled? Given the case put before him, the Lord President did not have to address this matter, and did not do so.

[29] When *Cook* v *Grubb* reached the Inner House, the authorities were reviewed, but none was found to support the pursuer's contention that, if an obligation which can normally be constituted by probative writing only is embodied in a compromise, probative writ was unnecessary for constitution or proof. In particular, consideration of the Session Papers in *Love* v *Marshall* suggested that the question of enforcement of the claimed right in heritable property was not insisted in before the Inner House, and thus that the case went no further than to suggest that a compromise agreement could, in principle, be proved by informal writing and parole evidence. In *Torbat* v *Torbat's Trs.* the Lord Ordinary had therefore been mistaken to consider himself bound by *Love* v *Marshall*. In these circumstances (per the Lord Justice Clerk (Grant) at page 16):

> "On principle and on the authorities, I am satisfied that, in the absence of *rei interventus*, a contract for service for more than a year contained in a compromise of which it forms a major and fundamental part cannot be constituted or proved except by probative writ."

The earlier decisions were:

> "…authority for the proposition that an agreement to compromise an action or a claim may be proved by parole, or by a combination of informal writings or parole, to the effect of sopiting all further proceedings in the action or claim [but not] that where, as here, a term in a compromise agreement happens to be a contract known to our law as one of the *obligationes litteris* i.e. contracts which cannot be constituted

> except in writing, all writing can be dispensed with and the contract proved by parole evidence." (per Lord Mackintosh at page 20).

Or as Lord Strachan put it (at page 23):

> "I agree that the law now is that a compromise can be proved by informal writing, or even by parole evidence. That means… that a person may prove in that way the fact that an action or claim has been settled, and also the terms on which it has been settled. Whether the terms of the compromise are entirely valid and binding seems to me to be another question, and I do not think that it has ever been decided, for instance, that an *obligatio litteris* may be proved by parole evidence merely because it is included in a compromise."

Again, therefore, the court does not directly address the question of whether writing is required for a compromise agreement which does not itself create an *obligatio litteris*, but rather obliges parties to take the steps necessary to create it by executing formal writing. And nor do the earlier authorities reviewed provide a clear answer to this question.

[30] It was, however, addressed in *McFarlane* v *McFarlane*, which post-dates the coming into force of the 1995 Act. Here the parties were brothers engaged in a number of litigations. In the first of these, the pursuer sought recovery of possession of heritable property. In the second, the defender sought an order for execution and delivery by the pursuer of a valid disposition to this same property. Correspondence passed between their solicitors regarding settlement of these actions. The parties then litigated by minute and answer procedure on whether the solicitors' correspondence amounted to an enforceable compromise agreement. In submissions, evidence having been led, counsel conceded that:

> "in a contract for the compromise of court proceedings there was no need for any particular formalities, and that the requirements of the [1995 Act] did not apply to such a contract, nor were there the requirements which one would need in order to constitute a valid exchange of missives" (paragraph 34).

In the light of counsel's concession, Lord Menzies observed (at paragraphs 41 – 42) that:

> "Actions which are pending in Scottish Courts are settled routinely by the most informal methods… It may be that an agreement concluded informally (and particularly verbally) will be more difficult to prove and found upon than a more

> formally constituted agreement, and may give rise to greater scope for dispute as to its precise terms, but informality or absence of writing is not a necessary requisite for such a contract… [I]t is important to bear in mind that what is being considered in the present case is not a contract for the transfer of title to heritable property, nor for the transmission of any real right; this is a contract for the compromise of a court action, conferring only personal rights. An agreement that there will be a transfer of real right in property in the future may be a term of this contract, but it does not follow that terms which might be essential for such a future transfer of property are essential in the present contract…"

His Lordship was satisfied that the parties had reached a binding agreement for the compromise of the two court actions and granted decree to this effect. The cause was sisted to enable the defender to execute and deliver the disposition which the Court held he had agreed to do.

[31] Ms Shewan submitted that counsel's concession regarding the 1995 Act in *McFarlane* v *McFarlane* was wrongly made. I agree. And with respect to Lord Menzies I am unable to agree with his analysis in the above passage. As *Cook* v *Grubb* makes clear, a compromise agreement does not in principle require to be in writing. And such an agreement cannot in itself create real rights for which writing is required. But it does not follow from the fact that such an agreement confers only personal rights that it cannot also be a contract for the creation etc of a real right in land falling within section 1(2)(a)(i) of the 1995 Act. The underlying point is that section 1(2) draws a clear distinction between contracts for the creation etc of a real right in land, which involve personal rights only, and the documents which create the real right itself. But both require to be in writing in order to be valid and enforceable.

[32] This was well explained by Lord Drummond Young in *The Advice Centre for Mortgages* v *McNicoll*. In holding that the personal bar provisions of subsection 1(3) and (4) only have application to the personal rights to which subsection 1(2)(a)(i) applies his Lordship held (at paragraph 18) that:

> "…Subsection (2)(a)(i) refers to 'the constitution of … a contract … for the creation, transfer, variation or extinction of an interest in land'. Subsection (2)(b), by contrast, refers to 'the creation, transfer, variation or extinction of an interest in land', subject to certain exceptions. The intention is clearly to separate contracts relating to land on one hand from dispositions and other deeds that actually effect the creation or transfer of an interest in land on the other hand. That is a distinction between a transaction that gives rise to merely personal rights and a transaction that gives rise to real rights, or at least rights that will be made real when another legal step is taken, that step being registration or, in the case of a lease, the taking of possession…"

Accordingly it is a *non sequitur* to suggest that, because an agreement creates only personal rights between the parties to it, it therefore cannot be a contract for the creation of a real right in land where it obliges a party to take the steps necessary to create that right. Conveyancing missives provide the obvious example. In themselves concluded missives of purchase and sale constitute a contract which confers personal rights only. But it is beyond dispute that missives are also a contract for the creation etc of a real right in land to which section 1(2)(a)(i) applies. What they oblige the seller to do is to provide a disposition of the subjects which, when registered, will create the real right itself. The requirement that this disposition be in writing is to be found in section 1(2)(b). For the same reason a compromise agreement by which one party obliges himself to execute a disposition for the transfer of a real right in land falls within section 1(2)(a)(i).

[33] Ms Shewan submitted that the sheriff court decision of *DWS* v *RMS* was wrongly decided on this same point. Again, I agree. In this case there was a dispute as to whether parties had compromised a litigation relating to financial provision on divorce by, *inter alia*, agreeing to transfer title to certain heritable properties. Although it was ultimately held that there had been no concluded agreement, the sheriff repelled an objection to the admissibility of evidence of oral acceptance of the contract made on the basis that it fell within the terms of section 1(2)(a)(i) of the 1995 Act. Reviewing the authorities, the sheriff distinguished *Cook*

v *Grubb* in particular on the basis that it related to a contract of service (paragraph 18). With respect, that is not a good ground to distinguish this case, but as already noted it does not address directly the point which the sheriff had to decide. As to *McFarlane* v *McFarlane*, the sheriff noted counsel's submission that it proceeded on a concession wrongly made, but accepted the *non sequitur* at the heart of this decision:

> "[29]… A compromise agreement, if proved, confers only personal rights. It is therefore not a contract for the transfer of a real right in land. It does not require to be in writing. Evidence of alleged written offer and oral acceptance is admissible."

As is noted in Anderson, *Compromise agreements and heritable property*, at page 172:

> "The compromise agreement alleged to exist in [*DWS v RMS*] is a contract, by which each party is given a personal right against the other, requiring that other to transfer a right of co-ownership of land. It is not easy to see, therefore, how such an agreement can fail to be a 'contract… for the… transfer of a real right in land' in terms of section 1(2)(a)(i) of the 1995 Act."

I share that view, and am unable to accept the sheriff's conclusion or to follow it in the present case. The 1995 Act clearly recognises and differentiates between the deeds necessary to create etc a real right and the personal contracts by which parties agree to create such a right. It then provides that both must be in writing. I do not see that the position is any different if a contract of the latter kind is made for the purpose of compromising a claim.

[34] Accordingly, the contract which the pursuer seeks to enforce, even if a compromise agreement, is a "contract for the transfer of a real right in land" for the purpose of section 1(2)(a)(i) of the 1995 Act, and thus one for which writing is required in terms of section 2(1). The position is no different in this regard if, as the pursuer avers in the alternative, there was a promise by the defender rather than an agreement. As there is no writing, the pursuer's claim is irrelevant and falls to be dismissed unless she can establish that the defender is subject to statutory personal bar in terms of section 1(3) and 1(4) of the

1995 Act. The question at this stage, therefore, is whether she has pled a relevant and specific case in relation to these provisions, sufficient for proof.

[35] The general approach to be taken to interpretation of sections 1(3) and 1(4) of the 1995 Act is relatively strict. As Lord Drummond Young said in *The Advice Centre for Mortgages* v *McNicoll* (at paragraph 16):

> "… The formal requirements for contracts and other deeds falling within the specified categories are extremely simple and rational. It is not difficult to satisfy those requirements. In those circumstances, I am of opinion that there is no need to give the personal bar provisions in subs (3) and (4) of s 1 a liberal interpretation. The legal acts specified in subs (2) are either matters of obvious importance… or relatively unusual acts that are likely to be undertaken with due consideration. The need for a particular legal form should accordingly be obvious. If parties do not adhere to the very simple requirements that are now prescribed, they have only themselves to blame. That is especially so when they are legally advised."

These observations clearly have some resonance in the present case, as Ms Shewan pointed out. The pursuer did have legal advice in 2010, and she had before her a draft agreement which, had it simply been signed, would likely have avoided the present litigation. If she cannot now plead or prove a properly arguable claim to personal bar, she may well only have herself to blame.

[36] However I also accept the general point, as Lord Glennie put it in *Heather Capital Ltd (In Liquidation)* v *Levy & Macrae*, at paragraph 100, that:

> "…the purpose of pleading is to give fair notice of the assertions of fact sought to be established in the evidence as well as to identify the essential propositions of law on which a party founds. Elaborate pleading is unnecessary in any action, not just in a commercial action. The purpose of the pleadings is to give notice of the essential elements of the case. The pleadings should set out the bare bones of the case. They are not the place to set out in full the evidence intended to be adduced."

This was said in cases where the reclaiming prints ran to 59 and 93 pages respectively. Nonetheless the general point is that at the stage of debate too forensic an approach to the detail of a party's pleadings may be inappropriate, if when looked at as a whole, they give

fair notice of the essential elements of the case which that party seeks to make. In the present case counsel were agreed that there were four essential requirements in a claim of statutory personal bar under sections 1(3) and (4) of the 1995 Act, and that it was incumbent on the pursuer to show that she had averred a relevant and specific case in relation to each and all of them.

[37] The first requirement is that the pursuer must have "acted or refrained from acting in reliance on the contract…" The particular agreement should be identified and the actings relied on should be clearly referable to that agreement: see *Advice Centre for Mortgages* v *McNicoll* at paragraph 33 per Lord Drummond Young. The particular agreement relied on must be the agreement to which section 1(2)(a)(i) applies, and not any other agreement made by the parties at the same time, but which did not require to be in writing. In this case that means that the pursuer must identify actings referable to the claimed agreement that title to the Montrose property would be transferred to her following repayment of the mortgage, and not to the other matters on which she also claims that there was agreement – namely that the defender would purchase the Montrose house, pay the mortgage, and permit the pursuer to live there meantime – none of which required to be in writing.

[38] The pursuer expressly avers that she acted and refrained from acting in reliance on the claimed agreement to transfer title. That is particularised by three averments, namely that she:

> "…chose a property within the budget defined by the defender, and located within an area he approved of";
>
> that she:
>
> "…took no steps to find alternative accommodation through the local authority or similar, which would have given her security of tenure and the potential to purchase a property in her own right";

and that:

> "She did not pursue any claim for payment of a capital sum, available to her as a former cohabitant, either in terms of section 28(2)(a) or (b) of the Family Law (Scotland) Act 2006."

[39] The first of these averments is not clearly referable to the claimed agreement to transfer title, as opposed to any of the other matters on which the pursuer claims that the parties agreed. Even if the defender dictated the budget and the area, and the pursuer chose a house within these constraints, this says nothing about whether he had agreed that, at some point in the future when the mortgage was repaid, he would transfer the title to the house. It is referable to an agreement that the defender would provide mortgage free accommodation for the pursuer and the parties' son while he was growing up, but nothing beyond that. I do not see how it could properly be held that the pursuer chose the house within the area and budget dictated by the defender because she was relying on an agreement that the title of the house would be transferred to her perhaps many years later. There is no relationship of reliance between the two matters. This first averment is therefore irrelevant for the purpose of the first requirement.

[40] The second of these averments is also irrelevant. That the pursuer chose not to look for alternative accommodation is clearly referable to the fact that the defender purchased the Montrose house and permitted her to live there, but it is not clearly referable to the claimed agreement that when the mortgage was eventually paid off he would transfer title to her. Even if there was no agreement to transfer title, the pursuer was clearly being provided with rent free and mortgage free accommodation for a lengthy period. It was, as Ms Shewan submitted, to the pursuer's advantage to refrain from seeking alternative accommodation on which she would have had to pay rent or a mortgage. It therefore cannot be seen as clearly referable to the claimed agreement to transfer title rather than rational self-interest. It could

not be properly concluded that by not seeking alternative accommodation the pursuer was thereby relying on an agreement that title to the Montrose house would one day be transferred to her.

[41] The pursuer's third averment is relevant in relation to the first requirement however. She avers that she refrained from bringing a claim for payment of a capital sum as a former cohabitant, during the one year period from the date of separation in which it was open to her to do so: 2006 Act, section 28(8). This is capable of being seen as her refraining from acting in reliance on and referable to an agreement by which the defender would, in effect, give her a capital asset which she now values at £250,000. She avers that this agreement compromised and resolved her financial claims against the defender both in respect of herself and of maintenance for their child. In other words the pursuer offers to prove that she did not make a claim for a capital sum under section 28 because the defender had already in substance agreed to pay her one. She is therefore claiming to have refrained from acting in reliance on the claimed agreement to transfer title, and in a manner which is capable of being seen as directly referable to such an agreement. In this respect, therefore, the pursuer has averred a case for proof on the first requirement.

[42] The second requirement of section 1(3) is that the pursuer must have acted "with the knowledge and acquiescence of the other party to the contract…" In *George and Elizabeth Mitchell* v *Caversham Management Ltd.* Lord Bracadale held to be well founded (at paragraph 23) the submission of counsel:

> "… That in order to satisfy the test in [section 1(3) of] the 1995 Act it would not be sufficient that the defender knew generally that the pursuers were arranging their affairs in reliance on the fact that the contract had been varied. It seems to me that what is required is for the pursuers to be able to point to specific actings or examples of refraining from acting and that these must be known to and acquiesced in by the other party. These provisions provide relief from a failure to meet the general requirements as to written agreement. That would require clear identification of the

> actings or refraining from acting. Further the actings or refraining from acting require to be known about and acquiesced in by the other party. Accordingly they should be capable of clear identification in order that the relevant knowledge and acquiescence of the other party may be ascertained."

It should be recognised, however, that this was said after proof, and is therefore not necessarily to be read as a judgment as to the degree of specification of pleading required in relation to section 1(3) when considered at the stage of debate. It is also apparent that, in the case before Lord Bracadale, the pursuers failed on the evidence even to establish that they had acted or refrained from acting in a manner referable to the claimed variation of contract.

[43] At paragraph 7.17 of Reid & Blackie's *Personal Bar* the authors write in relation to this second requirement of section 1(3) that:

> "Actual knowledge may be difficult to establish, but in many circumstances knowledge may be presumed or imputed where the person denying the obligation is likely to have been aware of the other's affairs."

The authors also cite the case of *Gardner* v *Lucas* (1878) 5 R 638 at 656 where it was said that common law *rei interventus* applied on the basis of actings that were either:

> "…known to the other party or must necessarily be held to have been in the contemplation of that party when he entered the agreement".

I take it from this citation that the authors are of the view that a similar approach is appropriate in relation to statutory personal bar under section 1(3) of the 1995 Act. But as they also state, however, it is not enough that the defender is shown to have known of the pursuer's particular actings. It is also necessary to show that the defender knew that these actings were done in reliance on the claimed contract.

[44] In the present case there is no express averment that the defender was aware of or acquiesced in the refraining from acting which the pursuer avers was done in reliance on the claimed transfer contract. Her position was, however, that there was sufficient in the pleadings as a whole to enable her to establish facts from which the defender's knowledge of

these matters could properly be inferred. In that regard it is averred that the parties had lived together for more than ten years at the date of separation. The claimed agreement is said to have followed discussions about their future financial arrangements following separation. It is said to have compromised and resolved the pursuer's financial claims against the defender. While it is averred that the pursuer sought legal advice, there is no averment that the defender did likewise. He did however draft the unsigned agreement, which includes provision regarding transfer of the title of the Montrose house following repayment of the mortgage.

[45] I accept that the question is whether there are pleadings sufficient to establish facts at proof from which it could properly be inferred that the defender knew and acquiesced in the particular refraining from acting which the pursuer says she did in reliance on the claimed agreement to transfer title. It is not enough that it might be established that the defender would have general knowledge of the pursuer and her affairs. It is also not enough that it might be established that the agreement existed and that the defender would likely have known that the pursuer might place reliance on it in some way. The pursuer has offered to prove that, in reliance on the claimed agreement, she did not make a financial claim against the defender. What she has to do is to also offer to prove that the defender knew that she had refrained from doing this in reliance on the claimed agreement to transfer title, and that he acquiesced in her doing so.

[46] I am persuaded that there is a basis to allow proof in relation to the pursuer's claimed refraining from making a section 28 claim. This lies in the fact that the pursuer has expressly averred that the agreement to transfer title to the Montrose house was part of a compromise agreement, reached after discussion between parties at the time of their separation, and made to settle her financial claims against the defender arising out of the

relationship. These averments carry within them the necessary implication that the defender knew that the pursuer was in a position to make a financial claim against him, and that if the agreement to transfer title to the house was made she would not, in reliance on it, make such a claim. It would also follow, again on the pursuer's averments, that the defender would have known all this in 2010, but did nothing to deny the claimed agreement to transfer title until 2018. In the circumstances I consider that it would at least be open to the Court to conclude that this amounted to acquiescence: see Reid & Blackie at paragraph 7.20. A case for proof on the second requirement is therefore sufficiently pled on this point.

[47] The third requirement is that the position of the pursuer, "as a result of her acting or refraining from acting as mentioned in subsection (3) has been affected to a material extent": section 1(4)(a). As Reid & Blackie state (at paragraph 7.27), it is not clear just how "material" the effect must be, although they suggest that the matter might be approached on the basis that the effects should be proportionate to the nature of the obligation, or in relation to the nature of the effect relied on (and whether it involved expenditure of money, and if so how much). But helpful though these observations are, it seems to me that it is neither necessary nor appropriate to seek to gloss the statutory language. Whether a party is or is not "affected to a material extent" must be a matter of judicial assessment, after hearing evidence, and having regard to all the circumstances of the case. It follows that the Court should not be too quick, at the stage of debate, to hold that a party has not pled a sufficiently specific case on this issue. It seems to me to involve very much the sort of "value judgment" to which Lord Glennie referred at paragraph 100 of *Heather Capital Ltd (In Liquidation)* v *Levy & McRae*, and which should seldom be made on the basis of pleadings without hearing evidence.

[48] Ms Shewan's submission was in effect that the bald averment that the pursuer did not make a claim for a capital sum under section 28, without quantifying that claim by reference to the requirements of this section, was not sufficient to establish materiality. This submission was coupled with a further submission that even had such a claim been made it would have had no merit. In my view however there is enough in the pursuer's pleadings, taken as a whole, to allow her to attempt to prove that her refraining from making a section 28 claim affected her to a material extent. I am not prepared, at this stage, to say that the pursuer's claim for a capital sum could have had no merit, at least to the extent that the loss of it could not be regarded as material for the purpose of section 1(4). I say that conscious of the difficulties and complexities involved in making a section 28 claim: see for example *Jackson* v *Burns* [2019] Fam LR 88.

[49] In particular, it is apparent from the unsigned "agreement" drafted by the defender (and which has been lodged in process) that following their separation he was at least prepared to contemplate buying a house – now claimed to be worth £250,000 – paying off the mortgage and then transferring title to the pursuer. This, coupled with the pursuer's averment that all this was agreed in order to compromise her financial claims, suggests to me that it would not be right, at least at this stage, to suppose that a claim by the pursuer for a capital sum under section 28 could have had no merit. Having said that, I do not accept Ms Malcolm's submission that the mere loss of the right itself (by operation of section 28(8)) is sufficient for present purposes. The pursuer has to establish that her right under section 28 had a value sufficient for its surrender to be material for the purpose of section 1(4) of the 1995 Act. That is not axiomatic. However I am satisfied that she is at least entitled to proof on this point.

[50] The fourth and final requirement is that the pursuer must show that, as a result of the defender withdrawing from the claimed agreement to transfer title she "would be adversely affected to a material extent". In this regard, the pursuer's only averment was that if the defender was entitled to withdraw she would be rendered homeless. Does she need to aver more? Ms Shewan submitted that she did, and relied on *Caterleisure Ltd* v *Glasgow International Prestwick Airport Ltd.* In this case Lord Emslie, giving the Opinion of the Court, said (at paragraph 16) that he

> "…saw some force in the defender's contention that mere loss of anticipated benefit under a contract will not necessarily be sufficient for [the purpose of section 1(4)] in all cases…"

However by putting the matter this way Lord Emslie leaves open the possibility that mere loss of anticipated benefit might, in at least some cases, be sufficient for the purpose of the fourth requirement. Indeed in the case in question, the Extra Division was not prepared to disturb the Lord Ordinary's decision in this regard.

[51] Furthermore, the submissions of counsel, which found favour with Lord Emslie, involved an acceptance that there might be a distinction between the mere loss of the benefit of a house purchase transaction, and the homelessness resulting from it (see paragraph 9). In my view this must be right. The two things are not the same. Say in the present case, for example, that the pursuer had bought another house since the parties' separation. In that scenario the defender's withdrawal from the claimed agreement to transfer title would not have rendered her homeless because she could have gone to live at her other property instead. But that is not what is averred in the present case. It is said that the defender's withdrawal from the contract will not only cause the pursuer to lose the benefit of this contract – by not becoming owner of the Montrose house – but will also leave her without anywhere else to live. In my view that is an averment that she will be adversely affected to a

material extent by the defender's withdrawal. Therefore she is entitled to proof on this fourth requirement also.

Conclusion

[52] The agreement to transfer title to the Montrose house which is contended for by the pursuer is a contract to which section 1(2)(a)(i) of the 1995 Act applies and which therefore must be in writing. The pursuer has however pled a case, sufficient to entitle her to proof, that the defender cannot withdraw from any verbal agreement or promise to transfer title to the Montrose property because he is subject to the statutory personal bar set out in sections 1(3) and 1(4) of the 1995 Act. Such a claim can only arise on the basis of the pursuer's averments to the effect that in reliance on the claimed transfer agreement or promise she refrained from making a claim under section 28 of the 2006 Act, that the defender knew and acquiesced in this, that the loss of the right to make such a claim affected her to a material extent, and that were the defender to withdraw from this claimed agreement or promise the pursuer would be rendered homeless. Whether such averments can be established will of course be a matter to be determined after evidence.

[53] Accordingly I will refuse the defender's motion to dismiss the action pursuant to his first plea in law. However this plea should be left standing until after proof, which should therefore be a proof before answer. Parties should liaise with the sheriff clerk to identify suitable dates. Meantime I will certify the diet of debate as suitable for the instruction of counsel. Beyond that, I will reserve all questions of expenses.