

SCOTLAND / JUDGMENT

Smith v. Barclay [2006]

ScotSC 103 (29 August 2006)

[2006] ScotSC 103

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JUDGMENT

OF SHERIFF RICHARD A DAVISON In causa PHYLLIS SMITH, PURSUER Against WILLIAM BARCLAY DEFENDER Act: Party Alt: Miller, Messrs. Allan MacDougall & Co., SSC A 1459/04 Phyllis Smith v William Barclay. Dundee , 29 th .. August, 2006 The sheriff, having resumed consideration of the cause, finds the following facts admitted or proved:- 1. The pursuer is Phyllis Helen Smith who resides at 1 Nelson Terrace, Dundee . She is 78 years old. She is a retired school teacher. She is a widow. 2. The defender is William Donald Barclay (not William Robert Barclay) who formerly resided at 23B Ravelston Park , Edinburgh and now resides at Flat 14, 14B Riversdale Crescent , Edinburgh . He is or at any rate until recently was, managing director of M & S Toiletries Limited. 3. The pursuer is the mother of Pamela Riach Smith. The defender is the former cohabitee of said Pamela Smith. 4. The defender and Pamela Smith formed an association in about 1997 at about which time he was first introduced to the pursuer. 5. The pursuer was a widow, her husband having died a number of years ago. The home she had shared with him was located in a part of Dundee which she considered was becoming less desirable to live in. She was accordingly anxious to move elsewhere. 6. The relationship between Pamela Smith and the defender had broken down by 1999 but was subsequently rekindled. In about November 2000, she and the defender jointly purchased a property known as "The Den," which was located within the grounds of Hopetoun Estate near Linlithgow in West Lothian . The purchase price was £525,000. She and the defender thereafter cohabited there until their separation in 2003, the defender leaving said property finally in or about November, 2003. 7. Pamela Smith was concerned about the welfare of the pursuer. She and the defender agreed to approach the pursuer to see how she would feel about a proposal that an extension should be built to "The Den" for her occupation. It was always understood that the pursuer would require to fund the building of the extension. It was further agreed that she would not pay any rental for her use of the property. 8. The pursuer was keen to get away from the part of Dundee in which her house was situated. The defender was heavily committed to his work and was often away from home. Pamela Smith worked in Edinburgh and was home every night and it was acknowledged that the two women would provide company for each other at this relatively isolated location. In general terms, the proposal appealed to the pursuer. 9. The pursuer's late husband had been a bank manager and the pursuer, apart from being inherently shrewd, had learned from him of the need

to have some form of security before parting with money. She accordingly requested initially that ownership of the extension should be recorded in her name. However, the local planning authority would not grant planning consent for the extension in separate ownership from the main house. The defender would not contemplate the pursuer becoming a heritable proprietor to any extent of the main property nor would he agree to her being a heritable security holder over the property. He declined to acknowledge in writing that she would be making any financial contribution to the construction of the extension. Her insistence and his refusal formed the source of considerable difficulty between the parties and for Pamela Smith. 10. Ultimately, the pursuer determined to proceed without the benefit of a written agreement. Before doing so, the defender had stated to her at a meeting at "The Den," in 2002 prior to any money being paid by the pursuer to the defender and Pamela Smith, that in the event of the property being sold, the pursuer would get her money back. Pamela Smith was not a party to that discussion or agreement. 11. The pursuer then made three payments to Pamela Smith, which payments were used to pay the builders of the extension, Moore and Mulheron Contracts Limited, the payments matching sums certified as due to them by the architects appointed by the defender and Pamela Smith to oversee the construction of the extension, Messrs. Kerr Marshall Associates. These payments were (i) £30,315 paid on 11 th . September, 2002; (ii) £41,000 paid on th . October, 2002 and (iii) £35,000 paid on 23 rd . January, 2003, a total of £106, 315. These payments were all credited to a joint account, of which the account holders were Pamela Smith and the defender, with the Bank of Scotland, St. Vincent Street , Glasgow . 12. Said payments were not gifts to either of the defender or Pamela Smith. 13. The defender paid the architect's fee of £9,342.13. 14. The work of construction of the extension was completed by December, 2002 and the pursuer began the process of moving into the extension. Certain items of furniture were collected from her home in Dundee and transported to "The Den." Certain carpets were laid though there was a dispute between the pursuer and the defender about their suitability with the defender meeting the cost of replacement carpeting. She had commenced marketing of her own property in Dundee , though with little, if any, success. 15. The pursuer, however, never did move into the extension. She was asked to delay doing so while friends of Pamela Smith who were homeless due to a new house they were to take entry to not being completed resided in the extension pending the completion of their property. By the time they left in summer 2003 the relationship between Pamela Smith and the defender was breaking down. By June 2003 they had ceased to cohabit though the defender remained in occupation at the property. The defender finally left the property in November, 2003 and returned to live in Edinburgh . Throughout 2003 his attitude towards the pursuer became increasingly hostile. One consequence of this was that there was a time in about March, 2003 when she intimated she no longer proposed to move into "The Den." However, she subsequently agreed to do so and resumed preparations for her planned move, including requesting in writing that the defender supply her with keys for the extension, which he did by letter dated 6 th . May,

2003. (5/1 of process) In that same letter he described the pursuer's financial contribution to the construction of the extension as "your investment." 16. The Den was placed on the property market in about September, 2003 without the pursuer being informed. It was sold with

entry as at 23 rd . December 2003 at a price of £700,000. In the meantime, there had been an abortive attempt by the pursuer and Pamela Smith to buy out the defender. 17. Following the completion of the sale, Pamela Smith voluntarily paid the pursuer £50,000 from the proceeds. 18. In about March, 2004, the defender offered to settle with the pursuer on a payment to her of £25,000, an offer she rejected out of hand. She later asked the defender to put any proposal he might have to settle their dispute in writing which he declined to do. 19. The defender and Pamela Smith were jointly enriched by the pursuer's contribution of £106,315 towards the cost of building the extension. 20. The price obtained on sale in November, 2003 of £700,000 was an increase of £175,000 on the price paid by Pamela Smith and the defender when they purchased the property in 2000. 21. The pursuer's intention in making the payments totalling £106,315 was to provide for herself a home along side her daughter's home in which she would reside for the rest of her life. It was not her intention to confer any immediate benefit upon the defender though she recognised that, if he outlived her, he would benefit to the extent by which the extension enhanced the value of the whole property. 22. A reasonable assessment of the extent to which the extension enhanced the value of the property at the time of its sale on 23 rd . December, 2003 is £132,000. 23. Having been repaid £50,000 by her daughter from the proceeds of sale, the pursuer has suffered a loss of £56,315 from the total paid by her to the defender and Ms. Smith by which amount they remain enriched. Finds in fact and law:- 1. There being no obligation imposed jointly on the defender and Pamela Smith to repay the sums paid to them by the pursuer on any particular basis, the transmission of the funds from the pursuer to the defender and Pamela Smith cannot be characterised as a loan. 2. The intention of the pursuer being to provide for herself accommodation alongside her daughter's home where she, the pursuer, could reside for the rest of her days, and to pay for its construction, and not to confer an immediate benefit on either the defender or Pamela Smith, the defender and Pamela Smith, being joint pro indiviso proprietors of the property known as "The Den," Winchburgh, West Lothian, have obtained a benefit from their use of the funds contributed by the pursuer. 3. The purpose for which the funds were provided, namely her accommodation for the rest of her life, having been frustrated by events, and the property having been sold at a value enhanced by the extension paid for by the pursuer, the defender and Pamela Smith have obtained as a consequence a financial benefit from the pursuer's contribution in circumstances which were not intended to occur and from which they were not intended to obtain a benefit from the pursuer's contribution. 4. The defender and Pamela Smith have accordingly been jointly unjustly enriched. 5. The extent by which the extension enhanced the value of the property being £132,000, the extent to which they have been enriched is £132,000. 6. Pamela Smith having paid £50,000 to the pursuer voluntarily, the balance due to the pursuer is £72,315. 7. The pursuer having restricted her crave to £56,315, being the balance of the amount paid to her is entitled to decree of repetition for that sum. Finds in law:- 1. The transaction between the pursuer and the defender and Pamela Smith not being one of contract or loan, the pursuer is not entitled to decree for repayment of any sum lent. 2. The defender and Pamela Smith having been jointly enriched unjustly, decree as craved should be granted. 3. The sum sued

for being less than the extent by which the defender and Pamela Smith have been jointly enriched and being the amount outstanding to achieve repetition, decree for that sum is reasonable and should be granted as craved. Accordingly, repels the first plea-in-law for the pursuer; sustains the third plea-in-law for the defender. Repels the second plea-in-law for the defender for want of insistence; sustains the second plea-in-law for the pursuer and repels the fourth and fifth pleas-in-law for the defender; grants decree against the defender for payment to the pursuer of the sum of FIFTY SIX THOUSAND THREE HUNDRED AND FIFTEEN POUNDS (£56,315) STERLING, with interest thereon from the date of citation until payment at the rate of 8% per annum; reserves meantime all matters of expenses arising in the cause and assigns as a hearing on expenses. Statutes referred to: The Requirements of Writing (Scotland) Act, 1995 Sections 1 and 11. Authorities referred to: 1. Institutions of the Law of Scotland : Stair I :10:2 and I:11:2 2. Dollar Land (Cumbernauld) Limited v CIN Properties 1997 SLT 260 3. Graham-Stewart v Feeney 1995 GWD 35-2048 4. Shilliday v Smith 1998 SC 72 5. Whyte v Docherty , not reported, Arbroath A514/99 Sheriff C. N. R. Stein on 8 th . January, 2002 and Sheriff Principal R. A. Dunlop Q. C. 3 rd . March, 2003. Textbooks referred to: 1. Encyclopaedia of the Law of Scotland : Vol 13 para 1705 2. The Law of Scotland : Gloag & Henderson, 11 th . Edition Paras 24.22 and 24.23 3. Stewart on Restitution: para 5.42 NOTE The Pursuer was a quite remarkable and redoubtable lady of seventy eight years of age, a retired school teacher, who conducted this litigation with dignity, with grim determination, with respect for the court, if not, at times, for her opponent and against a background of preparation which would have been creditable for any member of the legal profession. When she gave her evidence it was in a clear and comprehensive manner which gave rise to little concern about the reliability of her recollections notwithstanding her age. She was entirely credible. I am afraid I have to say that she was considerably more reliable than her daughter, Pamela Smith, whose approach to giving evidence about the subject matter of the litigation was one of preferring to have no recollection of the entire episode. Her credibility was also to be contrasted with that of the defender, who was distinctly ill at ease while giving evidence and could reasonably be characterised as being shifty. He was less than honest. It is not necessary for me to rehearse all the evidence that was led before me. The pursuer told me that the defender and her daughter formed a relationship initially in 1997 which lasted for about two years during which she only met him on a couple of occasions. Pamela Smith was residing near Peebles at the time and when the pursuer visited her at weekends, the defender occasionally appeared. However, she was led to believe that the relationship had terminated. It then appeared to have been rekindled sometime in 1999 and in 2000 the pursuer learned that her daughter and the defender were considering purchasing a property known as "The Den," which was situated in the grounds of Hopetoun Estate near the village of Winchburgh in West Lothian . Given the on/off nature of the relationship between her daughter and the defender, the pursuer had reservations about the wisdom of this course but did not get involved. She did however go to see the property which she properly described as unique. Despite that, she thought they paid over the odds to acquire it at £525,000, a view shared by Mr. McComiskie, a chartered surveyor who gave evidence

for the defender, who thought its proper market value in November, 2000 would only have been about £450,000. At the time the pursuer was residing in Dundee in the home that she had shared with her late husband who had been a bank manager. The area in which the house was situated had deteriorated and, while the pursuer had a number of good friends in Dundee, she was no longer happy in that house, though, in fact, she currently continues to reside there. She described life there as being particularly unpleasant on account of the location nearby of accommodation for homeless persons. A neighbour had been convicted of involvement in drug dealing. She was anxious about her own safety living there on her own. The defender and Pamela Smith were aware of these concerns and Pamela Smith had her own concerns about the pursuer's welfare. They suggested to her that an extension could be built to "The Den" and that she could come and stay there for the rest of her life and that they would look after her. The defender's employment as managing director of M. & S. Toiletries regularly took him away from home for several days at a time and he saw the pursuer's presence as providing company for Pamela Smith. The matter was discussed and the defender agreed that he would deal with all the arrangements if the pursuer would fund the project. An architect was appointed and plans were prepared. There were discussions about the costs. Eventually planning consent for the extension was obtained but it was subject to the condition that the extension could not become a "separate" dwelling house and that the house plus extension would remain a single entity in single ownership. The pursuer, being shrewd by nature and having learned from her late husband about the wisdom of effecting proper steps to protect financial investment, was keen, firstly, that she should have some heritable proprietorship of the extension but she accepted that that could not be done on account of the planning condition preventing that. The defender would not countenance her becoming any kind of co-proprietor, whether pro indiviso or otherwise, of the whole property, nor would he agree to any heritable security in her favour over the property. One cannot help but wonder why if his intentions were always honourable. Pamela Smith was content to consent to the pursuer becoming a heritable proprietor but the defender was not. The pursuer was reluctant to part with her money without any form of security. She suggested to the defender that he get his friend, Mr. Abrams, an Edinburgh solicitor, to prepare a Minute of Agreement but he would not co-operate in that either. The pursuer told me that her intention had been to try to ensure that her contribution to the property would "pass" to her estate, that is to say, that her daughter and her daughter alone would be the ultimate beneficiary. She was aware that the defender had children and she did not want the money she had inherited from her husband to go anywhere other than to her daughter. Having regard to the way things worked out, I regard this passage in her evidence to be of particular significance, that stated intention being consistent with her desire for some form of ownership or security in return for her investment. The defender was always pushing what she described as "the family context" and suggesting that no written agreement was necessary. Eventually she was faced with a take it or leave it situation and gave in against her better judgment. Before handing over any money however she got the defender to agree that in the event of the property being sold, she would get her money back. There was, however, no evidence that Pamela Smith

was involved in that discussion and no evidence that she agreed to such a condition. While it might be argued that his concession might amount to some sort of conditional loan agreement, I have, on balance, come to the view that there was no contract among the parties in the conventional sense and therefore no proper contractual obligation which could form the basis for an action for repayment. I should perhaps add that the fact that the pursuer regarded what had occurred as amounting to a loan does not in any way detract from her credibility or reliability. It is with some hesitation that I have come to the conclusion as a matter of law that what occurred did not amount to a contract of loan and I understand without difficulty how a lay person, even one as well informed as the pursuer, would regard the transfer of money for a purpose which was not a gift, which the transfer of money here certainly was not, as to be characterised as a loan. In the event, she agreed without anything in writing, to fund the building of the extension and builders were duly appointed and the work commenced. Payment was made in three instalments in response to a series of certificates issued by the architects. The pursuer made payment into a joint account in the name of Pamela Smith and the defender with the Bank of Scotland and the builders were paid from these funds. The defender met the architect's fees and certain other minor costs, mainly involving work to the existing building or to the grounds. The extension was duly completed and the pursuer placed her Dundee property on the market for sale. There was no immediate interest. She was asked by Pamela Smith if it would be in order for the extension to be used for a period by a colleague of hers from work who was having a new house built but there had been delays in completion and he had in the meantime sold his existing property. Arrangements were made for the pursuer to be paid rent by this family. Some of the pursuer's furniture was moved by employees of the defender's company in one of the company vehicles. By the time the family who had moved in temporarily had moved out, it had become clear that the defender and Pamela Smith were having difficulties with their relationship. It appeared that it had in fact broken down earlier, but neither of them had told the pursuer. She was aware that the defender appeared to be always grumbling, his disposition not being assisted by a fall from a horse in which he sustained injury. Then one morning when the pursuer was reading her Scotsman newspaper, she saw "The Den," being advertised for sale. The pursuer was appalled. She had parted with her money and might have parted with her house only to find that she had nowhere to go. She sought an opportunity to remind the defender of his undertaking, as she saw it, that she would be repaid her money if the property were sold. Pamela Smith acknowledged that the pursuer should have been told sooner of the breakdown of the relationship and the plan to sell. She further acknowledged that she had at least a moral obligation to repay the pursuer from the proceeds of sale and in due course she paid her £50,000. Settlement was put back to 31 st . March, 2004 and the pursuer wrote to the defender insisting on a meeting prior to that date to resolve what was to happen about her contribution. There was a meeting on or about 8 th . February. The pursuer, the defender and Pamela Smith were present. The meeting was relatively calm. The pursuer made it clear that she would settle for £50,000 back from each of them. The defender offered £25,000 as he was leaving. The pursuer telephoned him the following day. She

requested him to put a written offer to her for her consideration. He said he would, but never did. The pursuer then had to concentrate her efforts on helping Pamela Smith find alternative accommodation. That happened in mid March though what was found was about 50 miles from her work place. She helped her daughter move out of "The Den" and into this new accommodation. All the while she regularly tried to speak to the defender by telephone but he would not return her calls. It was at this time and in response to being ignored by him that she determined that she would seek the repayment of her entire contribution. She said that she had a nephew who had studied law. Amongst other things he directed her to a decision of Sheriff Principal R. A. Dunlop Q. C in Catherine Whyte v Margaret Docherty A514/99, a decision from Arbroath Sheriff Court in which the appeal decision was dated 8 th . January, 2002, on the law of unjust enrichment. She considered that there were similarities between the facts in that case and her circumstances and that the defender here had been unjustly enriched. The architect, Kerr Marshall, wrote to her, in reply to her question, expressing the opinion that the value of the property would have been enhanced by the building of the extension by an amount greater than the cost of building the extension. She dismissed Mr. McComiskie's opinion as "speculative." Cross-examined by Mr. Miller for the defender, she maintained that she had told the defender, in response to his offer of £25,000 in settlement, that that was not enough. She admitted that she had obtained an inhibition against the defender but disputed that there was anything vindictive in her doing so. Prima facie, it appears to me to be a protective remedy she was entitled to invoke and no argument to the contrary was directed to me, though it would be a matter for the superior court, that the inhibition had been improperly sought and she be recalled. She described somewhat melodramatically the difficulties she had encountered in tracing the defender to serve the summons on him. She explained that she had been unimpressed with either of the two sets of solicitors she had consulted about her position and had thus determined to pursue the matter herself. She agreed she had had previous success in a small claims action but she denied being litigious, a patently ridiculous suggestion. She conceded that she could have produced a written agreement either herself or with legal assistance and had not done so and that she could have refused to part with any money in the absence of agreement but she wanted to make the move and while unhappy about not having the position confirmed in writing, was prepared to take her daughter and the defender on trust. She conceded that she had been fond of her daughter's previous partner and stated that she was "neutral" about the defender. The defender had a temper which caused her some alarm. Her daughter had left the pursuer and the defender to determine what the agreement should be saying she would go along with whatever they did agree. The pursuer denied having any real doubts about moving to "The Den." She accepted that there was a point at which she told the defender that she was having doubts but that was in the context of his disinclination to enter into a written agreement. They had rows about that. In one row, the defender had become very angry and had shouted and sworn at her but she had told him that she would not be intimidated. Pamela Smith suggested she should leave, which she did, but it was not her intention not to move to "The Den" as a consequence. None of the money he had spent on the building or ground did

anything to improve the extension as opposed to the building as a whole. He might have spent £20,000 on improvements but none of them were necessary for the extension and some of them, in her view, were unnecessary like, for example, the replacement kitchen, but what they did with their money was not her business. She disputed the suggestion that only a few items of her furniture had been delivered. She listed what appeared to me to be a substantial number of items. She accepted that she had written a letter in which she appeared to be apologising for being indecisive though I remained unclear what it was that she was supposed to have been indecisive about. In the same letter she expressed some anxiety about carpets he was selecting for "her extension," reserving her approval until she had seen them. She agreed that she had also written to him saying, "Please do not offer me any money," but that was in the context of her seeking to persuade him to take "The Den" off the market and at a point where she was confused and distressed by her discovery that it was on the market. She accepted, with the benefit of hindsight, that it had been silly and stupid of her to proceed without a written agreement. However, she was clear that everyone understood that the money was not given as a gift and the defender had acknowledged that in writing. Pamela Smith gave evidence for the pursuer. She told the court she was 47 and that she was the Head of Children's Services for Edinburgh City Council Social Work Department. She agreed with the suggestion from the pursuer that there came a time when the defender appeared to tire of country life, though she could not recall a fall from a horse. She confirmed that "The Den" had been sold and that she did not understand why the defender would not pay back the money from the pursuer which had financed the building of the extension. She acknowledged that the extension would not have been built without the pursuer's substantial financial input. She had paid the pursuer £50,000 from her share of the proceeds. The defender had made an offer which she thought was £25,000 or £30,000. This had taken place in the sitting room in "The Den," in about February, 2004. Ms. Smith recalled that the pursuer had been keen to obtain a written agreement before committing herself to parting with money. She accepted that this had given rise to at least one major row between the pursuer and the defender. Subsequent to this row, the defender had turned off the answering machine on the telephone system apparently making it impossible for the pursuer to telephone to "The Den." She agreed that around this time the pursuer had said that she was not moving in but subsequently she had said she was. She was aware that the terms of planning consent precluded title to the extension being taken in the name of the pursuer as the extended house was to remain in single ownership. She could not recall any discussion about the pursuer taking a share of the title to the whole property. She agreed that the payments made by the pursuer were not gifts. The money was paid to enable the building of the extension. She regarded both the pursuer and the defender as stubborn. She accepted she was at fault in not informing the pursuer of the breakdown of her relationship nor the proposed sale of "The Den," excusing herself saying "I had other things to concern myself about." She accepted that the extension added to "the ambience" of the property. She said that she and the pursuer had discussed buying out the defender but she could not recall his terms. She agreed with the suggestion that what he sought was "prohibitive." The meeting at which a possible

resolution was discussed was a long meeting but there had been no shouting or quarreling on that occasion. She agreed that the defender did have a temper but categorised it as one emerging only "eventually." She did not regard the money paid by the pursuer as being a loan but the funding of the building of the extension for her mother's own use. She accepted that her mother had only had a few nights stay in the extension and had derived no real benefit for her contribution. Cross-examined, her recollection was that her mother's move to "The Den" was first considered in about 2001. There had been a meeting with the architect and planning consent had been obtained. The witness had wanted the pursuer to live closer to her. Builders were appointed and there was a discussion with the pursuer about funding. The tender from the builders would not have been accepted had the pursuer not been prepared to fund the builderworks. She had seen the plans and knew the amount of accommodation which would be provided and agreed that it was a sensible idea. She recalled a total of £100,000 being discussed with the defender stating that he would meet any sum over that amount. She agreed with the suggestion that the money had not been a loan. She had no recollection of any discussion about repayment in the event of the sale of the property. She could not recall any discussion about what would happen to the pursuer's contribution on the pursuer's death. In this respect I prefer the pursuer's recollection but accept that Pamela Smith may not have been party to such discussions and was not a party to the discussion about repayment on sale. She thought that people who came to view the property when it was put on the market in autumn 2003 were impressed with the extension. She considered it to have been nicely built and attractively presented. She agreed that some viewers were not sure what they would do with it. The eventual purchaser appeared to have in mind that the extension would be occupied by an older relative. Ms. Smith agreed that there was a point at which the pursuer had said she was not coming to live in the extension and had offered a series of reasons for doing so. She thought this was around Christmas 2002. The discussion about that became so fractious that she had asked the pursuer to leave. They had had other visitors that day and that had displeased the pursuer. Her attitude was "frustrating." But it did not last. She subsequently asked for keys and was given a set by the defender. She stated that the deterioration in her relationship with the defender coincided with her friend at work being placed in a desperate situation through building delays. I had the impression that this was a convenient excuse to keep the pursuer away at this difficult time. She agreed with the suggestion that the pursuer had not moved much of her furniture into "The Den." However, the defender had resolved an issue about carpets. In re-examination, she was taken through a list of items of furniture most of which she acknowledged having arrived at "The Den." She did not know on what basis the defender had made his offer in settlement. Ms. Smith appeared to be caught in the dilemma of having some sympathy with both sides and not wishing to be giving evidence for either. There were a number of fairly surprising gaps in her recollection but essentially she confirmed the pursuer's position so far as concerns her intention in providing the money and she at least acknowledged a moral obligation to repay the pursuer. She was, unfortunately, not a particularly impressive witness. The pursuer's proof then closed and the defender gave evidence on his own behalf. He

confirmed that at the material time he and Pamela Smith had a joint bank account. A statement of the contents thereof at the material time was lodged as a defence production 6/1/1 of process. It demonstrated that payments totalling £106,315 had been paid into that account by the pursuer. He agreed that the payments matched those due to the builders certified as due in interim certificates and a final certificate issued by the project architects for the extension to "The Den." He agreed that, in effect, he had paid the builders using the funds supplied by the pursuer. He agreed that this was a figure reflected in earlier estimates that she had agreed to fund. He, on the other hand, had met the costs of a series of improvements to the existing property which he assessed as having cost in the region of £27,000 on top of which he had paid the architect's fees of £9,700 approximately. He agreed that there had been meetings between himself and the pursuer substantially but denied at any time saying that she would get her money repaid if the property were to be sold. I did not believe him. He accepted that the construction of the extension would not have gone ahead had the pursuer not funded it. He accepted that there had been some discussion about ownership but founded on the position necessarily arising out of the decision of the planning authority that as a condition of planning consent for the extension, there would be a requirement that there would be no division of ownership of the original property and the extension. There was no discussion, he claimed, about the pursuer becoming part owner of the whole property. He believed that there had been some discussion about "security." He did not recall any fuss about reducing the agreement to writing, in particular about asking Mr. Abrams, the solicitor, to produce something. I did not believe him in relation to these matters. He maintained that there was nothing, of course, to prevent the pursuer from preparing a minute of agreement or similar. He did acknowledge that the original plan was that the pursuer would occupy the extension for the rest of her life. He did not recall any discussion about the pursuer's desire to ensure that on her death her estate would inure to the benefit of her daughter only. I did not believe him. He agreed that it was Pamela Smith who was the prime mover in the plan but that he was "happy" about what was planned. I have reservations about the extent to which that was ever true, but if it ever was, then as time passed, it ceased to be the case. He maintained there was a time when the pursuer turned up in her car and the minute she got out of it she said to them that she had made a decision that she was not coming to live in "The Den." He said that attempts to persuade her to reconsider ended in a heated argument when the pursuer was ultimately asked to leave. At that time, the work had been completed. The pursuer was making excuses about the sale of her own house for not coming. He said she went on about her good social life in Dundee and her concern about missing out on activities she enjoyed. He said this seemed to him to be a final decision. He agreed that one of his company's vehicles had been used to transport belongings and furniture from the house in Dundee to "The Den," but it was not clear when that was. He suggested that only a very small number of items were released by the pursuer for transfer. I preferred her evidence, supported by Pamela Smith, eventually, about this issue. He agreed that it was during the period that Pamela Smith's work colleague and his family were occupying the extension that the relationship between Pamela Smith and himself broke down. He maintained that up to this

point there was no sign of the pursuer wanting to move. This did not appear to me to be consistent with his delivering to her a set of keys for the extension in May, 2003. He confirmed the details of the sale of the property and that this represented an increase of £175,000 over the price he and Pamela Smith had paid for it. He said that he had never met Mr. McComiskie, the chartered surveyor who was to give evidence on his behalf, and had made no effort to influence him. As we shall see, this much, at least, appeared to be true. He claimed to have been disappointed with the resale price achieved considering that the value of the property had been significantly enhanced at his expense. That claim did not survive perfunctory examination. That however was the basis of his discussion with the pursuer in February, 2004 when he declined to repay her what she had paid for the extension. He described her at that meeting as "pontificating about a lot of things." He considered that he would have been "considerably out of pocket" if he had agreed to pay her £56,000 which was what she was seeking. He offered her £25,000 and when she had said "no" he told her that he would see her in court. That, I consider, is a reasonable indication of how this experienced businessman considered it appropriate to deal with the pursuer. He then claimed that she had telephoned him from Dundee saying that she would accept his offer. He told her to put it in writing. She never did. I prefer the pursuer's evidence about this exchange. Cross-examined by the pursuer, he declined to disclose his income. He denied having a low opinion of the pursuer. He agreed that there had been a discussion about a buy-out of his interest by the pursuer and Pamela Smith but denied that the figures proposed had been prohibitive. He maintained that in arriving at a figure of £25,000 as his settlement proposal he was taking into account all the expenditure that he had incurred in having improvements carried out to the property and in the light of what that had cost him £25,000 was a reasonable compromise. It was not easy to see how it could be. In any event, there was no longer any figure on offer to the pursuer. He further maintained that the pursuer had told him that she did not want the money back and that he should "give it to Pam." He accepted that the pursuer had not intended to give him the money as a gift but to pay for the construction of the extension for her use. He accepted that that plan had not come to fulfillment but that he had not repaid the whole of the money contributed to the plan by the pursuer. He denied not having a conscience and maintained that he was "reasonably comfortable" with his decision not to repay. Shown the calculation produced by Mr. McComiskie, he admitted that he did not understand it. Finally he maintained that in execution of her decision not to proceed further with her plan to move to "The Den," the pursuer had taken her property in Dundee off the market for sale. He maintained she had a wildly over optimistic opinion of its value. I did not form a good impression of the defender. In a number of material respects in which his evidence differed from that of the pursuer I did not believe him. I accept that there was a point in time when the pursuer did say she was not going to come but she did not persist in that position and to suggest the contrary as he did is misleading. Given his unexplained intransigence over reducing the parties' agreement to writing, it is unsurprising that there were times when the pursuer was reluctant to leave the security of her present home. The final witness was David McConnachie, a 52 year old chartered surveyor. He was a member

of the Royal Institute of Chartered Surveyors. He had been a partner in his present firm since 1988. He was an experienced professional dealing with land and property values. He accepted that his specialty was industrial property throughout the Lothians and in Fife. He agreed that in the present case he had been asked to consider the extent to which the new extension to "The Den" had contributed to the increase in the sale value of the property from £525,000 in November, 2000 to £700,000 in December 2003. The new owners had been very accommodating in this respect. He had, he considered, a clear idea about what had been done to the house during the ownership of Pamela Smith and the defender. He thought in some respects that the construction of the extension was "disappointing." It was typical of a modern house, using softwood rather than hardwood which would have been more appropriate. However, having regard to all the factors drawn to his attention, it was his opinion that the extension had enhanced the value of the property by the time of sale in December, 2003 by £132,000. He considered that the defender and Ms. Smith had paid over the odds for the property when they purchased it. He considered that property values in West Lothian had increased by about 30% during the period between purchase and sale. He thought the property in November, 2000 would have been worth about £450,000 without the extension. A 30% increase would take the value to £585,000 or thereabouts. That appeared to leave an increase of £125,000 which could only be explained by the extension. He had not taken account, in arriving at his figure of £132,000, of the cost of improvements to the existing property taking the view that they would otherwise enhance the value of the existing property. Reference was made to his report which appears to be 6/3/1 of process in which at page 3 he says in terms, "There is, in our view, no doubt that the extension to the property has contributed to the resale price obtained in December 2003 and we have further calculated that the proportion of the value pertaining to the extension at that time was in the sum of £132,000." Mr. McComiskie in his report then proposed a formula which I could not understand when I read it and he appeared to be at a loss to explain in the course of his evidence. It seemed to me that the increase in the value of the property of £175,000 could only be utilised as it appeared to be being attempted to be utilised had there been no alteration of significance in the layout and size of the property. Similarly, he was at a loss to explain his conclusion that the pursuer's contribution had enhanced the value of the property by only £28,000. It seemed wholly illogical that an extension built at a cost of £106,315 would only enhance the value of the whole property by £28,000. Cross-examined by the pursuer, he agreed that the defender and Ms. Smith had paid too much for the property. It was, however, a very attractive country property and he thought that its remoteness was an attraction in terms of its marketability. He accepted the design of the extension was unusual but complementary to the property, even if he remained disappointed by the quality of the wood used. His evidence appeared to take the defender and his solicitor somewhat by surprise. I, however, have no hesitation in regarding him as entirely credible and to be a professional highly experienced in valuing property in West Lothian and whose opinion about aspects of the value of property commands respect. The pursuer was perhaps a little uncharitable in dismissing his opinion as wholly based on speculation. Where I do have a difficulty is with the production comprising his report and

the opinion expressed there about the amount, £28,000, by which, he claimed, the pursuer's contribution of £106,315 enhanced the purchase price. He could not explain his formula to me nor to the defender's solicitor and accordingly I was not prepared to regard that aspect of his opinion as soundly based. In any event, it appeared to be sharply at odds with his opinion otherwise. Turning to the law, the pursuer directed me to a number of authorities. With all due respect to her efforts otherwise, in this respect she has caused me some difficulty with some of the reports etc to which she made reference by her failure to ensure proper citation. She did however refer me to p.396 of the 11th edition of *The Law of Scotland* by Gloag and Henderson and in particular to paragraphs 24.22 and 24.23 on the subject of the contract of loan generally and the loan of money in particular. In para.24.22, the learned authors distinguish between a commodate loan on the one hand and mutuum on the other. At paragraph 24.23, the following statement is offered as representing the law as at February, 2001, namely that "as a general rule, a loan of money is characterized by an obligation, on the borrower, to repay, subsequently, the amount lent; this distinguishes it from an advance which concerns a 'pre-payment' (i.e. an advance involves 'future consideration.')

However, the Inner House held that 'payments....which are only made because of some possibility occurring in the future,' may, nonetheless, constitute 'a loan rather than an advance for future consideration.' It was acknowledged that 'the distinction....between a loan which is recognised as such by the parties concerned and which is only made because the lending party has an expectation as to some future event on the one hand, and on the other hand an advance which is made towards a future debt which the grantor of the advance will require to meet in the future if certain eventualities occur' might 'be a narrow one.' The passages quoted are extracted from the Inner House decision in *Graham-Stewart v Feeney* 1995 GWD 35-2048. The pursuer further reminded me that, through a combination of sections 1 and 11 of the Requirements of Writing (Scotland) Act, 1995 that it was no longer necessary to prove a contract of loan by reference to the defender's writ or oath and that a contract of loan could now be constituted orally and proved *prout de jure*. Having regard to the evidence which I should believe and the law as referred to by her, the pursuer maintained that there was here a contract of loan and that I should have regard to the defender's admission that he had not made any repayment. A loan was repayable on demand and I should accordingly now grant decree as craved. Under reference to the same passages from Gloag & Henderson, Mr. Miller, for the defender, submitted that, having regard to the evidence from the various witnesses which on this issue was scarcely contentious, that the evidence did not demonstrate the existence of a contract of loan. At paragraph 1705 of Volume 13 of the *Encyclopaedia of the Laws of Scotland*, mutuum is defined as a loan for consumption in which the borrower is bound to return not the same thing, but the same quantity of that kind and quality at the end of the period of the loan. At 1706, the essentials of mutuum are said to be agreement on the respective parts of the lender and borrower, delivery of a fungible to the borrower for consumption, with an obligation on the borrower to restore the equivalent at the end of the period of loan. "A fungible is that which is estimated according to the quantity, and is not easily discernible nor noticed in the individual or particular body, but only in the like

quantity of the same kind.....that is to say, things consisting in number, measure, and weight. Bread, corn, wine and coal are examples of fungibles; but the most important is money." The statements in quotations are from Stairs Institutions at I.11.1 and I.10.2. There must be delivery of the relevant fungible. There must be an obligation to return the fungible in kind at the end of the period of loan. In the light of the foregoing statement of the law in regard to the essentials of the contract of loan, I agree with the defender's submissions that there is no evidence here of the creation of a contract of loan. Most fundamentally, there is no evidence of borrowing with a correlative obligation to repay as opposed to the payment of money for a particular purpose which, had it come to fruition, would have eradicated any question of repayment of money. The pursuer's alternative proposition was that the defender and her daughter had been enriched by her to the tune of £106,315 and that her daughter having repaid her £50,000 from the proceeds of sale of "The Den," the defender should now pay the remaining £56,315. I should perhaps record that no argument was proffered before me by either party in relation to joint and several liability or to any residual liability on the part of Pamela Smith and I have not therefore considered what obligations, if any, she might have. In particular, it was the pursuer's submission that the circumstances here were an illustration of the *condictio causa data, causa non secuta*. In support of her submission, she referred me to the decisions at first instance by my colleague, Sheriff C. N. R. Stein at Arbroath and on appeal to Sheriff Principal R. A. Dunlop Q. C. in the cause of Catherine White v Margaret Docherty , A541/99 from Arbroath Sheriff Court where the decision at first instance was promulgated on 8 th . January, 2002 and the decision on appeal was 4 th . March, 2003. It was the pursuer's submission that the facts in this case so closely resembled those in hers that I would be bound to reach the same conclusion. Part of the difficulty about that argument was that the reported decisions arise out of a challenge to the relevancy of the pursuer's pleadings rather than following a proof. However, the court reached its conclusion on averments that the pursuer had been unsettled following the death of her husband and after a period of unsettlement went to live with the defender, her daughter, in Carnoustie. The defender had suffered redundancy and was in arrears with her mortgage. The pursuer gave the defender £20,000 "in contemplation of her spending the rest of her life living with her." Certain further payments followed leading to a total of £25,762.22 all further payments being made on the same basis. It was conceded in the defences that the pursuer's intention was that she would reside with the defender for the rest of her life. However, the pursuer returned to Glasgow in 1997. She then raised the action claiming that the defender had been unjustly enriched. The defender did not dispute receipt of the payments. The defender argued that the pursuer's averments were irrelevant to support a case based on unjust enrichment. There was no averment that the defender had terminated the arrangement, the pursuer having elected to return to Glasgow . This had not been a loan so the pursuer was not entitled to repayment on demand. She would require to establish, in effect, that she had been put out of the defender's house if she were to succeed and she did not aver that that had occurred. It was argued for the pursuer that the case was based on unjust enrichment though it appeared to be recognised that the *condictio causa data, causa non secuta* might

not be apposite. Here the purpose for the payment had materialised, and so could not be said not to have materialised, an essential element for that form of claim for unjust enrichment. It was conceded that the pursuer brought the arrangement to an end herself. It was argued that this had the potential to fall under the *condictio sine causa*. The pursuer focused on the purpose of the payments, maintaining an argument that the issue of fault or blame was irrelevant, the question being whether the purpose for which the money had been paid over had been fulfilled or not. At page 3 of his judgment, Sheriff Stein quoted the passage from *Stair's Institutions* 1 vii 7, which seems to be to be apposite here. "The duty of restitution extendeth to those things, quae cadunt in non causam, which coming warrantably to our hands, and without any paction of restitution, yet if the cause cease by which they become ours, there superveneth the obligation of restitution of them; whence are the conditions in law, since *causa* and *causa data*, *causa non secuta*, which have this natural ground, and of which there are innumerable instances, as all things that become in the possession of either party in contemplation of marriage, the marriage, which is the cause, failing to be accomplished, the interest of either party ceaseth, and either must restore." That statement of principle reflects the state of fact that most actions for restitution of this kind arose historically out of "agreements" to marry which never came to pass. There can, of course, be no question of being partly married, whereas there can be a question, I suppose, of being partly accommodated for the rest of your life. Sheriff Stein also made reference in his judgment to *Shilliday v Smith* 1998 SC 72, as did the parties before me, this being the only modern decision from the Inner House on the subject of unjust enrichment to which I was referred and I will return to it later. Sheriff Stein drew from that decision that unjust enrichment and the relative remedies of repetition, recompense and restitution may arise in innumerable situations and drew attention to the extract from the judgment of Lord Cullen in *Dollar Land (Cumbernauld) Limited v CIN Properties* 1997 SLT 260 (at 271D-E) quoted with approval by the Lord President in *Shilliday* when he had said, "a person may be said to be unjustly enriched at another's expense when he has obtained a benefit from the other's actings or expenditure, without there being a legal ground which would justify him in retaining that benefit." The Lord President (Rodger) went on himself to observe that one of the situations to which the description of unjust enrichment could be attached arose where "property comes into someone's hands on a particular basis which then ceases to exist;" that he categorised as being the *condictio sine causa*. That description, in my opinion, aptly summarises the position in the present case. Helpfully, Sheriff Stein goes on to quote a passage from the judgment of Lord Caplan about the risks of categorisation, when he said, "There are many situations where the law has confirmed that unjust enrichment can arise and there has been a tendency to categorise them. However, this process should not deflect from the underlying equitable foundation of claims based on such categories. What makes it fair and reasonable that recompense, restitution or repetition should be made to the party who originated the enriching benefit is that it would be unjust that a party should be enriched at the expense of another when in the circumstances no such enrichment was intended." On the view I have reached about the facts of the present case, that helpful broad brocard eminently

encapsulates the situation. *White v Docherty* was appealed to the Sheriff Principal who refused the appeal. It appears from his judgment that counsel for the appellant concentrated on whether the averments made in support of her pleas in law justified the remedy of repetition sought by the pursuer in the case. Counsel for the respondent concentrated on equitable considerations, resisting a contractual analysis. The Sheriff Principal agreed with the submission that it would be inappropriate to follow an analysis based essentially on an English legal text-book, albeit it apparently had received the imprimatur of the then Lord President Rodger, in the face of the contents of *Stairs's Institutions* and the Inner House decision in *Shilliday*. He observed that while the decision in *Shilliday* was directly concerned with an illustration of the operation of the *condictio causa data, causa non secuta*, which in opinion, technically speaking, is what arises in the present case, the opinions extended more widely and provided valuable guidance on the question of unjust enrichment generally, the different *conditiones* merely identifying categories in which the same underlying basis of claim for unjust enrichment can exist. I respectfully concur with that observation. I further respectfully agree that any analysis of the facts in a matter of this nature starts with the focus of attention on the person allegedly unjustly enriched. If the cause or basis for the payment has ceased to exist or, even stronger in my opinion, never came to pass, there is ground for one of the remedies reflecting a state of unjust enrichment. I again respectfully agree with the focus, flowing from the observations of Lord Caplan, that a determination is required of whether the beneficiary should be allowed to retain a benefit it was never intended he should receive rather than litigation only being justifiable if the right category is pled and is supported by facts which fit into that category. Sheriff Principal Dunlop's comments on how to deal with conflicting averments at proof as to who caused the breakdown in the relationship and what regard should be had to that in the context of determining whether there has been unjust enrichment are also resonant in respect of the present case. Two issues were raised by the defender. The first was based on a line of evidence that the pursuer had conclusively determined not to come and occupy the extension. I have rejected that line having regard to the evidence that I have held established but, in any event, had I been with the defender, I consider that such a conclusion would not have been determinative, but merely one of the factors, in concluding whether or not there had been unjust enrichment. The second issue, which seemed to me to be substantially speculative, not referred to in the pleadings and not supported by any evidence which I have held established, was that the pursuer had mischievously contrived to cause the breakdown of the relationship between the defender and Ms. Smith. I have not found any support for this approach in my findings-in-fact but again, had I done so, I would not have regarded such a state of affairs as necessarily conclusive of the position. Mr. Miller, for the defender, did refer me to Stewart on Restitution at para.5.42, on the preceived importance of "good faith" on the part of the seeker for a remedy based on unjust enrichment but as Mr. Stewart makes clear "it is not clear precisely how it operates in unjust enrichment." In any event, I have not found that the pursuer acted with any lack of good faith. In fact the contrary is true. If there was any lack of good faith in the present case, it was on the part of the defender. Turning to the

decision in *Shilliday v Smith* 1998 SLT 976, this was a case based upon the *condictio causa data, causa non secuta* and, if you like, was an example of the typical case of that type, perhaps with a degree of modern variation, based upon the failure of a promise of marriage to materialise. The parties were living together in one cottage and were working together on the reconstruction of another cottage, of which the defender was the heritable proprietor, on the basis that they would marry and reside there. The work was completed over about an eighteen month period and involved both time and financial commitment by both parties. At the end of that period, the relationship between the parties broke down and the defender ejected the pursuer from the newly refurbished cottage. She sought the return of her expenditure for materials - a claim for recompense in other words - and also for repetition of money paid to the defender which he had used to purchase materials or pay tradesmen - on an averment that she had made various financial contributions to the reconstruction works "in contemplation of her prospective marriage to the defender and her relationship with him." It seems to me in the relative short period from the time that this case was determined that whether or not marriage was contemplated would no longer be a necessary material fact, so long as a party was able to aver that a financial contribution, and probably also the provision of services including physical labour, had been made in contemplation of the parties residing together, "permanently," though it clearly was a critical issue in *Shilliday's* case. The pursuer was successful at first instance and the defender's appeal to the Sheriff Principal was also unsuccessful. He was equally unsuccessful in the Inner House. Lord President Rodger at p.978, having referred to the passage earlier quoted from the judgment of Lord Cullen, went on to observe that some of the situations where a person could be regarded as having been unjustly enriched loosely corresponded with some of the classifications of actions from Roman law - though I observe that inherent in that observation there would appear to be the suggestion that there are types of unjust enrichment which may not correspond with any such classification and that broad principles are more important in this area of law than is any question of having to fit into a particular classification. He found it unnecessary to examine all the classifications and instead opined that "the term *causa sine data, causa non secuta* covers situations where A is enriched because B has paid him money or transferred the property to A on a particular basis which has failed to materialise - for example, in contemplation of a marriage which does not take place." He then goes on to discuss the appropriate remedy (978F onwards). "The person framing the pleadings must consider how the defender's enrichment has come about and then search among the usual range of remedies to find a remedy or combination of remedies which will achieve his purpose of having that enrichment reversed. Elementary examples make this clear. For example, if A has been unjustly enriched because he has received a sum of money from B, the enrichment can be reversed by ordering A to repay the money to B. B's remedy will be repetition of the sum of money from A." He goes on to give illustrations of case where restitution, reduction and recompense would be appropriate remedies, concluding with the observation that "often, of course, the situation will be complex and the pursuer will require a correspondingly sophisticated set of remedies to reverse the enrichment." In the

present case, it seems to me that it might have been arguable that the pursuer could have claimed an element of recompense on account of the degree of enhancement of the value of the property by the incorporation into it of the extension which she had financed, and I have in fact reached the conclusion that it did enhance the value of the property by £132,000 on the basis of evidence from the defender's surveyor, but she elected merely to seek repetition of the balance of the sum she had paid out which had not been repaid to her by the defender or Ms. Smith. As I see it, either of these would potentially have been competent remedies and the law is by no means so fixed as to require a single remedy for a given set of circumstances. That, in my opinion, is clear from the Lord President's opinion hereinbefore referred to. This is important in the present case as, with respect, it seemed to me that Mr. Miller fell into the trap of focusing on the propriety of the remedy and spent a great deal of time and energy wastefully trying to demonstrate that any amount by which the pursuer should be recompensed should be reduced if not extinguished by the defender's financial contributions to the improvements to the property. Unfortunately, even on a recompense basis, that approach was wholly undermined by the evidence of his own expert. But he simply did not deal with the remedy of repetition which, having regard to Lord Rodger's explanation, might properly be regarded as at least the primary remedy where the unjust enrichment is effected by the payment of money. In my opinion, the remedy of repetition is, in fact and law, the most appropriate in the present case and I have given effect to it. I recognise that what the pursuer did was pay money to her daughter with the intention that that money should be used to pay for the construction of the extension and it has been demonstrated and not challenged that the money in fact went into a joint bank account of Ms. Smith and the defender and out of that account as required to pay the builders. The property was in the joint pro indiviso proprietorship of both the defender and Ms. Smith and they have both been unjustly enriched to the extent of £106,315. I have held it to have been demonstrated that Ms. Smith has repaid £50,000 leaving the balance of £56,315 for which I have granted decree. Strictly this amount is due by both the defender and Ms. Smith but no point was taken about Ms. Smith not being a party to this action. I consider it appropriate therefore to grant decree against the defender, being the only defender, as one of the parties from whom the pursuer is entitled to seek repetition. What he chooses to do about the position between him and Ms. Smith is a matter for him and outwith the scope of this litigation, in my opinion. Finally, while I would expect expenses to follow success, since I was not addressed by either party to that effect and there may be issues pertaining to expenses on which I would require to be addressed, I have assigned a hearing on expenses. [BAILII: Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#) | [Donate to BAILII](#)

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