

SCOTLAND / JUDGMENT

Thomson v Mooney (AP) [2013]

ScotCS CSIH_115 (24 December 2013)

[2013] ScotCS CSIH_115

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[2013] ScotCS CSIH_115 [New search] [Help] EXTRA DIVISION, INNER HOUSE, COURT OF
SESSION

[2013] CSIH 115 Lord Eassie Lord Bracadale Lord Wheatley A171/11 OPINION OF THE COURT
delivered by LORD EASSIE in the Reclaiming Motion by BRIAN JAMES THOMSON Pursuer
and Reclaimer; against ELIZABETH MARIE MOONEY (AP) Defender and Respondent:

For the pursuer: G M Henderson; Campbell Smith WS, LLP For the defender: Innes; Balfour +
Manson LLP December 2013

- [1] This reclaiming motion is primarily concerned with the appropriate starting date for the running of time for the purposes of the five year negative prescription enacted under section 6 of the Prescription and Limitation (Scotland) Act 1973 in the context of a particular claim for recompense based on unjustified enrichment.
- [2] The Lord Ordinary's interlocutor upheld the defender's plea of prescription and the pursuer reclaims against that decision. The pursuer avers - and the defender admits - that the parties formed a relationship; in 2005 they became engaged to be married, an engagement ring being purchased by the pursuer for the defender; and they began to cohabit. In June 2005 the parties bought a house in Airdrie, the ownership of which was joint - each having a one-half pro indiviso share - and title was so recorded in the Land Register. However, the purchase and consequent joint ownership was funded by a sum of £70,000 provided solely by the pursuer, the whole balance of the purchase price being obtained by means of a secured loan from a lending institution (Bristol & West plc). Both parties were liable for the repayment of the loan to that institution.

- [3] The pursuer goes on to aver that in September 2007 the parties separated following the occurrence of a breakdown in their relationship, with the contemplated marriage not having taken place. There is, on the pleadings, a dispute whether the separation took place then, or earlier, in May 2007 to be followed by some attempted reconciliation but that is accepted as being immaterial to the primary issue in the reclaiming motion.
- [4] In the first conclusion of the summons the pursuer seeks payment of £35,000, being one-half of the sum which he provided on the purchase of the parties' house in Airdrie, which, as already mentioned, was jointly owned by them. (The house has now been sold and the free proceeds have been placed on deposit receipt pending resolution of the parties' dispute). The ground upon which the pursuer seeks that sum of £35,000 is that the funds which he provided for the purchase of the house were so provided on the basis that the parties contemplated marriage and that the house was purchased by them in contemplation of that event; and, since that event has not occurred, the defender is thereby unjustifiably enriched by having received ownership of a one-half share in the house by reason of the pursuer's financial contribution of £70,000.
- [5] For completeness, we should add that the pursuer advances a second conclusion for recompense on the basis of unjustified enrichment of various sums later advanced respecting the defender's business but his claim in that respect is not challenged as being prescribed or irrelevant. For her part, the defender has a counterclaim for repayments of capital and interest which she avers she made to Bristol and West and also to the Royal Bank of Scotland in respect of loans for which both parties were jointly and severally liable. Neither of these aspects of the dispute between the parties is relevant to the question whether the obligation to make recompense of the sum sought in the first conclusion of the summons has prescribed.
- [6] Counsel for both parties were at one in accepting that the starting point for the running of the five year period for the purposes of the negative prescription under section 6 of the 1973 Act is the date upon which the averred obligation to make recompense to the pursuer became enforceable. The defender's contention is that the obligation to make recompense arose, and became enforceable, in June 2005 when the house was acquired with the pursuer's funds. The five year period accordingly expired in June 2010. The summons was, however, not signetted until 6 April 2011 and accordingly the obligation upon which the pursuer founds had by that time been extinguished by the operation of the negative prescription. The pursuer however contends that the obligation to make recompense only arose, and therefore only became enforceable, when the parties separated in September 2007 (or May 2007 - it matters not for present purposes) and the engagement to marry came to an end. While the enrichment of the defender occurred in 2005 it only became an enrichment which was unjustified on the occurrence of the separation and the ending of the engagement to marry in September or May 2007.

- [7] In our view it is clear that the claim which the pursuer advances is an example of a well recognised category of unjustified enrichment, commonly described by reference to the Roman law term *condictio causa data causa non secuta*. The case of *Shilliday v Smith* 1998 SC 725 is a relatively recent illustration of the obligation which arises by operation of law where one party enriches another in the joint contemplation of marriage but the relationship comes to an end and the marriage fails to take place. The matter is expressed thus in *Stair, Institutions I vii 7*: "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 condictions in law, ob non causam 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....".
- [8] The passage from *Stair* which we have just quoted appears to us to identify the key to the creation and hence enforceability of the obligation to make recompense in a claim based on *causa data, causa non secuta*. Where enrichment has occurred in contemplation of a future event taking place, but that event fails to occur, it is only on that event failing to occur that the obligation to make restitution or recompense arises and becomes enforceable. As *Stair* puts it "...the marriage, which is the cause, failing to be accomplished, the interests of either ceaseth and either must restore". In our view, logically, that must be so in any case in which the basis of the obligation to make recompense or restitution of an enrichment as unjustified is based on a situation embraced by the *condictio causa data causa non secuta*. For so long as the cause in contemplation of which the enrichment was conferred is still in contemplation or still to be provided, and its accomplishment has not yet failed, the enrichment cannot be said to be *sine causa* and thus cannot be said to be unjustified.
- [9] In the present case the Lord Ordinary, while recognising that the obligation upon which the pursuer's claim was based was the *condictio causa data causa non secuta*, nonetheless proceeded to reach the view that the want of justification for the enrichment - and hence the obligation to restore or recompense - existed from the moment of the enrichment itself. In paragraph 12 of his opinion the Lord Ordinary says: "[12] In the present case, when the parties acquired the house at.....title was taken in their joint names. Consequently when the pursuer paid £70,000 towards the purchase price of the house, the inevitable result was that the defender was enriched by the payment of half of that sum through her one half pro indiviso share in the property. The first requirement of recompense was accordingly satisfied. The critical question is whether the second requirement, the lack of any legal ground which would justify retention of the benefit, also existed. In my opinion it did. The defender's acquisition of her share in the house was funded in part by the payment made by the pursuer out of his own resources. Her receipt of the benefit of that payment was entirely gratuitous, and no basis was suggested in which she would have been entitled to retain the benefit. No doubt in some cases of this nature there may be an intention to make a gift, but

that would clearly be inconsistent with obligation to make recompense and the pursuer would fail on that ground, without regard to prescription". In the succeeding paragraph [13] the Lord Ordinary goes on to say:

- [13] For the pursuer it was submitted that the critical feature that distinguished this case from *N. V. Devos Gebroeder* [1] was the averment that he paid the £70,000 on the understanding that the parties would be married and would continue to live together. It was only when the parties separated that the enrichment of the defender could be described as unjust. In my opinion this argument is misconceived. There is authority that, where property is transferred in contemplation of marriage but the marriage does not take place, the party who receives the property is under an obligation to restore it under the *condictio causa data causa non secuta* or the *condictio sine causa*: *Stair, Institutions*, I vii 7, cited in *Shilliday* at 729. Nevertheless, the underlying ground for recompense or repetition is that in such a case there is no legal ground for retaining the benefit, and that absence of a legal ground is present from the outset. If the marriage does supervene the transfer may well be converted into an outright gift, but that does not affect the pre-existing position. Thus, for example, if a man transferred funds to his fiancé in contemplation of their marriage but then discovered that he required the money to pay a debt and thus avoid sequestration, there can be little doubt that he would be entitled to return of the money at once. This indicates very clearly that there is no legal ground for retention of the money even during the period prior to the marriage".
- [10] With all respect to the Lord Ordinary, we have come to the view that the legal analysis made by him in those paragraphs is not sound. He takes the view that from the very moment of the purchase of the house the pursuer was entitled to the instant return of his funds, should he require or merely ask for such a return. There is of course no suggestion that the parties to this action ever entered into a contract whereby the pursuer lent money to the defender in respect of the purchase of the house. We have difficulty in understanding the Lord Ordinary's statement that the defender's "receipt of the benefit of that payment was entirely gratuitous and no basis was suggested in which she would have been entitled to retain the benefit". A gift is not repayable at the whim of the donor simply because it is entirely gratuitous. In its very essence, a donation is not normally repayable. A gift may, however, exceptionally, become repayable if it is made in the contemplation of a particular happening, for example in contemplation of marriage which does not take effect; but, in that event, it only becomes repayable on the abandonment of the agreement to marry. For so long as the agreement or contemplation of marriage persists, and is not broken off, the recipient of the gift has cause for retaining it. We would add
- with reference to the penultimate sentence of paragraph [13] of the Lord Ordinary's opinion - that, of course, a gift may be repayable at the instance of the trustee in a sequestration of the donor's estates, were the donor insolvent at the time of donation, but that obligation to repay is based on the special fact of insolvency and requires the consequent annulment of the gift as a gratuitous alienation.

- [11] It is, we think, important to notice when considering the authorities on the topic of unjustified enrichment, including *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1996 SC 331, to which the Lord Ordinary refers, that an obligation to make good an unjustified enrichment may arise in a great variety of situations. In some the unjustified nature of the enrichment is present from the outset; but in others the want of justification occurs only later in time when something happens to remove the initial justification for the enrichment.
- [12] Before the Lord Ordinary the defender placed reliance upon the decision in *NV Devos Gebroeder v Sunderland Sportswear Ltd* 1990 SC 291 as supporting the view that the obligation on which the first conclusion of the summons was based became instantly enforceable when the defender in the present case was enriched by her being given a one half ownership of the house in 2005. But, in our view, that decision has no real application or relevance to the present case. Put shortly in that case, the sellers having been in material breach of contract were, on that account, without any contractual remedy for recovery of the price of the textiles supplied. The decision held that the absence of a contractual remedy existed from the moment of the breach; the legal or forensic error of the sellers and their advisers was to think that they could await a judicial determination to the effect that they were in material breach and therefore without contractual remedy as providing the moment at which a claim in recompense might first arise. In those particular circumstances, any claim by the sellers that the purchasers were unjustifiably enriched arose at the moment of the enrichment, the sellers being then already in material breach of contract and thus without contractual remedy. Hence the view expressed by the Lord President (Hope) at page 301: ""Thus the only remedy available to them, having in material breach of contract delivered defective goods to the defenders, was a possible claim quantum lucratus to the extent to which the defenders had been enriched. That claim came into existence as soon as the defenders were lucrati following receipt of the defective goods. It came into existence when all the facts necessary to establish it had occurred, and from that moment the pursuers were in a position to make a relevant claim for recompense based on those facts".
- [13] In *Virdee v Stewart*
- [2011] CSOH 50, upon which reliance was also placed by the defender before the Lord Ordinary, the facts were that the defender, Mr Stewart, inherited a croft and the pursuer, who was his sister, arranged with him to construct a house - seemingly a holiday house or secondary residence for herself and her family - on the croft land. The construction was effected by the pursuer knowing the land to belong to the defender and with his consent. The informal arrangements averred included the defender's having access to, and use of, the house when it was not in use by the pursuer or her family or let to holiday tenants. At a point in time substantially more than 5 years after the construction of the house (which was completed in August 1994) during which period both parties had, on averment, enjoyed to varying degrees the use of the house, the relationship between the brother and sister deteriorated and the brother excluded the pursuer from any use of the house. The Lord Ordinary (Lady Smith) in upholding the defender's plea that any obligation to make

recompense had prescribed, observed - at paragraph

- [25] of her opinion - that the claim could not be assimilated for example to a case of expenditure in contemplation of marriage and could not be seen as a case in which the *condictio causa data causa non secuta* might be prayed in aid. The decision accordingly does not assist the defender in the present case. We would add that, as has been remarked by Dr Martin Hogg in his article in the *Edinburgh Law Review* *Unjustified Enrichment Claims: When Does the Prescriptive Clock Begin to Run?* *EdinLR* Vol 17, p405 - which also comments critically on the Lord Ordinary's decision in the present case - no argument was advanced to Lady Smith that the *condictio ob causam finitam* was open, or might have been open, to Mrs Virdee.
- [14] For the reasons which we have set out, we consider that the Lord Ordinary fell into error respecting the starting point for the effluxion of time and that his decision to uphold the defender's first plea-in-law must be reversed.
- [15] As we have indicated, the primary issue in the reclaiming motion was the prescription issue. The other point argued before the Lord Ordinary concerned the relevancy of certain averments made by the pursuer regarding the nature of the parties' respective employments during their cohabitation and the operation of their bank accounts. The Lord Ordinary accepted the submissions as to relevancy advanced by counsel for the defender and excluded certain averments [2] . While on a strict view of the pursuer's claim alone, those averments might be said to be irrelevant, counsel for the pursuer explained that the making of those averments was prompted by the simple fact that in her answers to the articles of condescendence the defender herself alleged improper abstraction of funds from various bank accounts. The transactions on the bank accounts which occurred during the cohabitation were also raised by the defender in her counterclaim, there being a dispute as to who had made repayments of capital and interest to the lenders.
- [16] Before us counsel for the defender did not take any serious issue with that explanation and submission. Given that in her answers and counterclaim the defender has chosen to raise matters of income and expenditure transactions, we agree that the pursuer is entitled to the liberty to respond in his pleadings to those averments.
- [17] We therefore grant the reclaiming motion. We accordingly recall the interlocutor of the Lord Ordinary of 23 November 2012. We repel the defender's first plea-in-law. We allow to parties a proof before answer on their respective averments. We remit to the Lord Ordinary to appoint the date upon which such proof should proceed. But in respect of questions relating to expenses, we continue the cause before us for the enrolment of any motion respecting expenses, any such motion to be enrolled within 14 days of the date of the interlocutor which we pronounce in conjunction with this opinion. [1] 1990 SC 291 [2] Parties were agreed that in the event the terms of the Lord Ordinary's interlocutor excluding the averments are inaccurate in their references to the averments in question. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2013/2013CSIH115.html>

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