SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT DUNFERMLINE

[2020] SC DUN 29

A162-16

JUDGMENT OF SHERIFF PINO DI EMIDIO

in the cause

COMMODITY SOLUTION SERVICES LIMITED, a company incorporated under the Companies Acts and having its registered office at 64 Allardice Street, Stonehaven, AB39 2AA

and

CHARLES HENRY SANDS, Chartered Accountant and Insolvency Practitioner, having a place of business at 64 Allardice Street, Stonehaven, AB39 2AA, the liquidator thereof

Pursuers

against

FIRST SCOTTISH SEARCHING SERVICES LIMITED, a company incorporated under the Companies Acts and having its registered office at St. David's House, St. David's Drive, Dalgety Bay, Dunfermline, Fife KY11 9NB

Defenders

Pursuer: McIlvride QC, McKinlay Advocate; Raeburn Christie Clark & Wallace
Defender: Duncan QC, Reid Advocate; Clyde & Co (Scotland) LLP

Dunfermline 9 March 2020

The Sheriff, having resumed consideration of the cause; finds the following facts admitted or proved.

1. The first named pursuers are Commodity Solution Services Limited a company incorporated under the Companies Acts and having their registered office at 64 Allardice Street, Stonehaven, AB39 2AA. The second named pursuer is Charles Henry Sands, Chartered Accountant and Insolvency Practitioner. On 5 October 2010 he was appointed as

interim liquidator of the first named pursers by virtue of an interlocutor of the sheriff at Arbroath. On 13 December 2010 he was appointed as liquidator.

2. The defenders are First Scottish Searching Services Limited a company incorporated under the Companies Acts and having a place of business at St. David's House, St. David's Street, Dalgety Bay, KY11 9NB. They carry on business providing Searching Services. They provide reports of various Public Registers including the Personal Registers.

3. Mr Ian Donald Gardner was a director of the first named pursuers.

The Inhibition

4. On 6 December 2011 the pursuers were awarded decree against Mr Ian Donald Gardner in the sum of fifty thousand pounds with interest at the rate of with interest thereon at the rate of eight per cent per annum from 9 November 2011 until payment together with expenses in the sum of three hundred and forty five pounds and thirty pence.

5. No payment has been made by Mr Ian Donald Gardner to the pursuers in satisfaction of the whole or any part of the decree.

6. On 2 February 2012 a Schedule of Inhibition was served on Mr Ian Donald Gardner by sheriff officers.

7. The schedule identified Mr Ian Donald Gardner and his residential address at 6 Arbirlot Place, Arbroath ("the property").

8. On 8 February 2012 the Inhibition was registered in the Register of Inhibitions and Adjudications.

Marketing of the property

9. In around August 2010 the property had been marketed by the firm of Connolly & Yeoman Solicitors in Arbroath for sale at offers around £160,000.

10. There was little interest in the property.

11. In around Mr Ian Donald Gardner and Dorothy Gardner changed estate agents. The new estate agents re-advertised the property for sale at offers over £124,950.

12. In or around March 2012 an offer of £126.500 was received for the property but was subsequently withdrawn by the potential purchasers and the sale did not proceed.

Sale of the property to Paul Gardner and Louise Jones

13. In or around May 2012 Mr Ian Donald Gardner and Mrs Dorothy Gardner instructed Connolly & Yeoman to act on their behalf in the sale of the property to their son Paul Gardner and his partner Louise Jones ("the purchasers").

14. The purchasers agreed to purchase the property. They were represented by Thorntons, Solicitors, Dundee in the purchase transaction.

15. Thorntons also received instructions to act for Bank of Scotland plc which had agreed to provide a loan to the purchasers.

16. The transaction was at arm's length even though Mr Paul Gardner was the son of Mr Ian Donald Gardner.

17. The parties agreed that missives should be dispensed with to save expense. Otherwise the sale and purchase transaction proceeded in the usual manner.

18. On or around 10 May 2012 Thorntons wrote to Connolly & Yeoman to advise that they had been instructed to act on behalf of the purchasers. They requested the title deeds and the "various drafts" in order to progress matters.

19. On around 2 July 2012 Thorntons confirmed to Connolly & Yeoman that they had received loan papers on behalf of the purchasers.

20. The title deeds were passed to Thorntons for examination.

21. On or around 11 July 2012 Thorntons returned the title deeds to Connolly & Yeoman along with the draft disposition and application forms for the keeper of the Registers of Scotland ("the Keeper") for revisal.

22. Thorntons sought exhibition of the Form 10A Report from Connolly & Yeoman.

23. On or around 12 July 2012 Connolly & Yeoman instructed the defenders to carry out a Form 10 Report.

24. Form 10/11 Reports require a search in the Personal Register and the General Register of Sasines, together with a search in the Land Register for Scotland to check that the property has not already been registered there.

25. The report provided by the defenders against Mr Ian Donald Gardner for the period 11 July 2007 to 11 July 2012 stated "NO DEED" (number 5/3/8 of process).

26. The Form 10A Report disclosed three outstanding heritable securities in favour of Halifax Building Society, Southern Pacific Personal Loans Limited and GE Money Home Finance Limited.

27. The loan from Southern Pacific Personal Loans Limited had been repaid but no discharge had been registered at the time of the search.

28. The draft disposition and draft Forms 1 and 4 for the Keeper were duly revised by Connolly & Yeoman and returned to Thorntons.

29. On or around 17 July 2012 Connolly & Yeoman instructed an update of the Form 10A Report from the defenders with a proposed date of entry of 25 July 2012.

30. On or around 18 July 2012, Mr Ian Donald Gardner and Mrs Dorothy Gardner executed a disposition in favour of the purchasers which stated a date of entry of 31 July 2012.

31. The consideration stated in the disposition was £120,000.00, which was an adequate consideration for the property.

32. The updated report provided by the defenders in the Register of Inhibitions against Mr Ian Donald Gardner for the period 24 July 2007 to 24 July 2012 stated "NO DEED" (number 5/3/12 of process).

33. On or around 25 July 2012 Connolly & Yeoman wrote to Thorntons enclosing the updated Form 10A Report together with the executed disposition, the title deeds and a principal letter of obligation. In return Connolly & Yeoman received a cheque in the sum of £120,000.00 from Thorntons.

34. In due course Connolly & Yeoman repaid the loan from Halifax Building Society in the sum of £30,303.26 and the loan from GE Money Home Finance Limited in the sum of £27,187.80 from the sale proceeds of £120,000.00. The necessary discharges of standard security were received from Halifax Building Society and GE Money Home Finance Limited and subsequently registered.

35. The purchasers registered their title to the property under Title number ANG60085 on 6 August 2012.

36. The purchase was financed in whole or in part by a loan from Bank of Scotland plc who required a heritable security over the property.

37. Bank of Scotland plc's interest in the property as heritable creditors is in terms of a standard security in their favour also registered under Title number ANG60085 on 6 August 2012.

38. The letter of obligation from Connolly & Yeoman to Thorntons (number 5/3/14 of process) certified *inter alia* the accuracy of the Form 1 questions 1-14 insofar as concerned Mr Ian Donald Gardner and Mrs Dorothy Gardner.

39. The Form 1 submitted on behalf of the purchasers when the applied to register their interest in the property certified to the Keeper that searches of the Register of Inhibitions and Adjudications up to 23 July 2012 did not disclose any subsisting entries pertaining to Mr Ian Donald Gardner which were adverse to the interest in land.

40. A solicitor acting for a purchaser would require to (a) advise that purchaser, and any lender, of the existence of an inhibition; and (b) explain the risks of proceeding with the transaction without a discharge of the inhibition so far as it affected the property.

41. The sale proceeded without the necessary discharge being sought.

42. In the event that the Form 10A and/or Form 10A update had disclosed the Inhibition a solicitor in those circumstances would have enquired of the seller's solicitors whether it had been discharged.

43. In the event that the Inhibition had not been discharged the solicitor would have advised the purchasers and the lender not to proceed with the purchase unless a discharge of the Inhibition so far as it related to the interest in land which was to be conveyed to the purchasers was available at settlement or the subject of a personal undertaking by the selling solicitor to deliver such a discharge within a reasonable short period after the date the purchase price was received.

44. A normal purchaser would take the advice and not proceed in such circumstances. The purchasers were normal purchasers in this case.

Other searches of the registers

45. Form 12A is used where a property in registered in the Land Register for Scotland and requires a search in the Land Register and the Personal Register.

46. On 12 February 2013 the pursuers instructed the defenders to report in the Form 12A. The Form 12A Report disclosed the Inhibition by the pursuers against Mr Ian Donald Gardner registered on 8 February 2012.

47. On 18 February 2013 the pursuers instructed the defenders to report in the Form 11A. The Form 11A Report disclosed the Inhibition by the pursuers against Mr Ian Donald Gardner registered on 8 February 2012.

Approach of the pursuers had the Inhibition been reported in July 2012

48. Had the pursuers been asked to release the property from the effect of the Inhibition they would have demanded payment in full of Mr Ian Donald Gardner's share of the free proceeds of sale in exchange for agreeing to discharge the Inhibition so far as it affected his interest in the property.

Failure to report Inhibition in July 2012

49. The searches instructed by Connolly & Yeoman and which were provided by the defenders in Form 10A and Form 10A update covering the periods up to 12 July 2012 and 25 July 2012 respectively, ought, with the exercise of ordinary skill and care, to have resulted in the disclosure of the Inhibition in favour of the pursuers so far as it related to the search in the Personal Registers against Mr Ian Donald Gardner.

Proceeds of the Sale

50. Various outlays were incurred in respect of the sale including registration dues and search dues which totalled £1,179.62.

51. Interest was due to be paid to the sellers in the sum of £12.82.

52. The net sale proceeds were £61,342.14 from which the fees of Connolly & Yeoman in the sum of £1335.00 required to be paid leaving the net free sale proceeds from the sale of the property as £60,007.14.

53. Mr Ian Donald Gardner was entitled to a fifty per cent share of the net sale proceeds being the sum of £30,003.57.

Sequestration of Mr Ian Donald Gardner

54. On 25 August 2014 a charge for payment was served on Mr Ian Donald Gardner.

55. On 19 September 2014 a petition for the sequestration of Mr Ian Donald Gardner was lodged in court by the pursuers.

56. On 5 November 2014 sequestration was awarded in respect of Mr Ian Donald Gardner. The Accountant in Bankruptcy was appointed as trustee in sequestration.

57. The pursuers are the only creditor of Mr Ian Donald Gardner in the sequestration and his income is stated to be £621.

58. The only heritable property owned by Mr Ian Donald Gardner in the previous five years was his interest in the property.

59. Mr Ian Donald Gardner had no assets at the date of his sequestration. With which to meet the sums due to the pursuers.

60. The administration of the sequestration has been completed.

61. The trustee in sequestration has been discharged.

62. No payment has been received by the pursuers in respect of their claim in the sequestrated estate of Mr Ian Donald Gardner.

63. In the event that the sale had not proceeded Mr Ian Donald Gardner's interest in the property to the extent of a one-half share would have been an asset in the sequestration.

64. In the event that the trustee in sequestration had required the sale of the property the standard security holders would have been paid and thereafter the pursuers would have received that part of the free sale proceeds which was an asset in the sequestration.

Finds in fact and law that

1. on 25 July 2012 the purchasers of the property at 6 Arbirlot Place, Arbroath acquired the title to the property in good faith and for adequate consideration and that thereby the Inhibition dated 8 February 2012 ceased to have effect as regards that property;

2. the loss sustained by the pursuers would not have been suffered but for the defenders' breach of duty;

3. the loss sustained by the pursuers fell within the scope of the duty of care that the Sheriff Appeal Court held was owed by the defenders to the pursuers;

4. the pursuers lost a real and substantial chance of recovering the sum of £30,003.57 as a result of the breach of the duty of care owed by the defenders to the pursuers.

INTERLOCUTOR

1. Sustains the third and fourth pleas-in-law for the pursuers, repels the first, second fourth and fifth pleas-in-law for the defenders and grants decree for payment of the sum of THIRTY THOUSAND AND THREE POUNDS AND FIFTY SEVEN PENCE (£30,003.57);

2. Reserves all questions of interest and expenses meantime.

NOTE

Introduction

[1] On 4 November 2019 I heard a proof before answer in this case. The parties had entered into an extensive Joint Minute of Admissions which was lodged at the bar and became number 24 of process. The productions were copies of original documents and parties agreed that they were (a) to be treated as originals for the purposes of the proof before answer and (b) what they bear to be. The parties also agreed that correspondence was deemed to have been sent and/or received on the date on which it bears to have been sent and/or received. As a result, the oral evidence was in short compass. The pursuers led evidence from three witnesses in chief, there was no cross examination and the defender led no oral evidence. The parties proceeded to submissions and the respective lists of authorities for the pursuers and the defenders are numbers 25 and 26 of process.

[2] This matter has a significant procedural history. Following a diet of debate where the principal issue related to the question of whether the defenders owed a duty of care to the pursuers, on 5 March 2018 Sheriff McSherry found in favour of the pursuers on this issue. He sustained certain of the pursuers' pleas-in-law and made other ancillary orders. That decision was appealed by the defenders to the Sheriff Appeal Court. On 4 February 2019 the Sheriff Appeal Court allowed the appeal, recalled the sheriff's interlocutor of 5 March 2018, repelled the appellant/defenders' third plea in law and the respondents/pursuers second plea in law, allowed a proof before answer on the remaining pleas. Following a further discussion, the Sheriff Appeal Court dealt with issues of expenses arising in an interlocutor dated 20 June 2019. The Sheriff Appeal Court agreed with the sheriff that the defenders owed the pursuers a duty of care. The case next called before in the Sheriff Court on 5 July 2019 when a proof before answer was fixed for 4, 5 and

6 November 2019. After other sundry procedure, the allowance of 5 November 2019 for the proof was removed. In the event, due to the commendable extent of the agreement of evidence by the parties in the Joint Minute of Admissions and an admission made at the bar for the purposes of this proof before answer that the defenders carried out the property search negligently, it did not prove necessary to use 6 November 2019.

[3] The proof proceeded on the agreed hypothesis that the defenders accepted for present purposes that a duty of care was owed to the pursuers. This cleared the way for the other issues in dispute between the parties to be dealt with in the proof in this court. I was advised that it was the intention of the defenders to challenge the decision of the Sheriff Appeal Court on the issue of whether a duty of care was owed to the pursuers in a further appeal to the Inner House of the Court of Session if they failed in this proof before answer.

Evidence for the pursuers

Colin Graham

[4] Mr Graham is the chairman of the firm of Thorntons, solicitors which has a principal office in Dundee. He acted for the purchasers in the acquisition of the property. He had practiced as a solicitor since 1983 in the field of residential conveyancing. He also received instructions to act for the Bank of Scotland plc which was providing a loan to the purchasers and he prepared and registered the standard security in their favour. He said that the transaction was at arm's length even though Mr Paul Gardner was the son of Mr Ian Donald Gardner. The parties had agreed to dispense with missives to save expense. The reports on search produced to him by the selling solicitors did not disclose the Inhibition that had been registered against Mr Ian Donald Gardner. If the Inhibition had been disclosed, he would

have advised the lender not to proceed while it remained on the record. He thought that a normal purchaser would take his advice and not proceed in such circumstances.

[5] The defenders' senior counsel took an objection based on lack of record to the witness being asked whether Mr Paul Gardner had said anything to suggest that he would have been willing to proceed in the face of an undischarged Inhibition. The question was allowed under reservation as to competency and relevancy. The answer was that he had not. Mr Graham was a credible and reliable witness.

Alan Connolly

[6] Mr Connolly is a retired solicitor. He qualified in 1975. In 2012 he was a partner in the firm of Connolly & Yeoman in Arbroath. At that time he took instructions from Mr Ian Donald Gardner and his wife Mrs Dorothy Gardner to act for them in the sale to Paul Gardner and Louise Jones. He was aware that Paul Gardner was the son of Mr Ian Donald Gardner and Mrs Dorothy Gardner. He was satisfied that the transaction was at arms' length. Mr Connolly was a credible and reliable witness.

Charles Henry Sands

[7] Mr Sands is aged 62. He is a chartered accountant and insolvency practitioner who practices at the address in the instance. He qualified in about 1987 and set up his own practice in about 1997. He is the second named pursuer in this action. Moist of his work relates to corporate insolvency. He became the interim liquidator of the first named pursuer on the dates set out in the findings in fact. No payment had been made by Mr Ian Donald Gardner in relation of the decree for £50,000 obtained against him in about 6 December 2011. The Inhibition had been registered on about 8 February 2012 but the property was sold in

about July 2012 without the Inhibition being discharged. If at the time the sale was about to go through, Mr Ian Donald Gardner had requested a discharge of the Inhibition he would have expected to be paid the whole of Mr Gardner's share of the free proceeds of sale in exchange for releasing Mr Gardner's interest in the property from the effect of the Inhibition. There was no reason for him to accept any less than that sum. Eventually he did sequestrate Mr Gardner. Mr Sands was a credible and reliable witness and I accepted his unchallenged evidence. There was no suggestion made to him that he might have been forced to enter into a negotiation which might have led him to consider accepting a lesser sum. He was in a strong position because he could threaten to sequestrate Mr Gardner if his demands were not met. It was not suggested to him that there was a prospect of a lesser recovery on sequestration because Mrs Gardner as owner of the other one-half *pro indiviso* interest in the property might have been able to attempt to block or delay the sale. Therefore I have not looked behind Mr Sands' evidence on this point.

Parties' submissions

[8] The parties dealt with the issues in a different order and under slightly different heads. I have adopted the defenders' structure in the discussion that follows.

Pursuers' submissions

[9] The pursuers submitted that they had suffered loss by the defenders' negligent failure to disclose the Inhibition. As regards the issue of quantification of loss, they approached the issue as involving loss of a chance. The pursuers referred to the passage in *Perry* v *Rayleys Solicitors* [2019] 2 WLR 636 which is quoted below. They also referred to

Kyle v *P & J Stormonth Darling* 1993 S.C. 57 (I.H.) and drew attention especially to the following passage in the Opinion of the Court delivered by Lord McCluskey at page 69C-D:

> "There may be cases in which the litigant, suing his negligent solicitor, can demonstrate that the claim against the original defender would have been bound to succeed; in that event the measure of his claim against the solicitor may be close to or identical to the measure of his lost claim against the original wrongdoer. Equally, there may be cases in which the prospects of success in the original claim were so remote that the court could confidently conclude that the claim in the litigation was worthless and that the loss of the right to pursue it was a nugatory loss. In between there may be a whole spectrum of possibilities."

[10] The pursuers submitted that there were only two realistic scenarios if the defenders had reported accurately on their searches of the Personal Registers. Either Mr Ian Donald Gardner would have agreed to pay his one half of the free proceeds of sale to the pursuers or he would have been precluded from selling his interest in the property. The court could be confident as to what had happened in the real world. On the evidence agreed and led, the court was entitled to hold that if the Inhibition had been properly disclosed the advice to the purchasers from their solicitor would have been that they should not proceed unless the Inhibition was discharged. The purchasers would have followed that advice and the lenders would have followed their solicitor's advice and not proceeded in the absence of a discharge of the Inhibition as it affected the property. In those circumstances, two consequences would follow if the transaction was to proceed. Mr Gardner had to get a discharge from the pursuers and this would be forthcoming only on full payment to the liquidator of his share of the free proceeds of sale. The pursuers accepted that this could be viewed as a loss of chance case, in so far as the outcome depends on the acts of third parties but there were only two realistic scenarios on the counter-factual. The only other realistic alternative was that the sellers were precluded from selling and Mr Gardner's one half share of the property would have fallen into the sequestration that would have followed. The court could also

proceed on the basis the appropriate valuation of the loss incurred was £30,003.57. It was agreed the market had been tested at a higher price, the consideration was adequate at £120,000.00 and the Bank of Scotland were willing to fund on that basis in 2012. There was no evidence to suggest that the value of Mr Gardner's interest had reduced after that date. The court was entitled to assess without speculation that quantum would be the same in both scenarios. The only other scenario involved the purchasers proceeding with the Inhibition remaining in place. There was nothing to suggest that the purchasers would have wanted to proceed on that basis, or that they could have done so without bank funding. The prospect was unrealistic and could safely be discounted.

[11] The pursuers submitted that it was unnecessary to decide whether the Inhibition was discharged by virtue of section 159 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 ("the 2007 Act"). This matter was relevant if the defenders had argued that the pursuers had to raise an action of reduction. Reduction would depend on whether the Inhibition had terminated but that was not the issue. The court simply required to determine what would have happened if the defenders had complied with their duty and disclosed the existence of the Inhibition. This would only be of significance if there was an argument to mitigate loss that would depend on whether the Inhibition was terminated but the defenders were not contending that the pursuers have failed to mitigate their loss. The court required to look at what would have happened if the inhibition was disclosed. The defenders' position was that good faith remained a live issue. The averments remitted to probation include a passage at page 6 of the Record in article 5 of condescendence which is in the following terms.

> "The transfer was made in breach of the inhibition. The Inhibition ceased to have effect in relation to the property when the deed conveying the property was delivered to [the purchasers]"

There is a basis on record for saying that the benefit of the Inhibition was lost in breach of the Inhibition. As the parties agreed that there was adequate consideration, the issue in dispute was related to good faith for the purposes of section 159(1) of the 2007 Act. On the evidence, the question of the existence the Inhibition was not raised or disclosed during the conveyancing transaction. The pursuers accepted that there was no direct evidence bearing on the knowledge of Mr Paul Gardner but they invited the court to make a finding by inference that the condition as to good faith had been satisfied. It was accepted that no attempt had been made to rely on the presumption in section 159(4) of the 2007 Act. The question was whether on the balance of probabilities the Inhibition had ceased to have effect in regard to the property. Section 159(4) provides for an evidential presumption, it is not exclusive as to what may fall within the scope of section 159(1). Emphasis was laid on the unchallenged evidence of both solicitors involved that the transaction was done at arm's length.

Defenders' submissions

[12] The defenders' counsel provided a most helpful written Outline Submission which formed the basis for senior counsel's oral submission in court. The defenders' submission was divided into three parts. The first point was that the Inhibition had not been terminated and as a result the action was at least irrelevant. For the purposes of the proof before answer, the defenders accepted that the existence of the Inhibition ought to have been noted in the reports provided. The defenders proceeded on the hypothesis that a duty of care was owed, in line with the decision of the Sheriff Appeal Court noted above. The Inhibition was not rendered ineffective under reference to the terms of the 2007 Act. The pursuers bore the

onus of proving that the transaction had been carried out in good faith and had failed to do so. The pursuers had failed to call relevant witnesses. Reference was made to the Opinion of Lord Glennie in *Royal Bank of Scotland PLC* v *Carlyle* [2010] CSOH 3 at paragraph 36. The passage was *obiter* but the Lord Ordinary had indicated that had he been in doubt about a commitment given orally by the bank he would had to take account of the bank's failure to call relevant witnesses. The pursuers had called neither Ian Donald Gardner nor Paul Gardner as witnesses. The objection was maintained. On 21 February 2013 when the purchasing solicitors were advised of the existence of the Inhibition they wrote to the purchasers advising that the pursuers' solicitors had written asking *inter alia* if Paul Gardner had been aware of the Inhibition (number 5/4/1 of process). If the court thought that the pleadings were adequate it was of some interest that there was apparently no reply. This was perhaps a straw in the wind that pointed to the pursuers being unable to bring themselves within section 159 of the 2007 Act.

[13] The second part of the submission dealt with foreseeability and causation of loss. The loss claimed was said not to be a "but for" consequence of the breach of duty and the loss claimed did not fall within the scope of the duty of care that the Sheriff Appeal Court held was owed by the defenders. The scope of the duty had not been fully discussed in the Sheriff Appeal Court and was open for consideration in this proof before answer.

[14] The third part of the submission dealt with quantification of loss. The defenders referred to a passage in *McGregor on Damages* (20th ed. 2017) at paragraph 10-051 where it is observed that for the loss of a chance to sound in damages it must be a real and substantial chance. Further a chance that is less than 10% is generally negligible but it probably depends on the circumstances. The defenders submitted that where there are multiple factors that inform the overall chance the chance of each having materialised should be

assessed and the different chances multiplied to provide the overall chance. Where there are more than two factors that approach should not be applied so as to produce an unrealistically low overall chance. They referred to a further passage in *McGregor on Damages* 20th edition at paragraph 10-103. The defenders submitted that a number of past hypothetical actions of third parties were engaged in the pursuers' case. In the absence of any evidence from the purchasers or the sellers the court could conclude that there was no basis to assess what, if any, chance had been lost and the defenders should be assoilzied. If the court thought that there was a basis in the evidence to conclude that there was a real and substantial chance of the debt being satisfied the court would have to assess the chance in order to assess the overall chance of recovering the monies claimed by reference to a series of question about what the purchasers and the sellers would have done.

[15] The court was invited to sustain the defenders' first plea in law to the relevancy of the action having regard to the absence of any averment and consequent evidence of good faith, and to dismiss the action. Alternatively the court should sustain the defenders' second and fifth pleas-in-law having regard to the absence of any evidence that loss has been sustained, and grant decree of absolvitor.

Reasons for decision

[16] I have found it convenient to adopt the defenders' structure of broad headings.

Was the Inhibition rendered ineffective?

[17] Section 159 of the 2007 Act provides as follows when property is acquired by a third party:

> "(1) [Notwithstanding section 160 of this Act,] an inhibition ceases to have effect (and is treated as never having had effect) in relation to property if a person acquires the property (or a right in the property) in good faith and for adequate consideration.
> (2) For the purposes of subsection (1) above, a person acquires property (or a right in the property) when the deed conveying (or granting the right in) the property is delivered to the person.
> (3) An acquisition under subsection (1) above may be from the inhibited debtor or any other person who has acquired the property or right (regardless of whether that person acquired in good faith or for value).
> (4) For the purposes of subsection (1) above, a person is presumed to have acted in good faith if the person—
>
> (a) is unaware of the inhibition; and
> (b) has taken all reasonable steps to discover the existence of an inhibition affecting the property."

[18] With regard to the background to the enactment of section 159 of the 2007 Act my attention was drawn to the Scottish Law Commission's Report on Diligence Number 183 (2001) especially to passages at paragraphs 6.109ff at page 178ff. I have had regard in particular to paragraphs 6.113 and 6.114.

[19] The defenders contend that the Inhibition did not cease to have effect as regards the property as the good faith criterion was not met. The twin elements required under section 159(1) for an inhibition to cease to have effect with regard to a property acquired by a third party are that such a person must acquire the property or a right in the property in good faith and for adequate consideration.

[20] Since the hearing before me the United Kingdom Supreme Court has given Judgment in the case of *MacDonald and another* v *Carnbroe Estates Limited* [2019] UKSC 57. That appeal concerns the Scots law of gratuitous alienations on insolvency. One issue considered by the Court is a question as to the interpretation of the term "adequate consideration" in section 242(4)(b) of the Insolvency Act 1986. The Judgment was given by Lord Hodge with whom Lord Reed, Lord Wilson, Lord Briggs and Lord Sales agreed. At paragraphs 29 to 39 Lord Hodge discusses "adequate consideration" as used in the 1986 Act.

The discussion involves a broader survey of the term in the law of bankruptcy. Following dicta of Lord Cullen when he was a Lord Ordinary in *Lafferty Construction Limited* v *McCombe* 1994 SLT 858, Lord Hodge emphasises the objective nature of the test. Lord Cullen had stated that:

> "the expression "adequate" implies the application of an objective standpoint. The consideration should be not less than would reasonably be expected in the circumstances, assuming that persons in the position of the parties were acting in good faith and at arm's length from each other."

I decided that it was not necessary to ask parties if they wished to make supplementary written submissions. The remarks of Lord Hodge are helpful and they confirm views expressed by Lord Cullen some years ago. In the present case parties took no issue on the question of adequate consideration and section 159(1) of the 2007 Act expressly makes good faith a separate requirement. I have proceeded on the basis that if parties thought the recent decision in *MacDonald* altered their thinking to any extent they would have asked for the opportunity to make further submissions.

[21] As regards the question of whether the purchasers were in good faith for the purposes of section 159(1), there are a number of matters to be considered. It is common ground that the consideration was adequate for the purposes of section 159. The inhibited disponer and the purchasers used different solicitors. The transaction was at arm's length even though Mr Paul Gardner was the son of Mr Ian Donald Gardner. The property was exposed for sale in the open market without success at a higher price for some time prior to the decision to proceed to sell to the purchasers. The files of both the selling and purchasing solicitors relative to the transaction have been recovered. The inhibited disponer Mr Ian Donald Gardner must have known that he was inhibited but chose not to tell his solicitor about it. He acted in breach of the Inhibition and it can be inferred that he was not acting in

good faith. Had his solicitor been aware of its existence either from his client or from the search provided by the defenders, I am satisfied that Mr Ian Donald Gardner would have been advised that a discharge would have to be obtained from the inhibiting creditor, i.e. the pursuers, to release the property from the effect of the Inhibition so that the sale could go ahead. There is no evidence that suggests that Mr Ian Donald Gardner can have had any expectation that the defenders would fail to disclose the Inhibition in both of their search reports prior to settlement.

Ruling on objection

[22] Evidence was led under reservation from Mr Graham on the question of whether Mr Paul Gardner had said anything to suggest that he would have been willing to proceed in the face of an undischarged Inhibition. The averment in article 6 of condescendence was in the following terms.

> "The inhibition had not been previously discharged. To proceed without the necessary discharge would expose the lender and purchaser to an unacceptable risk that the disposition and standard security be reduced in an action *ex capite inhibitionis* at the instance of the Inhibitor and/or that the Keeper exclude indemnity on the title sheet and in the charge sheet."

I repel the objection as I consider that the pursuers have made enough relevant averments to allow this issue to be canvassed at proof.

[23] The issue of good faith in section 159(1) of the 2007 Act focusses on the persons who acquire in good faith and for adequate consideration. The focus is not on the inhibited debtor who is the disponer of the property. In the present case, I have found that the solicitors who acted in the purchase acted in good faith. The purchasers instructed solicitors who caused the appropriate inquiries to be made in this arm's length transaction. This included the exhibition to them of clear searches in the personal registers. It is not the fault

of the purchasers that the searches that were exhibited were clear when they should not have been. On the evidence of the purchasing solicitor who was also acting for the heritable creditor, I am satisfied that had he received a report on search that had disclosed the existence of the Inhibition the transaction would not have proceeded unless the Inhibition was discharged so far as it affected the property. Mr Graham's evidence was that nothing was said by Mr Paul Gardner that would suggested that he would have been willing to proceed in the face of an undischarged Inhibition. Given that clear searches were exhibited to Mr Graham on which he relied, there was no reason for this issue to be discussed by them. I do not consider that the pursuers required to go further and call Paul Gardner as well. Mr Graham had separate responsibilities to the heritable creditor, which was also instructing him. Receipt of a clear search was vital for him to fulfil that role appropriately. Even if Mr Paul Gardner had known of and been willing to proceed in the face of an undischarged Inhibition, on the evidence the Bank would not have taken the same view. In a sense Mr Paul Gardner's personal view would have been of little importance, given that the purchasers required the loan funds to proceed.

[24] An updating report on search was exhibited to the purchaser's solicitor just prior to settlement. As there was inevitably going to be a delay in the registration of the interests of the purchasers and their lenders in the Land Register after settlement, the exhibition of a clear search to a date very close to the date of settlement was a precaution that limited the exposure of the selling solicitors in terms of their letter of obligation. It protected the interests of both the purchasers and the lenders. The purchasing solicitors acted prudently when they saw the updated clear search at settlement. The defenders missed the Inhibition in both their first search report and their update report. There is no reason to think that the purchasers contemplated that they would pay the agreed purchase price on a basis that

anticipated that the defenders would fail to report on an adverse entry in the Personal Registers. An absence of good faith would have to relate to a circumstance that would lead to Ian Donald Gardner's share of the free sale proceeds not being paid to the pursuers. The only circumstance of that kind in this case is the defenders' failure to report the existence of the Inhibition which affected the property because it operated as a negative diligence.

[25] Section 159(4) creates a presumption that an inhibition will be rendered ineffective where it is established that a person who acquired in good faith was unaware of the inhibition. Section 159(4) cannot be relied on by the pursuers in this case. It has not been established that the purchasers were unaware of the inhibition, though they did take reasonable steps to discover it by the action of their solicitors who had the clear searches prepared by the defenders exhibited to them prior to payment of the purchase price. While both requirements for the operation of the presumption provided for by section 159(4) have not been established, this does not prevent a finding that the requirements of section 159(1) have been met. The pursuers have discharged the onus of proving that the transaction was in good faith as well as for adequate consideration. As a result the Inhibition ceased to have effect as regards the property when the disposition was delivered in exchange for payment of the agreed purchase price. Therefore, I reject the defenders' submission that section 159(1) is not triggered, despite the inability of the pursuers to avail themselves of the presumption in section 159(4). The analysis in the preceding two paragraphs leads to the conclusion that the Inhibition ceased to have effect when the purchasers acquired the property.

Loss: foreseeability and causation

[26] There are two questions to be addressed under this head. The first is formulated as follows by the defenders: Is the loss a "but for" consequence of the breach of duty? The second is formulated as follows by the defenders: does the loss claimed fall within the scope of the duty of care that the Sheriff Appeal Court held was owed?

[27] In respect the first issue reliance was placed on the following passage in the case of *Hughes-Holland* v *BPE Solicitors* [2018] A.C. 599 where Lord Sumption JSC said:

> "In the law of damages, [that an event would not have occurred but for the act of the defender] has never been enough. It is generally a necessary condition for the recovery of a loss that it would not have been suffered but for the breach of duty. But it is not always a sufficient condition. The reason… is that the law is concerned with assigning responsibility for the consequences of the breach, and a defendant is not necessarily responsible in law for everything that follows from his act, even if it is wrongful."

[28] The defenders argued that in the absence of any evidence from the sellers and the purchasers the court was not able to reach a view on what would have happened had the Inhibition been reported. The only result of the report of the inhibition would have been to place the parties with awareness of its existence. It did not follow that it can be inferred that the sellers would seek a discharge to allow the transaction to proceed.

[29] On the facts I have found I consider that the inference can be drawn. The purchasers were simply buying the property on an arms' length basis. There is nothing in the evidence to suggest that the disclosure of the inhibition would have led to the transaction being cancelled. There is no basis in the evidence to think that the purchasers would have declined to continue with the acquisition. There was no effect on the price they paid. The suggestion that the sellers would have let their son and his partner wait out the inhibition does not take account of the real benefit accruing to the purchasers when title in the property passed to them. The disclosure of the existence of the Inhibition would not prevent

the purchase going ahead. Its effect would have been upon the final destination of that part of the free proceeds of sale that were due to the inhibited disponer. My answer to the defenders' first question is "yes".

[30] In respect of the second question, it was pointed out that the Sheriff Appeal Court said nothing about the scope of the duty they held was owed by the defenders. Given that an inhibition is a negative diligence and on its own will never secure repayment of a debt, why would the repayment of a debt fall within the scope of the duty owed when searching for an inhibition? It was asserted that what was provided by the defenders was clearly "information" as that term was explained by Lord Sumption JSC in the *Hughes-Holland* case. Reference was made to a further passage at paragraph 41 which is in the following terms.

> "By comparison, [to advice – explained in paragraph 40] in the "information" category, a professional adviser contributes a limited part of the material on which his client will rely in deciding whether to enter into a prospective transaction, but the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client (or possibly his other advisers). In such a case, … the defendant's legal responsibility does not extend to the decision itself. It follows that even if the material which the defendant supplied is known to be critical to the decision to enter into the transaction, he is liable only for the financial consequences of its being wrong and not for the financial consequences of the claimant entering into the transaction so far as these are greater. Otherwise the defendant would become the underwriter of the financial fortunes of the whole transaction by virtue of having assumed a duty of care in relation to just one element of someone else's decision."

[31] I agree that what was provided by the defenders was information about the contents of the register. The Inhibition is a negative diligence and I accept that it is possible to envisage more complex transactions where the financial consequences of the decision to proceed on receipt of the negligently provided information are greater. That information was material not only to the overall purchase and sale transaction but to the final destination of one half of the free proceeds of sale caught by the Inhibition. Mr Ian Donald Gardner could have had no expectation that the defenders would negligently fail to report the

existence of the Inhibition. There is no question of an expansion of the scope of the duty owed by the defenders. The effect of the Inhibition upon the purchase and sale at all times related only to the one half of the free proceeds of sale which would otherwise have been received by Mr Ian Donald Gardner. The information provided by the defenders when they reported on their search of the Personal Registers was material to the interests of the purchasers (and their heritable creditors). If the purchasers took in good faith and for adequate consideration, they were entitled to the protection of section 159(1) of the 2007 Act as regards their interest in the property.

[32] The Inhibition ceased to have effect as regards the property by virtue of section 159(1) on delivery of the disposition in exchange for payment of the purchase price. This was prejudicial to the interests of the pursuers who had put the diligence in place to protect those interests. As a result, the information provided by the defenders was central to the purchase transaction going ahead without the Inhibition being discharged. It does not matter that the decision to proceed with the purchase was made by a purchaser in good faith and that the pursuers had no inkling of what was going on. The only loss that resulted from the consequences of the negligently provided information being wrong was such as would fall inevitably on the pursuers. This is a relatively narrowly defined loss. The purpose of the negative diligence would have been fulfilled had it been disclosed in the search report. The transaction could have gone ahead but, at the very least a part (if not the whole) of the one half of the free sale proceeds to which Mr Gardner was entitled would have been destined to settle his liabilities to the pursuers under the decree in their favour. Instead those proceeds became available to him personally to use as he wished prior to his sequestration. There is no reason to think that Mr Ian Donald Gardner had agreed to sell his interest in the property in anticipation that by some chance the existence of the Inhibition would not have

been disclosed by a routine search of the Personal Registers. Satisfaction of the debt was a direct and foreseeable consequence of the production of an accurate search report by the defenders which disclosed the Inhibition. There is no expansion of liability such as would justify characterising the claim as one which would involve the defenders in underwriting the financial fortunes of a whole wider transaction by virtue of there being imposed on them a duty of care within limited scope. Therefore, I conclude that the scope of the duty owed by the defenders covered the kind of loss that has been sustained in this case. My answer to the defenders' second question is "yes".

[33] On the facts I have found had the search in the personal registers against Mr Ian Donald Gardner had been correctly carried out the loss would not have occurred and so I now turn to the issue of quantification.

Loss (or loss of a chance): quantification

[34] If liability is established, then both parties agreed that this was a case in which the damages had to be evaluated on the basis of the loss of a chance. They also agreed that the court had a wide range available to it though they disagreed as to what the result of the evaluation should be.

[35] When the court requires to assess what would have happened in the counter-factual world, the pursuers still must prove what they would have done on the balance of probabilities. The test is relaxed in cases the past hypothetical actions of a third party so that the court can take a "loss of a chance" approach. The parties accepted that this was appropriate in the light of certain *dicta* in the recent decision of the UK Supreme Court in *Perry* v *Rayleys Solicitors* [2019] 2 WLR 636. Lord Briggs said the following at paragraph 20.

> "20. For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation."

[36] The supposed beneficial outcome depends on what others would have done in this case. I agree with the defenders that there are a number of variables to be considered. I propose to deal with each of the past hypothetical actions of third parties the defenders submitted were engaged in the pursuers' case in turn.

a. What advice would the purchasers' solicitors have given? I am satisfied that Mr Graham's advice to the purchasers (and to the lenders) would have been that the inhibition required to be discharged before the transaction could proceed. The parties were in the fortunate position that missives had not been concluded so that either side could have walked away from it. The pursuers would undoubtedly have been in a strong position to seek payment in return of the discharge of the inhibition so as to allow the proposed transaction to proceed.

b. Would the purchasers have followed that advice? As far as the purchasers were concerned there would be no difference in the amount that they paid. I am satisfied that the purchasers would have followed the advice.

c. Would the seller (by which I understand them to mean Mr Ian Donald Gardner) have sought to discharge the inhibition? I am also satisfied that the inhibited disponer would have sought to discharge the inhibition at least to the extent of allowing this transaction to proceed. The successful completion of the purchase and sale would have ensured that Mrs Dorothy Gardner would receive the one

half of the free sale proceeds due to her. If Mr Ian Donald Gardner had refused to agree to a payment being made to the pursuers, he would have faced an early petition for sequestration at the instance of the pursuers.

d. Would Mr Ian Donald Gardner have agreed to pay his entire share of the free sale proceeds to secure the discharge of the inhibition? The pursuers would have been in a very strong position to demand payment in full of Mr Ian Donald Gardner's share of the free sale proceeds as the price of the transaction going ahead. The underlying decree in their favour was for a substantially larger amount.

[37] If the search had disclosed the inhibition this would have changed the advice of the purchasing solicitor Mr Graham to both the purchasers and to the bank. The second named pursuer as liquidator would have sought 100% of the free sale proceeds due to Mr Ian Donald Gardner. If the transaction went ahead it protected the interests of Mrs Dorothy Gardner in the sense that she would receive her share of the free sale proceeds. Mr Gardner had very limited scope for bargaining with the liquidator. The pursuers were in a very strong negotiating position on the evidence led. This is not a case where the chance was such as could be described as negligible in the sense described in the passage in *McGregor on Damages* referred to above. Having regard to the answers to all the questions discussed above, there is no basis for concluding that they would have failed to obtain 100% of Mr Gardner's share of the free sale proceeds. The measure of the claim is identical to the measure of the loss occasioned by the defender's failure to report on the Inhibition in the Form 10A and Form 10A update report. Therefore I have granted decree for payment as craved.

[38] I have reserved all questions of interest and expenses meantime. If parties wish a hearing about these issues, they should contact the sheriff clerk at Dunfermline so that a suitable date can be identified.