SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT DUNFERMLINE

[2018] SC DUNF 14

DNF-A162-16

JUDGMENT OF SHERIFF JOHN CRAIG CUNNINGHAM McSHERRY

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 a place of business at St David's House, St David's Drive, Dalgety Bay, Fife, KY11 9NB

Defenders

Pursuers: McKinlay
Defenders: Reid

Dunfermline, 5 March 2018

The Sheriff, having resumed consideration of the cause, finds that this court has jurisdiction; Sustains the pursuers' first and third pleas in law; Repels the defenders' first and third pleas in law; Finds the defenders liable to the pursuers in the expenses of the debate as taxed; Fixes pre-proof hearing and proof on dates to be afterwards fixed; and Sanctions the action as suitable for the employment of junior counsel.

Note

[1] This case called before me on 3 July and 26 September 2017. Notes of the basis of the preliminary pleas of both parties had been lodged and were referred to. Mr Reid for the defenders led in the debate.

[2] The facts of the case are not in dispute.

[3] The pursuers were holders of an inhibition over 6 Arbirlot Place, Arbroath DD11 2ER (the inhibition and the property). The property was at the time owned by Ian Donald Gardner (Mr Gardner) and his wife. On 6 December 2011, the pursuers obtained decree against Mr Gardner for the sum of £50,000. As a result of that debt the inhibition was served on Mr Gardner. In February 2012, the inhibition had been properly Registered in the Register of Inhibitions and Adjudications (the Register). Despite that, on 6 August 2012 the Keeper of Registers of Scotland (the Keeper) allowed Paul Gardner, who is the son of Mr Gardner, and Louise Jones (the purchasers) to Register title to the property. That was done without the Keeper noting the inhibition on the title nor with any indemnity. The pursuers are unable to recover their debt from Mr Gardner. The defenders were instructed to carry out a Form 10A search on behalf of the sellers prior to their purchase of the property. The search *inter alia* includes a search in the Register. Two searches were undertaken but neither disclosed the inhibition. The inhibition was not discharged before the sale and the purchasers' title was registered in the Land Register without qualification. The pursuers have received no monies from Mr Gardner. The pursuers maintain that the defenders owed them a duty of care in these circumstances.

The defenders' submissions

[4] Mr Reid said that no such duty of care was owed and, as a result, the pursuers' case

is fundamentally irrelevant and should be dismissed.

[5] He argued that there was no relationship in this case between the pursuers and the defenders. The contractual relationship is between the defenders and the purchasers. The pursuers had no relationship with the purchasers. The defenders were engaged by the purchasers with a view to protecting their interest and, in any event, the pursuers' interests were already protected. The Keeper had a statutory duty under s 6 (1) of the Land Registration (Scotland) Act 2012 in force at the relevant time, to enter on the title sheet made up "any subsisting entry in the Register of Inhibitions and Adjudications adverse to the interest". The duty imposed upon the Keeper adequately protects an inhibitor such as the pursuers.

[6] Further, the loss was not reasonably foreseeable. It must have been reasonably foreseeable that the Keeper would not obtemper a statutory duty. The test is that of a reasonable person and such a person would not foresee that there would be such failure.

[7] Further, imposing such a duty of care is not fair, just and reasonable. Parliament has provided that the Keeper checks the Register before registering title in the Land Register. Mr Reid asked how a duty of care can be imposed on the defenders to guard against the system established by Parliament letting the pursuers down. For that reason alone the law should not impose the alleged duty on the defenders.

[8] In addition, the loss claimed by the pursuers is pure economic loss. I was referred to *Clerk and Lindsell on Torts* 21 ed, para 1-43. Mr Reid submitted that the law required the pursuers to bring themselves within the *Hedley Byrne* v *Heller Partners* [1964] AC 465 (*Hedley Byrne*) rules to establish a duty of care. There requires to be (i) a special relationship equivalent to contract between the parties; (ii) an assumption of responsibility by the defenders towards the pursuers; and (iii) reasonable reliance upon the defenders by the

pursuers. *Henderson* v *Merrett Syndicates Ltd* [1995] 2 AC 145 (*Henderson*) is authority for there being a requirement of assumption of responsibility to another in respect of certain services. None of these is present in this case.

[9] The pursuers do not aver that the defenders knew of their existence let alone assume responsibility to them. There are no averments that the defenders entered into a relationship with the pursuers. There is no relationship equivalent to contract between the searcher and the holder of an inhibition. There is no assumption of responsibility as the defenders did not know that the pursuers existed. If there was a relationship with the pursuers the defenders would not need to carry out a search to know of the existence of an inhibition. The pursuers' case is that every time a search company accepted instructions from a seller, it assumes responsibility to the holder of an inhibition. There are, accordingly, no relevant averments which allow the pursuers to establish that a duty of care was owed by the defenders to them. The defenders' third plea-in-law should be sustained and the action dismissed.

[10] The pursuers rely on the following:

the core ingredients of a basic duty of care are: (i) a sufficiently proximate relationship; (ii) foreseeability of damage; and (iii) that it is fair, just and reasonable to impose the duty of care. Reference was made to *Caparo Industries plc* v *Dickman* [1990] 2 AC 605, (*Caparo*).

Mr Reid said that none of these was present in this case.

[11] There is no proximate relationship between a searcher and the holder of an inhibition.

[12] Assuming there is sufficient proximity, the loss is not reasonably foreseeable. The pursuers aver that the failure to report the inhibition would result in loss and damage to the pursuers. If no search had been instructed, the inhibition would still be in place and would not stop the sale of the property is the pursuers' case.

[13] Finally no reasonable reliance was placed by the pursuers upon the defenders. The pursuers relied upon section 6 of the Land Registration (Scotland) Act 1979 and the requirement that the Keeper note on the title sheet any existing inhibition. The pursuers are protected by this duty on the Keeper not upon the defenders' disclosure. If disclosed, the seller may choose not to go ahead with the sale or may proceed in bad faith. Mr Reid submitted that it was not foreseeable that reporting an inhibition would result in the debt being satisfied.

[14] The imposition of the alleged duty was not fair, just and reasonable as Parliament has provided for the Register and the Keeper to maintain it. There is further the duty on the Keeper to record any inhibition on a title sheet when transferring title. The duty having been established, it is unnecessary to impose a duty on the defenders.

[15] Mr Reid submitted that in the Note of Basis of the pursuers there is stated that the defenders are directly responsible for the loss sustained by them and that they are the only party liable for the losses claimed. This is plainly wrong. Mr Gardner is liable to them as would be the Keeper if the inhibition was not identified.

[16] Whether a duty of care was owed turns on the question of legal analysis as the pleadings define the limits of the evidence to be led. To send the case to proof would be unfair to the defenders incurring the costs entailed. *Mitchell* v *Glasgow City Council* [2009] UKHL; *Jamieson* v *Jamieson* 1952 SC (HL) 44. In *Caparo* the question of whether there was a duty of care was determined as a preliminary issue.

[17] As regards the pursuers' answers they point to *Gretton and Reid Conveyancing* 4th ed in support of their claim. There is no authority to support that liability of independent searchers to third parties has been tested. It is further stated that a liability could arise on the general principles of the law of delict. The law of delict does not support a duty of care by

the defenders to the pursuers. The pursuers also rely on *Caparo*. That case does not support a duty of care and in any event, as the claim is for pure economic loss *Caparo* is the wrong standard to determine a duty of care. *Ministry of Housing* v *Sharp* [1970] 2 QB 223, (*Sharp*) referred to by the pursuers has a headnote that could support them but it is now accepted that *Hedley Byrne* is of more general application and that it took some time to recognise the significance of the decision. *Customs and Excise Commissioners* v *Barclays Bank* [2006] UKHL 28, (*Customs and Excise Commissioners*). The assumption of responsibility line is now accepted to flow from *Hedley Byrne*. Mr Reid argued that care should be taken about relying on *Sharp*. While it is recognised that *Sharp* was correctly decided, *Customs and Excise Commissioners* states that it would be unjust if no compensation could be obtained for the adverse consequences on property rights of negligence of an official performing such a service in the public interest. The bank was not entrusted by statute or otherwise with the provision of a public service. The defenders have not been so entrusted. The bank in that case had advance notice that the freezing orders would be served and knew of their existence. In this case there was no such notice. The reason the defenders were not aware from the pursuers of the inhibition was that the pursuers had relied upon the Register to protect their interests.

[18] As regards relevancy and specification the defenders insist on their first plea-in-law and Mr Reid invited me to dismiss the action. The averment by the pursuers in Art 5 that the defenders knew or ought to have known that a failure to disclose such inhibition was likely to result in the sale of the property in breach of any inhibition, is irrelevant as there are no averments to allow that inference to be drawn. It presumes that the Keeper will not do what is required under section 6 of the 1979 Act. If deleted what is left does not support a case of negligence and the entire case falls to be dismissed.

[19] The averments about the reliance that solicitors would place, on the search or the

risks that the purchasers and their lender would be exposed to are irrelevant as they have nothing to do with the pursuers and any duty they claim to have been owed. They should be deleted.

[20] The pursuers' averments about s 159 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 are irrelevant as to engage that section it is necessary for the purchaser to be in good faith. There is no averment to that effect and no basis on which to draw such an inference. The seller and buyer here are father and son. Mr Reid suggested that there might not have been good faith.

[21] The pursuers' averments of loss are irrelevant as they assume that Mr Gardner would have paid the free proceeds of sale to the pursuers if the inhibition had been reported. Mr Gardner was aware of the inhibition but took no steps in its respect. There are no proper averments of loss and the action falls to be dismissed.

[22] The pursuers' averments about the outcome of any possible sequestration are irrelevant as they suggest that the same sum would be paid to the pursuers from the sequestration as from the proceeds of sale. No account is taken of the costs of sequestration which would be met from the sale proceeds.

[23] The pursuers are proceeding on a misunderstanding that an inhibition can secure payment of the debt. Mr Reid stated that all it can do is prevent the voluntary transfer of the property.

[24] The action should be dismissed.

The pursuers' submissions

[25] The pursuers claim that as a result of the fault and negligence of the defenders they have suffered loss in the sum craved. The loss arises as a result of the failure of the defenders

to disclose the existence of the inhibition in favour of the pursuers recorded in the Register on 8 February 2012, the pursuers having obtained a decree for £50,000 plus interest and expenses against Mr Gardner in November 2011.There is no dispute that the defenders failed on two occasions to disclose the existence of the inhibition. The searches were instructed prior to the settlement of the sale transaction and prior to the payment of the net proceeds of sale to the seller, Mr Gardner. Ms McKinlay submitted that a search is undertaken of the Register to alert parties to any inhibition prior to the transfer of the purchase price and to allow that inhibition to be discharged in exchange for payment. If not so, she wondered what was the purpose of such a search in the Register. She denied that there was any obligation on the Keeper at the point when the disposition and standard security were presented for registration. She claimed that the defenders owed the pursuers a duty of care. She invited the court to repel pleas in law 1 and 3 for the defenders and sustain pleas in law 1 and 2 for the pursuers and to fix a Proof before Answer in the alternative. If the court were to consider that evidence as to how the loss arises be heard before a conclusion can be reached as to whether a duty of care exists she invited the court to repel the preliminary pleas for the defenders, sustain plea in law 2 for the pursuers and to fix a proof before answer.

[26] She detailed the factual background, which does not appear in the main to be in dispute. She claims that the transaction between the sellers and the purchasers was at arm's length despite one of the purchasers being the son of Mr Gardner. The defenders' agents completed the registration form which certified to the Keeper that the searches of the Register had disclosed no adverse entries.

[27] The pursuers offer to prove that had the inhibition been disclosed the purchasers' solicitor would have enquired of the seller's solicitor whether the inhibition had been

discharged; that the purchasers' solicitor would have advised the purchasers and their lender not to proceed unless a discharge was available at settlement. To do otherwise was to risk a reduction *ex capite inhibitionis* at the instance of the pursuers and/or that the Keeper exclude indemnity on the title sheet; and that there were sufficient funds to enable the pursuers on receipt of payment to discharge the inhibition in the Register.

[28] As regards the duty of care, she submitted that whilst *Gretton and Reid* expresses the view that searchers owe a duty of care to third parties, she accepted that no consideration is expressly given to the current circumstances.

[29] She accepts that the test as to whether a duty of care existed is the threefold test set out in *Caparo*, *supra*, which is part of the law of Scotland, *Mitchell*. She raised the question of a further test in cases of pure economic loss and referred to *Customs and Excise Commissioners*, *supra.* She relied upon Lord Bridge's statement in *Caparo* that is it correct to regard an assumption of responsibility as a sufficient but not as a necessary condition of liability, a first test if answered positively may obviate the need for further enquiry; if answered negatively further consideration is called for. Accordingly it is not a prerequisite for the existence of a duty of care in cases of pure economic loss that there be an assumption of responsibility. The assumption of responsibility is an objective test. She referred to Phelps v *Hillingdon London Borough Council*. In *Sharp* a search of a local land charge registry was negligently undertaken and omitted the compensation notice. This resulted in the plaintiffs being unable to recover the compensation to which they were entitled. The searcher was under a duty of care to any person he knows or ought to know will be injuriously affected by a mistake. Such a duty of care could only arise where there was a voluntary assumption of responsibility was rejected. Lord Rodger in *Customs and Excise Commissioners* did not consider *Sharp* to be an exception to the overarching rule that there must be an assumption

of responsibility for a duty of care to exist. Where the defenders have taken responsibility for carrying out the search for the pursuers Registered there, where a failure to identify the pursuers would cause loss, the law should recognise that, on carrying out the search, an assumption of responsibility on the part of the defenders. What the pursuers offer to prove would not result in the case necessarily falling and the test in *Jamieson* is not met as regards relevancy.

[30] She submitted that there was a very close relationship between the defenders and the pursuers in the circumstances. Had the defenders carried out the searches in the Register properly, they would have identified the pursuers' inhibition in circumstances entirely within the control of the defenders.

[31] She submitted that it was entirely foreseeable that a failure to identify the existence of an inhibition in the search which occurs prior to payment of the purchase price would result in a loss to the inhibitor. She agreed that if no search was carried out prior to a sale, that the existence of an inhibition would not stop the sale. She also conceded that an inhibition could not prevent Mr Gardner transferring his interest in the property. She claimed that a purchaser and his lender would not wish to purchase property burdened with an inhibition. She submitted that the purpose of a search in the Register was to identify an inhibition prior to payment so that the inhibition would be discharged prior to settlement. The pursuers offered to prove this.

[32] The system of registration is not to blame but rather the failure of the defenders to disclose what the Register disclosed.

[33] Section 159 of the Bankruptcy and Diligence (Scotland) Act 2007 provides that the inhibition ceases to have effect (and is treated as never having had effect) if the property is acquired in good faith and for adequate consideration. The pursuers, she said, had no basis

to assert otherwise. Subsection 2 provides that the property is acquired when the deed conveying the property is delivered. She said that the inhibition ceases to have effect on the date the purchase price is paid and prior to the deeds being sent to the Keeper for registration.

[34] As regards relevance and specification, she submitted that for an action to be dismissed on the grounds of relevance, even if the claimant were to prove everything averred the case would necessarily fall. A plea of want of specification is properly taken where the averments fail to provide fair notice of the case that is being made out, such that the other party would be prejudiced in preparation for the proof. Neither test is close to being met having regard to the pursuers' averments which taken in their entirety are relevant to the existence of a duty of care and the extent of that duty.

[35] As regards the Keeper's duty under section 6 of the 1979 Act she submitted that whether or not the inhibition was entered or not was of no consequence because the price had already been paid over. The purpose of the search was to disclose the existence of an inhibition to the parties prior to settlement of the transaction to allow it to be addressed prior to payment of the price.

[36] She said that the averments in respect of the actings of solicitors were relevant in understanding the operation of conveyancing practice as regards the sale of heritable property.

[37] Section 159 of the Bankruptcy and Diligence (Scotland) Act 2007 has the effect of discharging the ongoing effectiveness of the inhibition and this has had an impact on the pursuers.

[38] She submitted that the pursuers' loss arises directly from the failure of the defenders to disclose the inhibition. There were sufficient funds from the net proceeds of sale of the

property to meet the debt due to the pursuers. She also submitted that the averments in respect of the sequestration of Mr Gardner are relevant.

[39] She further submitted that the defenders' averments that the pursuers had failed to mitigate their loss were irrelevant and the onus was on them to establish this. The pursuers only required to act reasonably and the defenders fail to identify actions which they claim to be alternative modes of redress.

[40] As regards reduction of the disposition *ex capite inhibitionis* is of very limited effect. She submitted that it would have no property consequences. There was no basis to establish that the purchasers were in bad faith. To proceed with an action for reduction she submitted would be to proceed with uncertain litigation.

[41] She finally submitted that the Keeper has acted upon the confirmation from the purchasers' solicitors that there were no adverse entries in the Register. The defenders do not explain the basis upon which the Keeper would compensate the pursuers.

Decision

Statutes referred to:

Bankruptcy and Diligence (Scotland) Act 2007

Land Registration (Scotland) Act 2012

Cases referred to:

Le Lievre v *Gould* [1893]1QB 491

Jamieson v *Jamieson* 1952 SC (HL) 44.

Hedley Byrne v *Heller Partners* [1964] AC 465 (*Hedley Byrne*)

Ministry of Housing v *Sharp* [1970] 2 QB 223, (*Sharp*)

Caparo Industries plc v *Dickman* [1990] 2 AC 605, (*Caparo*)

Henderson v *Merrett Syndicates Ltd* [1995] 2 AC 145 (*Henderson*)

Customs and Excise Commissioners v Barclays Bank [2006] UKHL 28, (*Customs and Excise Commissioners*)

Mitchell v *Glasgow City Council* [2009] UKHL

Michael v *Chief Constable of South Wales Police (Refuge and others intervening)* [2015] UKSC 2; [2015] AC 1732

Robinson v *Chief Constable of West Yorkshire Police* [2018] UKSC 4

Text Books referred to:

Clerk & Lindsell on Torts 21st Edition

Gretton and Reid, Conveyancing, 4th Edition

Gretton, The Law of Inhibition and Adjudication, 2nd edition

[42] The facts of the case are not in dispute. I shall reiterate them.

[43] The pursuers were holders of an inhibition over 6 Arbirlot Place, Arbroath DD11 2ER (the inhibition and the property). The property was at the time owned by Ian Donald Gardner (Mr Gardner) and his wife. On 6 December 2011, the pursuers obtained decree against Mr Gardner for the sum of £50,000. As a result of that debt the inhibition was served on Mr Gardner. In February 2012, the inhibition had been properly registered in the Register of Inhibitions and Adjudications (the Register). Despite that, on 6 August 2012 the Keeper of Registers of Scotland (the Keeper) allowed Paul Gardner, who is the son of Mr Gardner, and Louise Jones (the purchasers) to Register title to the property. That was done without the Keeper noting the inhibition on the title nor with any indemnity. The pursuers are unable to

recover their debt from Mr Gardner. The defenders were instructed to carry out a Form 10A search on behalf of the sellers prior to their purchase of the property. The search *inter alia* includes a search in the Register. Two searches were undertaken but neither disclosed the inhibition. The inhibition was not discharged before the sale and the purchasers' title was Registered in the Land Register without qualification. The pursuers have received no monies from Mr Gardner. The pursuers maintain that the defenders owed them a duty of care in these circumstances.

[44] As I understand it, this is the first case to be decided in Scotland concerning whether or not searchers of the Register have a duty of care to inhibitors on that Register when carrying out and reporting to a party to a transaction for the sale of a property. Ms McKinlay has said that, in the context of proceeding with an action for reduction, she would be proceeding with "uncertain litigation". By raising the present case, it could be said that she appears to be doing exactly that. This case is novel in the respect that there is no precedent in Scotland for the courts to find that a firm of searchers such as the defenders owe a duty of care to inhibitors, the pursuers.

[45] The pursuers' case is dependent on there being a duty of care owed to them as inhibitors by the defenders, a firm of professional searchers. The relevant averments are to be found in Article 6 of Condescendence. The defenders knew or ought to have known that solicitors instructing searches in the Register place reliance on the searches in advising a purchaser, seller or lender in respect of proceedings with the purchase of a property. In particular they aver that the defenders knew or ought to have known that a failure to disclose the inhibition was likely to result in the sale of the property in breach of the inhibition. The pursuers would lose the benefit of the inhibition and they would accordingly, suffer loss and damage as a result. It was their duty to take reasonable care to

ensure the accuracy of the reports produced and they were in breach of that duty.

[46] The defenders deny that there was any such duty of care owed to the pursuers. They made reference to section 6(1)(c) of the Land Registration (Scotland) Act 1979 now section 32 of the Land Registration (Scotland) Act 2012, which places a statutory duty on the Keeper to enter on a title sheet any adverse entry in the Register. Had the Keeper fulfilled that statutory duty, the loss complained of would not have been sustained. The pursuers have a remedy against the Keeper under statute and also at common law.

[47] I shall deal firstly with this primary submission.

[48] The Land Registration (Scotland) Act 1979 section 6(1) provided:

> "…the Keeper shall make up and maintain a title sheet of an interest in land in the register by entering therein-
> (c) any subsisting entry in the Register of Inhibitions and Adjudications adverse to the interest…"

[49] The Land Registration etc. (Scotland) Act 2012 section 32 provides:

> "References to certain entries in the Register of Inhibitions
> (2) The Keeper must, as soon as reasonably practicable after accepting the application [for registration of a deed such as a disposition] enter a reference to the entry in the title sheet."

[50] There is no statutory provision which provides that the Keeper shall be liable to an inhibitor if the Keeper fails to comply with this statutory duty. It was not explained to me how a duty of care at common law could be owed by the Keeper to the pursuers by failing to refer to the inhibition on the title sheet. Even if the Keeper had entered a reference to the inhibition in the title sheet, it is possible, if not probable, that the inhibition is *functus* having regard to after mentioned statutory provisions.

[51] As I understand it, after the sale and purchase of a property has settled, that is, the price has been paid over by the purchaser to the seller, the purchaser receives a deed transferring title in the property to him and then makes application to the Keeper to have

this deed registered. The price has already been paid over by the purchaser to the seller by the time such application is made. The question is what is the purpose of making reference to an inhibition on the title sheet? If such an entry had been made how this would protect the rights of the inhibitor?

[52] To understand this, I have had regard to what an inhibition actually is. According to *Gretton & Reid* at 9-17 "Inhibition forbids the inhibited person from selling or otherwise alienating heritable property. … Breaches of inhibition are not void, but are voidable at the instance of the inhibitor …by *ex capite inhibitionis."*

[53] Gretton, The Law of Inhibitions and Adjudications, 2nd Edition at 129-30 states…"the conveyance reduced does not become null as against all parties but only against the inhibitor. ...The effect of the reduction is simply that [the pursuers] are entitled to proceed as if ownership were still with [Mr Gardner]. At 131, "It is simply declaratory that the inhibitor is entitled to proceed as if the offending deed had not been granted. … Thus the reduction enables [the pursuers] to use diligence against [Mr Gardner's property]. This may seem hard on [the purchasers] but of course [they] took the subjects with knowledge of the inhibition." Accordingly, if the purchasers had knowledge of the inhibition, then *caveat emptor.*

[54] In this case there is no averment that they knew of the inhibition. *Gretton* presumes that the purchasers have paid over the price in full knowledge of the inhibition for them to be exposed to proceedings at the hands of the inhibitors, the pursuers. As a result of the admitted failure of the defenders to disclose its existence, on the face of it, they proceeded in ignorance of it. It seems that it is the purchasers' knowledge at the time of settlement of the transaction that is relevant, not at the time application is made to register the disposition in their favour as they could not be said to be proceeding with the transaction at that point. As referred to above the Bankruptcy and Diligence (Scotland) Act 2007 has relevant provisions

to which I later refer.

[55] Accordingly, the purpose of making the entry on the title sheet is to show the existence of the inhibition. This flags up for any subsequent purchaser or lender the possibility of the property in future being subject to reduction and adjudication. In that respect there is the possibility that the inhibition could be discharged in future. If there was a resale, for example, a purchaser on noting the existence of the inhibition on the title sheet would wish it addressed by the seller. In that respect the inhibitor's rights are enhanced, not protected, by the entry on the title sheet. It is the fact that the inhibition is registered on the Register, not that it is shown as an entry on the title sheet, which matters.

[56] Accordingly, whether or not the entry is referred to on the title sheet, the inhibition is still present on the Register and the pursuers' ability to enforce it is not affected by the omission of the Keeper to make reference to it. Accordingly, the rights of the pursuers are not adversely affected by the Keeper's omission. The Keeper has a statutory duty to make an entry of the inhibition on the Register but this does not burden the Keeper with a duty to exercise reasonable care in respect of inhibitors. I am not of the view that the Keeper owes the pursuers a duty of care in the circumstances of this case. *Esto*, there was a duty of care, there is no loss to the pursuers caused by the Keeper's failure in this respect.

[57] I now turn to the other points made in the parties' submissions.

[58] The pursuers' claim is for pure economic loss that is an economic loss which does not result from any physical damage to or interference with his person or property. *Clerk & Lindsell on Torts* 21st Ed 1-43 on p 29. In the present case the pursuers are claiming that they have lost the opportunity of recovering the sum due to them by Mr Gardner as a result of the failure of the defenders to disclose the inhibition on the Register.

[59] For a duty of care to exist in a case where economic loss is claimed there requires to

be a special relationship between the pursuers and the defenders. In *Hedley Byrne* the appellants were advertising agents who had placed substantial forward advertising for a company on terms on which they were personally liable for the cost of the advertising. Through their bankers they made enquiries into their client company's financial status and having received favourable references they placed orders, which resulted in a loss to the appellants. They sought recovery from the bankers of the client company, who had provided the favourable references. Their Lordships recognised that there could be a duty of care if there was a special relationship other than that of a fiduciary or contractual nature. Lord Reid at 496 states "…I can see no logical stopping place short of all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the enquirer was relying on him." Lord Morris at p 502/3 states "I consider that it follows and should be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person, who relies upon such skill, a duty of care will arise."

[60] Lord Devlin at p 528/9 states "… the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which… are equivalent to contract, that is where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract." "Responsibility can attach only to the single act, that is the giving of the reference, and only if that act implied a voluntary undertaking to assume responsibility."

[61] In *Hedley Byrne*, the assumption of responsibility where someone is entrusted to

provide advice upon which another is known to rely, was regarded as a necessary element in setting up the special relationship required for the duty of care to be established in cases for recovery of economic loss.

[62] According to these cases there requires to be a special relationship, a reliance on the skill of a person and an assumption by that person of responsibility to the claimant.

[63] There is no question the defenders were under contract to the instructing solicitor to provide searches in the Register and under a duty to disclose any entries therein. The instructing solicitor and his clients relied upon the accuracy of such searches. No contract existed with the pursuers. The pursuers' case is that they relied upon the defenders to exercise their skill in carrying out the searches of the Register to disclose their inhibition on the Register to the instructing solicitor and as a result of that failure they sustained loss.

[64] *Gretton and Reid, Conveyancing*, 4th Edition at 9-03 states "A searcher is liable for loss caused by an inaccurate search." "Whether they are liable to third parties who have relied on the search has not been tested but on the general principles of delict it would seem that such a possibility does exist." The specific circumstances in which this proposition is mooted are not disclosed.

[65] The pursuers rely on the case of *Caparo* to establish a duty of care owed by the defenders to the pursuers. In *Caparo* the appellants were the auditors of a company and certified the company's accounts. They had a statutory duty to report to shareholders. The respondents had invested in the company by purchase of shares with a view to taking it over on reliance of a negligently made audit. The appeal was allowed as liability for economic loss due to negligent misstatement was confined to cases where the statement or advice had been given to a known recipient for specific purpose of which the maker was aware and upon which the recipient had relied and acted to his detriment. It was held that

the statutory purpose of an audit of public companies was the making of a report to enable shareholders to exercise their class rights in general meeting and did not extend to the provision of information to assist shareholders in making decisions as to future investment in the company and further there was no reason in policy or principle why auditors should be deemed to have a special relationship with non-shareholders contemplating investment in the company in reliance on the published accounts even when the affairs of the company were known to be such as to make it susceptible to an attempted tale-over.

[66] Lord Bridge at 617C quotes Lord Wilberforce in *Anns* v *Merton Borough Council* [1978] AC 728, 751-752: "Through the trilogy of cases in this House- Donoghue v Stevenson, Hedley Byrne and Dorset Yacht Company Ltd. the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be addressed in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter- in which case a duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise…"

[67] Lord Bridge goes on to state that at 617F, G "…since the **Anns** case a series of decisions of the Privy Council and of your Lordships' House, notably in judgements and speeches delivered by Lord Reid of Kinkel have emphasised the inability of any single general principle which can be applied to every situation to determine whether a duty of

care is owed and if so what is its scope."

[68] What has in the past been referred to as the threefold test expressed by Lord Bridge at 617H is stated as "…in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any precise definition …" Having discussed the contractual liability a professional man owes to the instructing client his Lordship at 619C states "But the possibility of any duty of care being owed to third parties with whom the professional man was in no contractual relationship was for long denied because of the wrong turning taken by the law in *Le Lievre* v *Gould* [1893]1QB 491…But it was not until the decision of this House in *Hedley Byrne* that the law was once more set upon the right path."

[69] Lord Bridge at 618 B-C "Lord Bingham in *Customs & Excise Commissioners* at para 4-8 states "the first [test] is whether the defendant assumed responsibility for what he said and did vis-à-vis the claimant or is to be treated by the law as having done so." At 620 Lord Bridges regards two cases as being very much in point, namely, *Smith* and *Harris* in which surveyors who had carried out inspections and valuations negligently were held to be liable to the purchasers of the properties involved. At 620 "the salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transactions which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that

the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation."

[70] The above authorities concern situations where advice or information is given upon which it is reasonably foreseeable that a known class of person will act.

[71] In *Robinson* v *Chief Constable of West Yorkshire Police* [2018] UKSC 4 Lord Reed at para 21 states "the proposition that there is a *Caparo* test which applies to all claims in the modern law of negligence, and that in consequence the court will only impose a duty of care where it considers it fair, just and reasonable to do so on the particular facts is mistaken. As Lord Toulson pointed out in his landmark judgement in Michael v *Chief Constable of South Wales Police (Refuge and others intervening)* [2015] UKSC 2; [2015] AC 1732, para 6 that understanding of the case mistakes the whole point of *Caparo*, which was to repudiate the idea that there is a single test which can be applied in all cases in order to determine whether a duty of care exists, and instead adopt an approach based in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities." At para 27 Lord Reed states "It is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised. Following *Caparo*, the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case. It is the exercise of judgement in those circumstances that involves consideration of what is "fair, just and reasonable".

[72] Taking account of the foregoing authorities it appears to me that *inter alia* I have to have regard to legally significant features in past cases considering negligence and pure economic loss. It is not a question of being confined to any fixed test which must be applied in all cases in order to determine whether a duty of care arises.

[73] The sale of the property was in breach of the inhibition. This is admitted. In general a breach of inhibition is reducible by the inhibitor by raising an action for reduction *ex capite inhibitionis. Gretton* p128. The deed to be reduced would be the disposition by Mr Gardner in favour of the purchasers. This does not affect the title of the purchasers against anyone other than the inhibitors. It has no property consequences but enables the inhibitors to proceed as if Mr Gardner were still the owner. The inhibitors can adjudge the property, which according to *Gretton* at p131, may seem hard on the purchasers but they took the subjects with the knowledge of the inhibition. As stated above, in the present case there is no averment that the purchasers were aware of the existence of the inhibition on the Register. Had they been so aware, then by proceeding with the purchase, they took the risk that the pursuers would seek reduction *ex capite exceptionis* and proceed to adjudication to give the pursuers a real right in the property.

[74] In terms of section 160 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 an inhibited debtor breaches the inhibition when he delivers a deed (a) conveying the property over which the inhibition has effect to a person other than the inhibiting creditor.
Mr Gardner is accordingly in breach of the inhibition.

[75] However, section 159 of the 2007 Act provides:

> (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 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 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.

[76] In the present case the purchasers are, thanks to the negligence of the defenders unaware of the disposition and by having the defenders carry out the search in the Register they have taken all reasonable steps to discover the existence of the inhibition affecting the property. They are therefore presumed to have acted in good faith. There is no averment to the contrary. There is no averment that the price paid by the purchasers was not adequate consideration.

[77] Accordingly, even if the Keeper had made the entry in the Title Sheet of the existence of the inhibition, by statute the inhibition has ceased to have effect (and is treated as never having had effect). This is the consequence for the pursuers of the purchasers being unaware of the existence of the inhibition, given the facts of this case.

[78] In my view there is proximity or neighbourhood between the defenders, who took on the task of searching the Register and the pursuers, who had lodged the inhibition on that Register. By omitting to make the purchasers aware of the inhibition, the defenders

have caused the pursuers to have lost their right to a reduction *ex capite exceptionis* and adjudication. This consequence for the inhibitors was foreseeable by the defenders. They are presumed to know or ought to have known the legal consequences for the pursuers of their negligence. It is perfectly fair and reasonable in these circumstances that the defenders owed a duty of care to the pursuers. As regards the assumption of responsibility there is no direct assumption of responsibility to the pursuers by the defenders but in my view it could be implied from the special relationship between the searchers and the inhibitors as a result of the inhibition being registered in the Register. In any event, voluntary assumption of responsibility is not necessary in every case.

[79] As there appears to be no precedent in Scotland in a case such as the present, I have had regard to English cases. The case which would appear to be most in point is that of *Sharp***.** Unlike Mr Reid, I have taken the trouble to read beyond the headnote in that case. In that case a landowner had been refused permission to develop his land and had obtained a compensation payment from the Ministry. Notice of compensation was duly registered under section 28(5) of the Town and Country Planning Act 1954 in the Register of local land charges of the local authority. A couple of years later the landowner was granted permission to develop and solicitors for the purchasers lodged a requisition for an official search in the local land charges Register pursuant to section 17(1) of the Local Land Charges Act 1925. The search was negligently carried out by the clerk of the second defendants and a certificate signed by the local land charges registrar, the first defendant, which omitted any reference to the compensation notice issued to the purchasers. The purchase was completed and the purchasers refused to repay the compensation as they had no knowledge of the charge. The Ministry conceded that in view of the clear certificate the purchasers were protected by section 17(3) of the Act of 1925. The Ministry brought an action for damages against the first

defendant for breach of statutory duty and against the second defendants' vicarious liability for the negligence of their clerk who had made the search in the Register.

[80] Lord Denning MR in **Sharp** at paragraph 6 concerning the liability of the clerk of the Registrar who has made the mistake by omitting reference to the charge, "I have no doubt that the clerk is liable. He is under a duty at common law to exercise due care. That was a duty he owed to any person- incumbrancer or purchaser- whom he knew or ought to have known might be injured if he made a mistake." His Lordship disagreed that a duty to use due care only arose where there was a voluntary assumption of responsibility. Referring to Lord Reid and Lord Devlin in *Hedley Byrne***,** where an assumption of responsibility was deemed to be a necessary element of such duty of care, "I think they used those words because of the special circumstances of that case (where the bank disclaimed responsibility). But they did not in any way mean to limit the general principle." "In my opinion the duty to use reasonable care in a statement arises, not from any voluntary assumption of responsibility but from the fact that the person making it knows or ought to know that others being his neighbours in this regard would act on the faith of the statement being accurate. That is enough to bring the duty into being. It is owed of course to the person to whom the certificate is issued and whom he knows is going to act on it…But it is also owed to any person whom he knows or ought to know will be injuriously affected by a mistake such as the incumbrancer here."

[81] Following *Sharp* it appears to me that the defenders have a duty to use reasonable care in respect of the pursuers in the preparation of a search report, not by any voluntary assumption of responsibility to the pursuers on their part, but if they knew or ought to have known that others being their neighbours and in proximity, namely the pursuers as inhibitors on the Register, which the defenders were searching, would be injuriously

affected by a mistake such as the defenders admit to making in the present case. The defenders have failed in the exercise of that duty.

[82] There is the question of loss and its quantification. In my view there are adequate averments in Article 6 of Condescendence anent such loss and it is for the pursuers to prove these averments.

[83] Accordingly, I am sustaining the pursuers' first and third pleas in law and rejecting the defenders' first and third pleas in law.

[84] For completeness, although the question did not arise, I have certified the debate as suitable for the employment of junior counsel.