OUTER HOUSE, COURT OF SESSION

[2018] CSOH 79

A620/15

OPINION OF LADY WOLFFE

In the cause

AGNES BARR

Pursuer

against

JAMES CASSELS

Defender

Pursuer: Stevenson (sol adv); Campbell Smith LLP
Defender: Sanders; Allan McDougall

25 July 2018

Introduction

[1] The pursuer in this action seeks reduction of a disposition of land amounting to about 1.4 ha ("the subjects"), by the pursuer in favour of herself and the defender (and the survivor) dated 10 May 2006 and registered in the General Register of Sasines ("the GRS") on 9 June 2006 ("the disposition").

[2] The subjects disponed by the disposition had formerly been part of the land owned and farmed by the pursuer's father, John Logan Barr. The pursuer's father had previously disponed the subjects to the pursuer by a disposition dated 3 October 2003 ("the 2003 disposition") but only recorded in the GRS of even date with the disposition. In

circumstances I will come to narrate, a new house was built on that parcel of land. It is the pursuer's reduction of that disposition in favour of herself and the defender which is the subject matter of this action.

[3] At the time of the grant of the disposition, the pursuer and defender had been in a relationship, which had begun several years earlier. The defender, who is about 17 or 18 years older than the pursuer, had been the solicitor to the Barr family for many years. He had acted for members of the Barr family in relation to a variety of matters, including having acted for the pursuer in respect of her two divorces.

[4] The matter called before me for a two-week proof. The pleadings in this case are extensive. The Closed Record extends to some 50 pages. There are averments of other matters not obviously or directly reflected to the conclusions. For example, there are averments attacking the propriety of the defender having acted for the pursuer's father, John Barr, in relation to the 2003 disposition. (The averment in Articles 7 and 8 of condescendence and the answers thereto themselves occupy 19 pages of the Record.) However, John Barr is not a party to these proceedings and there is no conclusion (or plea) directed to the 2003 disposition. After discussion on the first morning of the proof, it was agreed that the essential ground for reduction of the disposition was for breach of fiduciary duty on the part of the defender. In the circumstances described, the defender was acting as solicitor for the pursuer in relation to the disposition and he was also benefiting as one of the disponees thereof.

The pleadings

[5] The pursuer's first conclusion is for reduction of the disposition. The second conclusion is for interdict against the defender from selling the land and the third conclusion seeks payment of £187,500 in lieu of reduction.

[6] The pursuer's first plea-in-law (as amended on the first day of the proof) is as follows:

> "The pursuer having been induced into executing the disposition condescended upon as a result of the Defender's misrepresentations, *et separatim* his actings including his breach of fiduciary duty, the disposition dated 10th May 2006 ought to be reduced."

The pursuer's remaining pleas relate to the second and third conclusions.

[7] The defender stated nine pleas-in-law, of which it is necessary only to note his pleas of prescription (plea 5), personal bar (plea 8) and that, having regard to the 2015 decree, it was contrary to natural justice to grant any of the conclusions to be granted.

Factual averments

[8] It is necessary to note the following additional matters averred in the pleadings:

1) There is reference to the defender's action in Paisley Sheriff Court for division and sale of the subjects ("the defender's action"). Although the pursuer (who was called as the defender in that action) was legally represented in those proceedings, summary decree was granted in favour of the defender on 23 March 2015 for declarator that the subjects be sold and the proceeds divided between the parties (it being inexpedient to divide the subjects) ("the 2015 decree"). Leave to appeal against that decree was refused on 22 June 2015.

2) The pursuer avers that the defender acted as her solicitor in relation to a number of matters, including her application to change her name, a claim for maintenance against a former husband, and the framing of a will for her in 2002. There are also averments of the defender acting as a solicitor for other members of the pursuer's family, which it is not necessary to record.

3) The pursuer also avers (in Article 2 of Condescendence) that the defender acted for the pursuer's father to obtain the requisite planning permission in respect of the proposed construction of a house on the subjects. (There was some evidence that, by reason of the agricultural character of the land this was not straightforward and that there is a planning condition restricting the class of persons who may occupy or acquire the subjects ("the planning condition").

4) On the question of the funding of the construction of the house, the pursuer avers:

> "The Pursuer paid for the costs of construction. The defender, in receipt of State benefits, was not in any position to contribute towards its construction... Cash had been given to the Pursuer by the Defender. It was given to her to do with as she wanted. The Pursuer was able to accumulate enough cash from the gifts of money made by the Defender so as to use the money towards funding purchase of building materials for construction of the house."

It should be noted that the defender denies this and himself avers that he "paid for the entire construction costs of the house". He also avers:

> "The defender did not give any cash gifts to the pursuer to do as she pleased with. As the pursuer is aware, and was aware, these sums were handed over for the specific purpose of the ongoing construction of the property including paying tradesmen and paying for materials."

5) The averments (in Article 5 of Condescendence) concerning the grant of the disposition are as follows:

> "On or about 10th May 2006, the Defender presented a document to the pursuer for her signature. The signed document is produced herewith. It is a disposition of heritable property from the Pursuer to the pursuer and the Defender. The pursuer asked the Defender what the document was for. She was told by the Defender that the document would transfer her father's land to her. The Pursuer did not read the document. The Pursuer relied upon the Defender's explanation of the purpose of the **document in adhibiting her signature to it**. At the time **of adhibiting her signature**, the Pursuer was not aware of the earlier 2003 deed; nor aware of the true nature of the disposition to the disposition purportedly conveying title to the Defender and herself. Unbeknown to the Pursuer, the defender purported to act as solicitor and agent for himself and the pursuer in the drafting, engrossment, execution and registration of the conveyancing deeds purportedly giving the defender nominal title to the pursuer's home. Morag Hill, the person allegedly having acted as witness to execution of the deed, was not personally present on the occasion that the Pursuer's signature was **adhibited to the document**." (Emphasis added.)

6) The defender's answer to these averments is as follows. After narrating the ongoing construction of the house, it is averred:

> "The defender reminded the pursuer that the property required to be transferred into the joint names of the parties being what had been originally agreed and being, at least in part, the basis on which the defender agreed to fund the entire construction and fitting out costs. The defender advised the pursuer that a formal Disposition would require to be signed by her and the title thereafter registered in joint names. The pursuer fully understood what required to be done and why it required to be done. The defender further advised the pursuer that it would be in her interests to discuss the matter with an independent Solicitor. The pursuer understood this but indicated to the defender that she neither required to nor wished to seek independent legal advice. She indicated that she was happy for the property to be in joint names and fully understood the legal import of granting a Disposition to that effect as she did."

There are sundry averments as to the rationale of having a survivorship clause, essentially because of the disparity in the respective ages of the parties.

7) The defender makes additional averments about the steps taken to advise the pursuer to obtain separate legal advice. These are as follows:

> "In addition to the defender explaining to the pursuer about her obtaining independent advice the defender instructed the conveyancing solicitor (Allan Findlay) then employed by the defender (Cassels) to write to the pursuer in

> formal terms fully explaining issues such as obtaining independent advice…. In terms of said letter the pursuer was provided with a copy of said letter to sign and return and a letter of reply for her to sign and return if she so wished. The pursuer signed and returned the letter of reply. The pursuer maintained their position that she did not require independent advice. The defender went through the terms of the proposed disposition. As the pursuer is aware the aforementioned Morag Hill witnessed the pursuer's signature of the disposition granted by her in favour of the parties. There was no coercion, fraud, undue influence or duplicity by the defender. The pursuer granted the disposition voluntarily, knowing what she was signing and its legal significance *qua* conveying a share in the property to the defender. The pursuer did so in the knowledge that parties to the action were building a home together with a view to a future together and in the knowledge that the defender was funding the cost of constructing and fitting out the said home."

Averments of the grounds of reduction

[9] The pursuer's averments setting out the legal basis of challenge are as follows:

> "**Cond. 9** As solicitor allegedly acquiring heritable property from his client, the Defender owed the Pursuer fiduciary duties of care to act in her interests. He was bound to advise the Pursuer to seek independent legal advice as to the nature of the transactions in which she was involved. The Pursuer was not advised to consult another solicitor. She was not told the true nature of documents she had been asked to sign. The Pursuer relied upon the representations made by the Defender. The Defender breached his fiduciary duties of care owed to the Pursuer. The Defender has gained personally from his breach of fiduciary duties. The Pursuer did not intend to dispone any interest in heritable property to the Defender. Had the Defender fulfilled his duties of care owed to the Pursuer, the Pursuer would have taken independent legal advice. With the benefit of independent legal advice the Pursuer would have been made aware of the true nature of the conveyancing documents given to her. She would not have disponed a share of her home to the Defender. In the circumstances, the Defender obtained a material personal benefit from his actings. In the exercise of the fiduciary duty of care, the Defender (i) ought to have declined to act for the Defender's [*sic*]; (ii) ought to have explained his reasons for doing so; and (iii) ought to have insisted that the Defender consult and engage the services of an independent solicitor. In a question with the Pursuer, the Defender was professionally negligent. No solicitor of ordinary skill and acting with ordinary care would have acted for the Pursuer in the manner condescended upon. The said letter from Donald B Reid is referred to for its terms. The Defender's averments in answer are denied save in so far as coinciding herewith."

I do not record the averments anent the 2003 disposition.

The pursuer's proof

The pursuer's evidence

[10] The pursuer described having a number of prior occupations. These included having been a social work carer, running a business supplying office furniture and as a nurse. Her current occupation was as a chef in a steakhouse in East Kilbride. She described having assisted with lambing on the family farm for 30 years but for which, she said, she was never paid. She said that it was in recognition of that contribution that her father conveyed the small parcel of land to her by the 2003 disposition. The pursuer first met the defender when she was 26. He assisted in obtaining maintenance from her first ex-husband. The defender was the Barr family's lawyer and other family members went to him on different legal matters. The defender also assisted the pursuer with her second divorce, which involved cross actions in Scotland and in North Carolina, and assisted with obtaining custody of the pursuer's daughter whom she had had with her second husband.

[11] A deed described as the will of the pursuer was put to the pursuer. The pursuer's evidence was that she had never received this. She acknowledged that the signature looked like hers, although the signature was smoother, but it did not reflect how she formed the letter "G". Furthermore, she maintained that she had never instructed a will from the defender. The only will she had ever made she had written out at the farm and had left with her parents there.

[12] As to whether or not the pursuer's father ever expressed an interest in conveying land, the pursuer's first response was that "farmers do not give away their land". At a later point in her evidence it was her position that her father wished to gift her a parcel of land on the farm in recognition of work she had done in the past for free. To that end, enquiries were made to secure the appropriate permissions given its character as agricultural land.

She and her father discussed the pursuer building a three-bedroom house. This coincided with the start of her relationship with the defender. The defender offered to assist in obtaining planning and other permissions. At other points, I understood the pursuer's evidence to be that she and her father had talked in the past about her father giving her one-half of an acre so she could build a bungalow (like her brother had done) She maintained, however, that she was not aware at that time of her father having given land to her. She only became aware of that in about 2005. The source of this knowledge she described, somewhat surprisingly, as "hearsay". It was only when planning permission was obtained that she understood that she was free to build a house on the land. As she described it, the defender took her father to the sunroom in the farmhouse and everything was done in private. However, she said, she knew she was getting the land and knew she was going to get a house.

[13] The pursuer explained that in about mid-2002 the defender became friendly with her, often inviting her out for dinner at a Glasgow Chinese restaurant. Their relationship progressed and the parties discussed moving in together and getting married. At this point, the defender was still married to his wife.

[14] Returning to the topic of how many deeds or legal documents the pursuer had signed (ie and were prepared by the defender), the pursuer was adamant she had only ever signed one document intending to have legal effect. This was the transfer of the parcel of land from her father to herself. She maintained that that document began with a passage all about property laws of the 14th century. It was all "gobbledygook" to her and the defender just told her to sign the deed. He told her it was all about land law hundreds of years ago and she would not understand. She signed it, she said, because the defender said it was transferring the land from her father's name to her. To try to relate this to some timeframe,

she estimated this was in about 2006 because the house was newly built at that point. She maintained that this was to effect the transfer of land from her father to herself "to make the house legal".

[15] The disposition, being the deed under reduction, was put to her. She at first acknowledged that the signature was hers (doing so twice in the first few questions on this chapter of the evidence). Indeed, when the first several lines of the disposition were read out to her, the pursuer was quick to say that she *could* understand this document. She could not understand the document that she had been given to sign in the past which she had already referred to in her evidence. When asked why she signed the disposition, she was adamant that this was not the deed she had signed. Whatever she signed, she had signed it because she trusted the defender. She confirmed that she did not understand what she had signed and did not read it. She was unaware what happened to the document she said she had signed, other than that she had given it to the defender and he had taken it to his office. At this point objection was taken on the basis that the document containing references to 14th century property law, and which was the single document the pursuer said she signed, ought to be produced. The pursuer's solicitor advocate explained, however, that no such document was to be produced.

[16] Thereafter the pursuer was asked to explain how her signature appeared on the disposition, to which she simply replied that she had described the document she had signed and this disposition was not what she had signed. She repeated that she could understand the import of the disposition. The other document, which she maintained she had signed, was more than a few pages, and the reference to the 14th century law was on the first page. She was unable to explain how her signature came to be on the disposition.

[17] She was adamant that she had never received any paperwork from the defender, the only paperwork she had ever received from him were her divorce papers. She had received no other paperwork. The defender kept everything, including all of the paperwork relating to the land and the house.

[18] Returning to the topic of her father's conveyance of some land to her, she repeated her evidence that this was to reflect the fact that she was never paid for her work but would take time off from work to come home and help with the lambing.

[19] In relation to the defender's involvement with the land, this was because she and the defender were supposed to be starting a new life together; he was the lawyer and everything she did she put by the defender. Their common expectation was that they would live together, although not immediately because the defender was still married to his wife.

[20] A number of letters from the defender's firm, Cassels, were put to her. The first was a letter dated 14 April 2006 ("the Advice Letter"), which was in the following terms:

> "Dear Ms Barr,
>
> 1.42 Hectares at Bonnyton Moor Farm Eaglesham
>
> I have been instructed by James Cassels in connection with the transfer of title to the above area of ground, which is currently owned by yourself.
>
> I am advised that you and Mr Cassels have agreed that the title should be transferred into YOUR JOINT NAMES AND TO THE SURVIVOR. This effectively means that on the first death the title to the ground 'automatically' passes to the survivor and in plain English if Mr Cassels were to die first then the title (ownership) automatically passes to you. It is also the case that if you were to die first that the title would pass to Mr Cassels. This is known ad [*sic*] 'a Destination' ie on the occurrence of a specific event (first Death) the titled [*sic*] is destined to pass to the survivor. It is also a contract that is entered into between you and in order to change the Destination then each party will require to consent.
>
> It also means that each of you has a share in the title (ownership) and in the event of any dispute that cannot be resolved then the ultimate recourse to either of you would be to make an application to a Court of competent Jurisdiction seeking a decree of

division and sale of the property. The court could order that the property be sold and the proceeds of sale divided between you.

The ownership of the buildings erected (or to be erected) on the land is also subject to the same rules and effectively the buildings become part of the land.

I have prepared a Disposition of the Land (and buildings) which is enclosed.

If it is your intention that that title (ownership) of the Land and buildings be transferred to your joint names and the survivor I would ask that you sign the deed at he [*sic*] place indicated by your pencilled initials and that you complete the date and place of signing. Your signature should be witnessed by an independent witness who should also sign and after their signature complete their personal details.

If you require any advice or instruction about signature please phone.

I MUST STRESS TO YOU THAT WHAT IS PROPOSED IS THE TRANSFER OF OWNERSHIP OF THE LAND AND BUILDINGS FROM YOUR SOLE NAME INTO THE JOINT NAMES OF YOURSELF AND MR CASSELS AND THE SURVIVOR. You must appreciate that once done the title cannot then be Transferred back without the consent of you both.

I would strongly urge that you take INDEPENDENT ADVICE as to the steps that you are about to take BEFORE SIGNING the Disposition.

In the vent [*sic*] that you are satisfied that you do not require that advice I would ask that you sign the enclosed letter and again have your signature witnessed in order that I can be sure of your receipt of this letter and your confirmation that you do not wish independent advice before signing.

Nothing in this letter is intended as advice to you other than to illustrate in broad terms the nature of the proposed transaction and it's effect. You should take independent advice if in any doubt."

[21] The pursuer was quick to assert that she had never seen this document, asking rhetorically "why would I give the defender half my land?" She had never received this letter.

[22] A second letter was put to her also dated 14 April 2006 ("the Waiver letter"), which bore to have been sent undercover of the Advice letter. This was in the following terms:

"Dear Mr Findlay

1.42 Hectares at Bonnyton Moor Farm, Eaglesham

> I refer to you letter of 14th April 2006 a copy of which is attached and I confirm that I have read and understand the terms thereof.
>
> I have decided that I wish to proceed to execute the disposition in favour of Myself and James M Cassels and to the survivor of us. I acknowledge that I have been advised to seek independent advice as to the nature and effect of granting the said disposition before signing but having had that advise [*sic*] I have declined to take independent advice.
>
> The executed Disposition is attached hereto."

[23] The pre-typed signature was in the name of "Agnes Y L Barr", whereas the signature appended was "Agnes Fillers". (This was one of the pursuer's married names.) Her first response was to say that she didn't know she was getting 1.4 ha. She accepted that this appeared to be her signature but she had not signed this letter. She could not explain how her signature was on it, but she repeated that she had not signed this letter. Nor had she received either of these letters.

[24] The pursuer was next asked some questions to elicit how she became aware of the disposition. So far as the pursuer could recall, she and her daughter had moved into the house in about October 2006. This was three or four months before the defender moved in because he first had to buy his wife a house. It is not necessary to go into the details of the breakdown of the parties' relationship. The pursuer recalled spending two Christmases with the defender in the house. It was in the course of an argument with him that she said the defender told her that she could not put the defender out because he owned one half of the house. She described being shocked. She went to four or five lawyers before any lawyer would accept her case, the reason being that the defender had given them all business in Glasgow.

[25] Ultimately, she instructed Lynn Collingham of T C Young. Lynn Collingham's advice was that as the pursuer had signed the document (ie the disposition) the defender

was entitled to one-half of the house. She maintained in her oral evidence that it had never been her intention to give or convey one half of the subjects to the defender.

[26] In relation to the parties' respective financial contributions, the pursuer accepted that the defender had "paid for a lot of stuff". This was because he wanted to be with the pursuer, to leave his wife and start a new life with the pursuer and her daughter. She explained that the defender would give money for her to treat herself but she never touched this. She put it away. This was years before, when she and the defender had started dating and going to Chinese restaurants. He often gave her money in an envelope and, if it was not money, it was jewellery. This was every couple of weeks or months, and the amounts varied from £1000, £5000, to £10,000 at a time. Her position was that he had given her this money unconditionally, explaining to her that he could not use the money and she was to treat herself, but the pursuer never did. She used these monies to pay for the work on the house and to pay the men. She stated that in addition to the defender giving her a lot of money he had also given her his limited-edition Saab.

The pursuer's cross-examination

[27] The pursuer's relationship with the defender had begun in about 2002 or 2003 and ended acrimoniously in about 2007. She was not sure of the exact dates.

[28] In relation to some of her work history, she worked on the farm from about 2002 until she hurt her back. This was probably after she had moved into the house in 2006. At that point the defender would not give her any money to look after the house or anything; she described the defender having changed after she had moved into the house. She sought money from her mum. She did not go back to work until about 2011.

[29] She was asked questions under reference to an application for legal aid made in August 2002. She accepted the entries recording that she had no income, no capital, and that she was in receipt of income support were incorrect. She accepted that she had undertaken no paid employment between 2002 and 2005. In the light of her earlier evidence, about receiving large cash sums from the defender at this time, she accepted that she should have come off income support. She had gone on income support in about 2001, when she came back from the United States, after divorcing her second husband. She explained the defender told her she could stay on income support because he had paid "a lot of" taxes. After a warning on incrimination, it was put to the pursuer that she had engaged in benefit fraud. She replied that she did not deny that what she did was wrong in claiming benefit support. She accepted that she knew she should not have claimed it. So far as she could recall, she had come off income support when she had moved into the house (ie around October 2006).

[30] The cover letter (dated 26 August 2002) to a will was put to the pursuer. She maintained she had not received this letter. In response to a question as to whether the will had been manufactured, she said yes, and became somewhat combative asking why would she draw up a will having just returned from the United States. She maintained throughout cross-examination that she had not signed the will. She accepted that the signature appearing at the foot of the page appeared to be her signature, but it was too smooth to be her signature. She was adamant that she had never signed the will and that this was not her signature. It was a forgery.

[31] Each term of the will was put to the pursuer and, apart from stating that she had never appointed the defender as her executor, she otherwise accepted that all of the provisions reflected her testamentary intentions. These were to bequeath her jewellery to

her daughter and to divide the residue of her estate among all three of her children. While it matched her testamentary intentions, she explained that the defender "knew her". She had never asked him to frame a will. At this point the passage in the pursuer's pleadings averring that the defender had acted for her in the drafting of the will, quoted at paragraph [9(2)] above, was put to her but she simply repeated her evidence that she had written out a will and left it in her father's safe. She had made her own will and written it out. Her signature on this will was a forgery. The signature purporting to be hers was too smooth.

[32] The cover letter to the disposition and the disposition was put to her. When asked whose signature appeared at the foot of the disposition, she said "it looks like mine" but maintained that Morag Hill never witnessed her sign anything at the farm. She repeated this and added that this was because it was a couple of days later that Morag Hill had appended her own signature as a witness. She maintained that Morag Hill had signed something as a witness when the pursuer was not there. The pursuer's position was that Morag Hill had not witnessed her signature on the disposition. The pursuer had signed this in her house and dropped it off at Morag Hill's house a few days later. (This evidence was difficult to follow: it was suggestive that the pursuer *had* signed the disposition and it was inconsistent with the main thrust of her evidence in chief.)

[33] The terms of the two letters from April 2006 (ie the Advice letter and the Waiver letter) were put to her and she confirmed that she had never received these. Anything that had been discussed regarding the land had taken place between the defender and her father. She repeated her evidence that she did not know about the 1.4 ha. She knew the author of the letters, Allan Findlay, but repeatedly stated that she would never have given away her own land. She accepted the terms of these letters were clear and easily understood and that

they recommended that she take legal advice. The Advice letter sounded fine to her, but she repeated she had never received this letter. The terms of the Waiver letter were put to her and she again repeated she had not seen this letter about the land; the signature looked like her signature but she had not signed this letter and therefore the signature on it was also a forgery. If it were Mr Findlay's evidence that he had sent these letters out or received the Advice letter back, he was either mistaken or lying. She was the one telling truth.

[34] Several questions were put to her that it was not unusual for a house to go in joint names when a couple moved in together, but the pursuer maintained she would never give her land away. She accepted that they would be starting a new life and that at the time the parties intended to move in together.

[35] A series of questions were asked of the pursuer about her communications with, and advice from, Lynn Collingham of T C Young and also under reference to a number of file notes in those agents' file. The pursuer confirmed that the matter on which she had sought advice from Lynn Collingham had been about signing a document entitling the defender to one-half the house and that this is what she had told Lynn Collingham at the time.

[36] The disposition was again put to her and she repeated her evidence that she had not signed the disposition but had signed a deed containing passages about 14th century land laws. When pressed as to whether or not it was her signature on the disposition, she said "it's my signature but it is not mine". She appeared then to confirm that this was her signature but that the paper she had signed was all about the 14th century property laws. The first two pages of that document were all about old land law. She confirmed she had asked advice from Lynn Collingham because she had signed a deed entitling the defender to half of the house.

[37] At this point the closed record in an action at the instance of the pursuer against the defender in Paisley Sheriff Court in 2009 was put to her. After a series of questions under references to certain passages in that record, which I need not set out, she confirmed that she knew by 2009 that the defender asserted that he was entitled to one-half of the subjects. She also accepted that, by then, she was very concerned about her situation generally and that in her view the defender had tricked her out of one-half of the house. It was in order to have this corrected that she had contacted solicitors. She gave evidence about an incident where the defender was seen walking about the house with a new girlfriend as if showing it for sale, which had worried her. She was worried that the defender would take the house from her.

[38] There then followed a chapter of evidence based on the recovered solicitor's file of T C Young, the agents whom the pursuer instructed on a number of matters. A number of file notes recording calls from, or advice to, the pursuer were put to her. Some of these entries also disclosed the pursuer being concerned about, and receiving advice concerning, a proposed action at the instance of her father against her or to challenge the 2003 disposition. For example, there was an entry in September 2010 about this and the pursuer confirmed that this was a live dispute at that time. She accepted that her dispute with the defender was simply part of the "bigger picture of events" (as it was put in Lynn Collingham's letter to the pursuer dated 20 September 2010), about which she was receiving legal advice from Lynn Collingham. The pursuer was affected by two disputes: one involving her father against the defender about the 2003 disposition and the transfer of land to her; and the second being the defender's action. She had not opposed the latter action, because Lynn Collingham's advice was that, because the pursuer had signed the disposition, the house had to be sold. In relation to the first dispute, she understood from Lynn Collingham that her father was

trying to get the house back. If that happened, ie if her father's disposition to her were reduced (ie the 2003 disposition), then the disposition by the pursuer in favour of herself and the defender would also fall, with the consequence that the pursuer would lose everything.

[39] A file note recording a meeting between the pursuer and Lynn Collingham on 3 August 2012 was put to the pursuer. This concerned the defender's action against her (for division and sale of the subjects). After narrating the recent procedure in that case, the file note recorded the following:

> "Agnes saying that she [ie the pursuer] is not necessarily opposed to the sale of the property in the future but only when [the pursuer's daughter] has completed her education.
>
> Agnes brought with her a large amount of paperwork that had been passed to her by her Dad and asked that I peruse it as it may be relevant to her case. She saying that she did not know what she was signing when she was presented with the disposition by [the defender] but advising that in my view that is not a defence to the fact that she signed a disposition. Explaining that if I passed her over something during our meeting to sign today, and she signed it without reading it, whilst as a solicitor I could be criticised professionally for not explaining the content and meaning of the Deed, the Law generally is that if you sign something without reading it, you have to accept the consequences if you are bound by what you have signed. She said she appreciated that." (Emphasis added.)

[40] Reference was then made to another dispute, between the pursuer and her father, and the relative file note entries between August and October 2012. In substance they recorded that the defender's father, John Barr, wanted to get the subjects back from the pursuer. If this happened, the title to the subjects conferred by the disposition on *inter alia* the pursuer would also fall. The entries record consideration of whether or not this should be disclosed to the defender in the context of the defender's action.

[41] A further series of questions followed, to the effect that the pursuer was seeking an assurance from her father that, if his action was successful, she would still have a roof over

her head. (Other entries, some dating from January 2011, were put to her.) She had fallen out with her father at this time. Ultimately, however, she never obtained sufficient reassurance. In August 2012, Lynn Collingham's advice was, essentially, "better the devil you know", which is why the pursuer had decided to side with the defender against her father at that time.

[42] It was put to her that at that time the pursuer had two options: to back the defender or to back her father. She backed the defender, she said, because she would be getting half the house and she had done so on the advice of Lynn Collingham. This was about seven years ago. It was put to her that she did this even although, in her evidence, she knew the defender had "done" her. She accepted all of this. Even back in 2011, she was reluctant to raise an action against the defender in relation to the subjects. She accepted that at that time one option was to go against the defender. She ultimately permitted the 2015 decree to pass against her in the defender's action. It was put to her that she had made a tactical decision to go with the defender, otherwise if she supported her father she would lose everything. She accepted she understood this at this time. And she accepted she took the view at that time that it was better to keep half (ie of the house) than to lose it all. She also accepted that she has known that she had "sustained a loss" arising from the defender's conduct more than five years before the raising of the proceedings.

[43] There was further evidence about the pursuer no longer being on speaking terms with her parents and siblings, notwithstanding that she still lived at the subjects. She asserted that her father was lying if he said he had paid for the pursuer's house and was "blatantly lying" as to what he had done for her. If he had asserted that he had paid for the house and for the attic to be done, this was a lie. It was put to her that her father was a liar to which she replied that this was not completely the case, but he "bent the truth".

[44] A number of further file note entries were put to her. She maintained she was always told she would be better off with the defender than with her father. She accepted that when she was told "to consider her battles" that this accurately recorded the discussion.

[45] There was no re-examination of the pursuer.

The pursuer's expert evidence: Donald Reid

Examination in chief

[46] The pursuer's second witness was her expert witness, Donald Reid. He was a solicitor in private practice with Mitchels Roberton in Glasgow. He had been a partner or (latterly) a director since 1975. His specialism was in commercial and domestic property, but he also had a wide range of dealings as a family solicitor. He had given expert evidence in court many times. He had contributed chapters to two books of essays on property-related topics; published articles in the Journal of the Law Society of Scotland and had served as a member of the property committee of the Law Society of Scotland.

[47] He had produced an expert report (lodged at 6/275) which he adopted. He had been supplied with a bundle of papers and, after an overnight break, these were duly lodged in the process. (To facilitate progress in the proof, a witness for the defender was interposed, namely Allan Findlay. For convenience I note his evidence below.)

[48] When his evidence resumed the next day, Mr Reid confirmed that he had had regard to the bundle of materials supplied to him with the letter of instruction. Having regard to the live issue in these proceedings, the relevant part of his report concerned his answer to question two (about the disposition). I need not record the first question and the answer he provided to it (which related to the 2003 disposition). So far as material, the passages of his report and his answer to question two are as follows:

"I begin by addressing the point on the hypothesis (which was not the fact) that [the defender] and [the pursuer] were not in a personal relationship in 2006. [The defender] was thus advising [the pursuer] on making over to [the defender] half of a property [the pursuer] owned. What possibly could the reason be for such a transaction, absent any personal relationship? I see two possibilities. One that [the pursuer] had simply formed an affection or liking or sympathy towards [the defender] and wanted to give him a gift. That takes us straight back to the fiduciary duty referred to above obliging [the defender] to steer wholly clear of any involvement and direct [the pursuer] to independent advice. The other is that the proposed conveyance was not truly a gift but an onerous consideration for services or goods or financial value being offered to equivalent value by [the defender] to [the pursuer]. In this regard [the defender] does point to the language of the 2006 deed which narrates 'certain good and onerous causes and considerations' and has offered the explanation that [the defender] had personally provided the funds for the construction of a house on the subjects. I can understand this response but I do not consider it has any exonerating effect for [the defender] even if, continuing the hypothesis, his involvement with [the pursuer] was not personal but purely commercial. This is because I consider the fiduciary duty remained paramount even where no personal relationship was present. Apart from that, if the deed truly represented a commercial deal then [the defender] was hopelessly conflicted: a solicitor advising [the pursuer], and [the pursuer] alone, would give her very clear and strong advice to be satisfied that there was, at least, a reasonable vouched equivalence between the value passing to [the defender] and the costs incurred by him on the project.

Next I ask whether the fact that [the pursuer] and [the defender] were in a personal relationship in 2006 goes any way to reducing or mitigating [the defender's] duty. After all, it might be said, a gift of property to a solicitor by some loved one such as, say, a spouse or a parent, should surely permit a more 'relaxed' approach to rule observance. I do not accept this. There may well be incidences out there where just such a relaxed approach has been taken without adverse result. That is as may be but it is my opinion that any solicitor so proceeding is thereby taking upon himself accountability for anything subsequently going wrong or being challenged. The practice, if it does occur, may be more understandable but it is not thereby more excusable. It simply cannot be condoned.

That leaves [the defender] with only one more card to play, namely the letter of advice Mr Findlay of his firm sent to [the pursuer] dated 14 April 2006 and the letter declining separate advice signed by [the pursuer], also dated 14 April 2006, addressed to Mr Findlay. Mr Findlay's letter strongly, indeed perhaps stridently, advises [the pursuer] to take independent advice but invites her, if she does not wish to do so, to sign a letter confirming. [The pursuer] took the latter option but I do not consider this was sufficient to validate or homologate [the defender's] actions. In my opinion the circumstances, involving as they did substantial benefit flowing to [the defender] personally, were wholly beyond [the defender] acting at all for [the pursuer], even if she declined his advice to go elsewhere. He should have insisted she did so as the only proper course. But of course [the pursuer] denies having

received the letter or signed the declining letter and if her testimony in this regard prevails then [the defender] is left, again, in a parlous position.

The relevant guide as to proper professional practice in these respects pertaining at the time was the Code of Conduct issued by the Law Society of Scotland in 2002. If so required I could extrapolate specific provisions which bear out my remarks as above.

I did note certain 'oddities' surrounding these letters of 14 April 2006:

- Mr Findlay's letter states that it encloses the Disposition and invites [the pursuer] to sign it. This did not happen because the actual Disposition was not purportedly signed until 10 May 2006.
- The declining letter from [the pursuer] states that the executed Disposition is enclosed, which it wasn't.
- [the pursuer] signs with a surname other than Barr. She signed 'Barr' on the actual purported Disposition.
- Neither Mr Findlay nor [the defender] appears to have picked up on these oddities.

[…]

Conclusions

It is my opinion that:

[…]

4. Even absent any relationship with [the pursuer], [the defender] breached his fiduciary duty to her in acting for both [the pursuer] and himself in relation to the 2006 Disposition and in not insisting she get independent advice. This was professional misconduct. It was also negligence against the *Hunter* v *Hanley* test.

5. Given that there was a relationship my conclusions at 4 apply *a fortiori* or at any rate the existence of the relationship has no exonerating effect.

6. The letters of 14 April 2006, if found to be valid, do not of themselves exonerate [the defender]."

[49] A series of somewhat general questions were put to Mr Reid, but he was, understandably, anxious to answer more focused questions by reference to specific passages in his report.

[50] Mr Reid was asked to explain how the *Hunter* v *Hanley* test applied to a breach of fiduciary duty. Mr Reid referred to the several legs of the *Hunter* v *Hanley* test. In his view,

the normal course had not been followed and the deviation from the norm here had been the decision to invite the pursuer to obtain separate legal advice but not to insist that she do so. In his view, no solicitor of ordinary skill and care would have failed to do so. What the defender should have done was to insist upon the pursuer getting independent legal advice.

[51] There followed a number of general questions about the effect of delivery of a disposition which, until recorded, conferred a personal right but not a real right of ownership. In the circumstances where a solicitor acted for both the disponer and the disponee, delivery to the latter could at least be inferred from the act of presentation of the deed at the GRS for registration. In the absence of that obvious step, the solicitor was required to take instructions about delivery. While he noted the gap of 2 ½ years between the signing of the 2003 deed and its recording in the GRS in 2006, he did not regard this as particularly relevant.

[52] Certain passages in the report obtained from the defender's expert, Mr Macreath, were put to Mr Reid for comment. To the extent that they differed it was, essentially, on whether or not the defender should have insisted upon the pursuer obtaining separate legal advice (as Mr Reid maintained) or whether it sufficed to advise her to do so (as Mr Macreath maintained). Mr Reid stood by his own conclusion, although he could follow Mr Macreath's reasoning.

Cross-examination of Mr Reid

[53] Mr Reid fairly acknowledged that Mr Macreath had gained a "justifiable reputation" in the field of regulatory and disciplinary matters. Mr Reid accepted that he had never represented a solicitor before the Scottish Solicitors Disciplinary Tribunal (the "SSDT"). He also accepted that, as at 2006, he had "relatively little" work involving solicitors' disciplinary

issues. He also accepted that, generally, the profession had become subject to more regulation in later years than less, and that the rules about professional ethics had become more developed.

[54] He was asked a number of questions about the documentation supplied to him with the letter of instruction. He had read these at the time but, if asked whether he had these specifically in his mind, he would refer to any discussion in his expert report. His understanding of the background was that the land had initially been owned by the pursuer's father; that at some point a dwelling house had been built and which was a new-build property. He also understood the sequence of transfers to be from the pursuer's father to the pursuer, and thereafter a grant by the pursuer to herself and the defender. His general recollection was that the land had been funded or contributed by the pursuer's father. A passage from other proceedings was put to Mr Reid, containing an averment on behalf of the pursuer that she had paid the whole costs of construction. Mr Reid fairly accepted that he could not now see what consequence or thought ran through his mind when he read that, but he did recall also reading documents with other assertions. He accepted that his general impression had been of a solicitor abusing his position and getting one-half the subjects for nothing, but he refrained from being judgemental in his report. He confirmed that it was his general impression that the defender had become a co-proprietor of the subjects for no consideration.

[55] Under reference to the disposition, he confirmed that the document was the disposition in its entirety as it contained no plan. It comprised three pages. He confirmed it had never been suggested to him that this was part only of a document. He also confirmed that it had never been suggested to him that the pursuer had not signed this disposition. So far as he recalled, the suggestion was that the pursuer did not know what she was signing,

but that she *had* signed it. He did not think it had ever been suggested to him that the pursuer had not signed the disposition.

[56] Mr Reid also confirmed that the warrant for registration, which was signed, would be contained at the bottom of the last page of the disposition. It appeared here on page 3 of the disposition. He also confirmed that it had never been suggested to him that the pursuer's signature on the disposition was a forgery.

[57] Under reference to the Advice and Waiver letters of April 2006, he confirmed that they were clear and unambiguous in their terms. Nonetheless, his position was that it did not suffice to send these letters to discharge any fiduciary duty owed at the time. He resisted the proposition that he was applying a standard as at 2018 retrospectively. His view was based on the reality at the time and what was contained in the Solicitor's Code of Conduct of 2002 ("the 2002 Code").

[58] A copy of a SSDT decision was put to him. While he was aware of this he had not studied its terms.

[59] A passage from the 2002 Code was put to him. Under the heading "the Interests of the Client", the following passage appears:

> "Where solicitors are consulted about matters in which they have a personal or financial interest the position should be made clear to the clients and <u>where appropriate</u> solicitors <u>should</u> insist that the clients consult other solicitors. For example, neither a solicitor, nor a partner of that solicitor, is generally permitted to prepare a will for a client where the solicitor is to receive a significant legacy or share of the estate." (Emphasis added.)

He accepted that the use of the qualification "where appropriate" was significant. The difference between him and Mr Macreath was that, in Mr Reid's view, the Advice letter did not suffice.

Re-examination of Mr Reid

[60] A passage from the 2002 Code, just quoted, was put to him. He accepted the proposition that the 2002 Code did not suggest an absolute requirement that in all circumstances a solicitor must insist on separate representation. He confirmed that it was his evidence that the defender should have insisted that the pursuer got separate advice. This was not based on the 2002 Code; or perhaps only partly so, but also on his own reading of the situation. This was his gloss on the phrase "where appropriate". This was one instance where, in his view, the defender should have insisted on the pursuer obtaining separate legal advice. He went further and suggested that the example in this case was stronger than the example in the 2002 Code of a will. That will was revocable whereas the gift of land by disposition was an irrevocable act.

[61] Given Mr Reid's emphasis on the characterisation in his last answer of the disposition as "a gift", he was asked to express a view on the hypothesis that the defender contributed "a significant amount" to the construction of the house, and whether that would change his opinion. He confirmed that it might, although it is fair to record he was uncomfortable considering the hypothesis. If there were still a question of an undervalue, he remained of the view that there was no question but that separate representation must be insisted upon. If, however, there had been full value given to the granter (which had been vouched), then perhaps it was more for the court to consider the question of whether or not the solicitor in that circumstance should be exonerated. When pressed as to the source of his inflexible rule, standing the terms in which the 2002 Code was expressed, he replied that even if the 2002 Code had not been there, he would still ask if there had been full contribution or equivalent to the value of the property passing. He would regard that as an exception to his inflexible rule and, as I understood his evidence, would be prepared to

accept a solicitor proceeding on the basis of the Advice and Waiver letters would not be acting inappropriately. He would be ready, in those circumstances, to accept that the solicitor had discharged his duty, though he emphasised the need for vouching of the value.

[62] As the pursuer's last witness was not available until the beginning of the second week of the proof, counsel agreed to interpose the defender. I record his evidence below.

David Donnachie

The J&E Shepherd valuation

[63] The pursuer's last witness was David Donnachie, an associate chartered surveyor with the firm J&E Shepherd. He had prepared a valuation of the subjects in October 2016 ("the valuation"). In brief, Mr Donnachie had prepared a report providing the market valuation of the subjects, their reinstatement value, and their value taking into account the restriction imposed by the planning condition. The reinstatement value was stated at £545,000. The market value with no planning condition restriction was stated as £750,000. However, the effect of the planning condition reduced the market value by half, to the figure of £375,000. The valuation also contained a statement that it would be "extremely unlikely" for a lender to offer a mortgage over the subjects for so long as the planning condition was in place.

Examination in chief

[64] Mr Donnachie was a chartered surveyor and had been a full member of the RICS since 1999. He had been in practice since that date. He was employed by J&E Shepherd in East Kilbride. His experience was in the valuation of all types of residential properties including in East Kilbride and in the surrounding areas. He adopted his report, the salient

features of which I have recorded above. He had undertaken his valuation of the subjects for the purposes of ascertaining its market value by considering the size and location of the house, its condition, and comparing it with other similar semi – rural properties of comparable sizes. In his view, the value of the subjects was the same in 2006 as in 2016.

Cross-examination

[65] He accepted that East Kilbride was a built-up area, but he also had experience in rural properties around East Kilbride and similar to the subjects. He accepted that this was only a valuation and not a detailed inspection; this was what was instructed. He was pressed as to his valuation of the subjects as at 2006. He explained that it was not a question of no movement in the market for 10 years. Rather, there had been a drop in value from 2008 which continued until 2012. There was then an uplift in the market from 2012 to 2016. As a consequence of this drop and rise in the market, the valuation as at 2016 was the same as 10 years previously. He had used six or seven similar properties by way of comparators in coming to the market value of the subjects. He accepted that these were not recorded in terms in the valuation but he had this information on file.

[66] He had certain aerial photographs put to him and readily described the area on which the subjects were located as agricultural land. He accepted that if one obtained planning permission to build on agricultural land it would increase its value. He was quick to state that he did not get involved professionally in valuing agricultural land. He volunteered that he had no knowledge or experience in valuing agricultural land. If the firm received such instructions these would be passed to an agricultural surveyor. He confirmed that agricultural land with planning permission was worth more than agricultural land

without planning permission, though he could not say what by what factor that difference would be.

[67] In relation to the subjects, he agreed it was a large house with an area of approximately 340 m², and that this would push the value of the house up. He was again pushed to estimate the increase in value of the land with planning permission and the house. He was patently reluctant to do so and gave a very rough estimate, as I understood him, that the land value would be around a third of the value of the house. He was anxious to stress that this was a "very rough" estimate; that J&E Shepherd had specialists dealing with development value and he was not involved in that kind of work.

[68] He confirmed the reinstatement value and that this was based on the floor area, age of construction of the house and type of materials. It was a new house built of conventional materials, namely a timber frame, built in a modern style. He was challenged on the basis that the effect of the planning condition would reduce the value. He resisted this, explaining that it was the price one would achieve with such a planning restriction. He accepted he was not a planning expert, although he knew the implications of having a planning restriction on the house such as that contained in the planning condition.

[69] Mr Donnachie was the last witness led on behalf of of the pursuer and the pursuer's proof was closed.

The defender's proof

The defender's evidence

Evidence in chief

[70] The defender explained he had been a solicitor in practice since 1979. Before then he had studied architecture for two years and worked at Glasgow School of Art and the Royal

College of Technology. He then joined the police, working most of his time in CID. He left the police to undertake a law degree and a law apprenticeship. His main area of work was in the criminal courts but he also undertook wills and powers of attorney. As at 2002, he was in practice on his own and at some point thereafter took on Mr Findlay as an employee. He confirmed he acted for Mr Barr and other members of the Barr family over the years in a variety of matters.

[71] He was then asked about a curious episode occurring at the end of a commission to take the evidence of the pursuer's parents earlier this year. Notwithstanding that Mr Barr's evidence about the defender had been uncomplimentary, Mr Barr approached the defender after the commission; he fumbled in his pocket for something and told the defender that he needed his help with a matter. The defender explained that he could not talk to or deal with Mr Barr. The defender left the courtroom where the commission had taken place but Mr Barr pursued him outside. Mr Barr repeated his request for the defender's assistance. The defender was very surprised. He had explained that he, the defender, could not help Mr Barr and that Mr Barr needed to speak to other solicitors.

[72] As at 2002 he was often up at the farm, probably two or three times a week and sometimes at the weekends. He and the members of the Barr family were on very friendly terms and he was treated as a member of the family. He dined with them, socialised with them and was invited to weddings and birthday parties.

[73] He also confirmed having acted previously for the pursuer in relation to her divorces. He confirmed that there was a slow-developing relationship between him and the pursuer from about 2002 or 2003. There had come a point when the two of them had discussed living together. He thought that maybe that point had come in about 2003 or 2004. Initially, the pursuer said she did not want to stay on the farm or near the farm, but

then things changed. After that point, she and the defender had discussed having a house built on the farm. He was asked about the size of the house and he explained that the plot of ground was part of Mr Barr's farm. Mr Barr had indicated to the defender that he would give him and the pursuer several acres to build a house on the farm. The size of the house had not really been discussed between the defender and Mr Barr.

[74] The defender confirmed he had funded the building of the house. It was funded in the following manner. He and the pursuer were in a close relationship and were going to build or buy a house. The defender had quite a lot of money and he gave the pursuer a lot of cash. He agreed with her evidence on this point. However, he gave her cash to hold. He did so because, he explained, he lived in a remote house whereas the Barr's farm had a safe and dogs and was a safer place for the cash. At this point he was close to and trusted by the Barr family. At this time the pursuer was on income support and so could not fund any construction costs of the house. The land had initially been provided by Mr Barr and a conveyance had been entered into by him in favour of the pursuer in about 2003.

[75] Turning to the disposition, he confirmed this had been prepared by Allan Findlay. It had not been prepared by him personally. He also confirmed that the three pages of the production comprised the whole of the disposition. No pages were missing. No pages had been removed. He confirmed the testing clause and that the signature appended at the bottom of the last page was the pursuer's signature. He was asked if he or anyone else had forged or transposed the pursuer's signature onto the disposition, a proposition he rejected. He had no reason to do so.

[76] He was asked about the will and whether he had forged the pursuer's signature on that deed. Again, he rejected that proposition with alacrity. If the pursuer had suggested

that the will was forged, or that she had never instructed him to prepare one, she was mistaken or lying.

[77] He explained the genesis of the Advice and Waiver letters. He had asked Allan Findlay, one of his employees at the time, to write to the pursuer. He asked him to send clear letters to let her know that she was entering into a transfer of land and that she was made fully aware of what she was doing. Allan Findlay did these and typed these letters on his own computer. The defender asked him to do this because it was a personal matter and he did not wish his staff or the typists to know his business. He wished to keep it confidential. He confirmed that it was within his knowledge that she had received these letters because she had spoken to him about them. He had no doubt about this. And he had no doubt that these had been prepared and sent by Allan Findlay. This had all occurred at the point where the house was under construction. There were good relations between him and pursuer at that time. He confirmed he had nothing to do with the registration of the disposition and that this all would have been done by Allan Findlay.

[78] In relation to a solicitor acting for the client with whom he was in an intimate relationship, he felt at the time that it was safe to act because of all of his input into the house and funding for it. He acknowledged he had had some concerns, given Allan Findlay's involvement. He explained it was a practical decision. He had just come back from Australia before these letters were sent. The pursuer had asked him for money to keep things going and he wished Allan Findlay to do the conveyancing. Meantime, the defender was busy; he was on a duty week at the sheriff court and he simply asked Allan Findlay to proceed. He had taken the view that something had to be done to protect the pursuer's position. He had spoken to her and her father, as he was at the farm, but the pursuer had

point-blank refused to go to another solicitor. He thought to himself: I must put this in writing from an independent person, ie Mr Findlay, and not from his own pen.

[79] It was put to him that Mr Reid was critical of his conduct and that the defender should have insisted the pursuer obtain separate representation. So far as the defender could recall, he did insist but she refused. This was not a matter that had come out of the blue; he and the pursuer had talked about this before construction of the house had started. He had spoken to the pursuer and the house was to be in joint names. She had received the Advice and Waiver letters from Allan Findlay.

[80] It was put to him that the pursuer did not know what she was signing. The defender rejected this, explaining she knew exactly what was happening and what was being asked of her. He repeated that she had told him she had received these letters. He did not know if she had gone for other help or independent advice. The Barrs were not a family who were strangers in dealing with solicitors.

[81] In relation to the 2003 disposition (from Mr Barr to the pursuer), the defender confirmed he had acted. He explained that at that time Mr Barr wanted the pursuer and her family out of the farmhouse; he wanted peace and quiet in his home. He believed that in conveying some land to her this would get her out of the farmhouse. This was at his behest. He confirmed that as his relationship developed with the pursuer, Mr Barr was aware of this and was happy with this.

[82] He confirmed that once the house was finished, the pursuer had moved in several months before he had, sometime in 2006. He also confirmed that latterly there had been a deterioration in the parties' relationship. This was later than the pursuer suggested. In his evidence, in about July or August 2009, the pursuer had left the house with her furniture and chickens. He had stayed on in the house. It was his only home. The pursuer had never

expressed horror at the notion that he was the co-owner of the subjects. He remained there until the pursuer broke into the house, at which point he couldn't return and had moved in with his sister, where he remained.

[83] He explained the circumstances that led him eventually to raise his own action, resulting in the 2015 decree in his favour. Once the defender's action had been raised, he had given an undertaking not to sell the subjects until this action was finished, which meant a further three years during which he was unable to sell the subjects.

Cross-examination of the defender

[84] The defender was challenged on his evidence that Mr Barr had wanted to give him and the pursuer land. The defender confirmed that Mr Barr knew he was in a relationship with the pursuer, that he had said this and that Mr Barr had expressed his desire to give some property to them. The pursuer had not been present. Mr Barr was happy if the pursuer and he had a house on the farm. He spoke to the pursuer but she was reluctant and said she really needed to think about this, because she had had a bad time recently with her family - including her parents. Mr Barr had wanted the pursuer away from the farmhouse, that was his main complaint. This was because the pursuer's daughter was disruptive and so was the pursuer. There was a lot of jealousy between the pursuer and some of her siblings.

[85] The defender said he was a little surprised when Mr Barr offered a parcel of land to him. There had been a degree of enmity between the siblings. They lived and worked in close proximity. There was a potential for difficulties (ie from the pursuer's siblings) and that is why the defender suggested to Mr Barr that the land should go into the pursuer's name and not his. He was an outsider to the family. He explained that he said to Mr Barr

that if he was giving land he might be in difficulty with his other children, and it ought to be put into the pursuer's name. He would send the disposition in favour of the pursuer.

[86] A passage was put to him from the pleadings in the defender's action. In particular, there was an averment that Mr Barr offered a plot of land. The defender was asked how he could reconcile that with Mr Barr's offer to him and to the pursuer. The defender stated that Mr Barr had made that offer but he, the defender, was staying at Clarkson. He had not taken it up. Meantime, the pursuer was going "hot and cold" about living on the farm with her daughter. He explained that he spoke to the pursuer and said they (ie the parties) could have the land. To protect the pursuer from sibling aggression, he suggested that the land should not be in his name but rather should be in the name of the pursuer. He could not recall being involved in the minutiae of the 2003 disposition. It was a long time ago. It was drawn up and needed to be witnessed, and so far as he could recall, this was done by a lady who lived at the bottom of the hill. He couldn't recall if he was present or not on that occasion. He was not sure.

[87] The pursuer's version of events spoken to in her oral evidence, that the defender had presented her with a document containing arcane language and references to 14th century land law was put, but the defender rejected this as "absolute nonsense". He did not know where this had come from. He had not given the pursuer the disposition to sign; it was Mr Findlay who had sent the disposition to her. He could not recall giving her the will to sign. He repeated his view that the pursuer's evidence about being presented with a document referring to 14th century land law was nonsense.

[88] He was asked why the 2003 disposition was only recorded in 2006. He explained that when the 2003 disposition had been signed, it was not known whether the application for planning permission to build a house on the land would even get off the ground. There

had been a very difficult planning officer at the council. The defender had had to liaise with SEPA about septic tanks and with architects; there were lots of side issues. The difficulty at that time was the uncertainty as to whether Mr Barr would get planning permission. It took years to get planning permission and there was the need to please all of his neighbours having an interest. The reason why planning permission had to be in the name of Mr Barr was because of the planning condition. The planning officer had told him the planning application had to be in the name of Mr Barr. The link between planning permission and the disposition was, basically, that if there had been no planning permission then the land would have remained with the Barr family. In reply to further questions, the defender confirmed he was not sure why the disposition helped in any question with planning permission. He did not know. The reason the 2003 disposition was there was because of the rest of the family. He didn't want the land in his name and Mr Barr agreed it would be in the pursuer's name. That was the reason for the 2003 disposition. It was reassurance to the pursuer that she would not be put out of the farm.

[89] It was put to him that he should not have acted for the pursuer in respect of the disposition. The defender did not accept this, given the Advice letter written to her and what Allan Findlay had done. He was satisfied at that time that, basically, what he had done was acceptable and would be understandable to anyone looking at matters from the outside. He had invested in the house and he and the pursuer had agreed on that.

[90] He was challenged as to the level of his contribution. The defender was firm that he had funded all of it, including the applications for planning permission and fitting out and furnishing. During some of the construction there had been a temporary link between the house and the farm to access the electrical and water supplies to the latter. He had supplied the pursuer with money. Whether she paid the contractor personally, he had met all the

larger items and the expenditure. He had given the pursuer cash in connection with the house. It had not been given unconditionally, as the pursuer asserted. He had given her cash to buy materials and to pay the labourers because she had a safer place for the cash than he had. She was on site. She lived on the farm. She could check deliveries. He was a busy solicitor and worked until the early hours. She was the conduit in getting funds to contractors to work.

[91] He accepted that he had not sent Terms of Business letters in relation to the 2006 disposition, nor had he opened a conveyancing file. He had probably sent such Terms of Business letters in previous years in relation to other instructions.

[92] There was no re-examination of the defender.

Allan Findlay

Examination in chief

[93] While now a summary sheriff, Allan Findlay had been in private practice for many years, often practising on his own account. He ultimately joined the defender's practice as an assistant. He confirmed that he was aware that the defender was in a personal relationship with the pursuer and that he had understood it to be the intention of the pursuer and defender to live together. The defender asked him to deal with the transfer of title to the pursuer and him. He was the author of the Advice and Waiver letters. These bore his reference. Indeed, he had typed these letters out himself. He had done so because the defender did not want his personal affairs to be known to his staff. It was in any event not unusual for Mr Findlay to type his own letters.

[94] In relation to the purpose of these letters, Mr Findlay explained that he had understood from the defender that an area of land at the farm, which was owned by the

pursuer's father, was to be transferred to or in the name of the pursuer, and the intention was that the house was to be built on that ground by the defender, with a view to them both having that as their family home and in joint ownership. He had sent these letters because the defender had asked him to do so. The defender was concerned that the pursuer should get independent advice before transfer of title effected by the disposition. The title at that point was in her own name. He understood the cost of building the house was born by the defender.

[95] He was taken to the terms of the Advice and Waiver letters, and he confirmed what he wrote and what he intended to convey. He assumed he had received the Waiver letter back but, after this passage of time, had no positive recollection to that effect.

Cross-examination

[96] So far as he could recall, these letters related to the point in time when the house was more or less completed. He had never met the pursuer. He accepted that he could not recall receiving the Waiver letter, it had been 12 years ago, but he assumed he had. He also assumed that these letters simply came in and were processed in the normal way. He did not know whether he himself had personally filed these.

[97] In response to a question, he confirmed that he was sure a copy of the disposition had been provided with the Advice letter because he had typed it. He could not say after this passage of time whether the disposition had been returned with the letter but he could not see why it would not have been at that time. He also confirmed that the defender was concerned that the pursuer get independent advice. He confirmed that he was also concerned about this, because the pursuer was signing away half of her land and it was important that she get independent legal advice and he made this absolutely clear to her.

[98] He confirmed he left the employment of the defender in about February 2007.

[99] It should be noted that this witness was not challenged on the basis that the disposition was incomplete or unsigned. Nor was there a challenge to his credibility and liability.

Re-examination

[100] Mr Findlay could not specifically recall sending the disposition for registration but confirmed that documents were sent for registration in batches. He confirmed the reference "A F/Cassel" was his reference and not that of a secretary. The reason that the Advice and Waiver letters were dated the same date was because he had typed and sent them on the same date. He could not recall any system for date-stamping letters on receipt. He confirmed that the firm's signature under the warrant for registration in the GRS was his own.

Morag Hill

Examination in chief

[101] The defender next called Morag Hill who had witnessed the pursuer's signature on the disposition. At the time she and her husband had been long-standing neighbours of the Barr family. She had known the pursuer since she was seven. Morag Hill and her late husband had been on good, neighbourly terms with the Barr family, helping each other out from time to time. Mrs Hill described regularly being asked to witness signatures for deeds being signed by members of the Barr family. This was usually while she was up at the Barr family house on the farm.

[102] She was asked if she would ever sign a blank piece of paper, to which she was quick to reply no, because she understood she was witnessing the signatures of those granting a deed. After the raising of these proceedings, she had discussed this with her son, a solicitor, and she understood that she was there to witness signatures. She was quite clear about this.

[103] The disposition was put to Mrs Hill. She confirmed her signature, date and the place of signing (at the Barr farmhouse) and the pursuer's signature. In identifying the latter she did comment that she did not know if the pursuer's writing was always the same. She clarified what she meant by this answer, saying that the pursuer was not particularly learned and she thought her writing might vary from document to document. She accepted that she suspected this but was not sure. She reiterated her position that she would not sign a blank piece of paper. She was also asked if she would have signed the disposition if the pursuer had not signed the deed. Mrs Hill was firm that the pursuer had to sign the disposition so she could see it in order for her, Mrs Hill, to witness that signature. She accepted that she did not read the document at the time, she just witnessed the pursuer's signature.

[104] In response to a question from the bench, as to whether she had acted as a witness where the grantee had already signed a document but acknowledged the signature in her presence, she confirmed that she had always witnessed the granter signing the deed she was being asked to witness. In the case of the disposition, she had witnessed the pursuer's signature in the kitchen of the farmhouse.

Cross-examination

[105] She was first asked if she had ever discussed the pursuer's marriages with the pursuer's brother, John Barr. She explained that she had no occasion to do so. This

statement was challenged under reference to an affidavit she had previously given, which lodged at that point, in which the following statement appears: "I recall on one occasion when [the pursuer's] problems were being discussed, and her father John stated there will be no third marriage". Mrs Barr readily acknowledged that she had forgotten about that observation.

[106] It was put to her that the pursuer had brought the disposition to her own home and had left it for her to sign. Mrs Hill stated that she could recall one occasion when she witnessed a document for the Barr family in her own home. She explained that she regularly witnessed deeds such as certificates, licences and so on. She simply witnessed a signature, as a neighbour would do. It was suggested to Mrs Hill that she was mistaken when she said she had witnessed the pursuer's signature. She rejected this, explaining that she would not sign (as a witness) if she had not seen the deed signed in front of her.

Mr Macreath

Mr Macreath's Report

[107] "**<u>Background</u>**

> [The defender] has been a solicitor since 1978. He acted for [the pursuer's father] in a number of matters as private client solicitor. In particular he acted for [the pursuer's father] in connection with ground subject to compulsory purchase at the time of the M77 road extension and the south orbital link to the M8. [The defender] acted for [the pursuer's father] on compensation issues in respect of a Compulsory Purchase Order in relation to ground at Bonnyton Farm. [The defender] acted for [the pursuer's father] in connection with a dispute over ground which [the pursuer's father] grazed but over which he did not have a formal tenancy. Proceedings were instituted whereby [the defender] represented [the pursuer's father]. [The defender] achieved a negotiated settlement for [the pursuer's father]. [The pursuer's father] was an established client. As a result he was introduced to [the pursuer], one of five children of [the pursuer's father]. At the time of introduction [the pursuer] instructed [the defender] in connection with her divorce. [The defender] assisted American lawyers representing [the pursuer] in the provision of information in connection with [the pursuer]'s divorce proceedings in the United States of America.

[The defender] formed a relationship with [the pursuer] in or around 2003. [The pursuer's father] wished [the pursuer] and her children to have a home, if possible, on ground at his farm steading. [The pursuer's father] was in his late 70's and was concerned that [the pursuer] needed to have a home. A solution was found that ground could be made over to [the pursuer] but that ground had no planning permission attached to it. Such planning permission may well prove difficult to obtain and [the pursuer's father] instructed [the defender] to assist. [The defender] assisted an established client, [the pursuer's father] to seek planning. [The pursuer] was an established client within the meaning of the Law Society Conflict of Interest Practice Guidance. An established client is one for whom a solicitor has or his practice unit has acted on at least one previous occasion. [the defender] and [the pursuer] agreed that any Disposition in favour of [the pursuer] need not be registered unless and until planning permission for a dwellinghouse was obtained with appropriate Building Warrant. The relationship between [the defender] and [the pursuer] became intimate. In 2006 planning permission was obtained for a dwellinghouse to be built on the ground gifted by [the pursuer's father] to [the pursuer] in terms of the 2003 Disposition. [The defender] met the attendant costs in connection with planning advice and other specialist services. [The pursuer's father] and [the pursuer] and [the defender] agreed that the unregistered 2003 Disposition by [the pursuer's father] to [the pursuer] be registered. [The pursuer's father], [the pursuer] and [the defender] agreed that title to the ground when planning permission was obtained would be taken in joint names of [the pursuer] and [the defender] and to the survivor. [The defender] was 18 years older than [the pursuer]. The purpose of transfer was to secure the interest of [the defender] as [the defender] had met all costs for Planning and Building Warrants including professional fees and would now meet all costs in the building of the dwellinghouse to be shared by [the pursuer] and [the defender]. The basic costs as advised by [the pursuer's father] would be £200,000 but the final fitting of the property would increase these costs to £350,000 with [the defender] meeting all of these costs."

"**2. In acting for [the pursuer] as grantor and for [the pursuer] and [the defender] as grantee of the 2006 Disposition did [the defender] properly and sufficiently discharge professional duties incumbent upon him?**

This transaction relates to a time when [the defender] and [the pursuer] were in a personal relationship. [the defender] according to the matrix of facts provided made financial provision to obtain planning permission for the building of the dwelling house on the ground. [The defender] maintains this was not a commercial relationship. The relationship between [the pursuer] and [the defender] was settled and the intention was for the parties to marry. Their intention was the dwellinghouse would be a matrimonial home for [the pursuer] and [the defender]. The ground with Planning Permission now had greater value than originally anticipated at the time of the 2003 Disposition. The ground is moorland at the Fenwick Moor. A dwellinghouse was to be built on the ground. The total cost of the building works and ancillary planning and professional fees, according to [the defender], amounted to £350,000 to be met entirely by [the defender]. [The pursuer's father] had gifted the ground to [the pursuer] in terms of the 2003 Disposition. [The

pursuer's father] no longer had an interest in the ground. [The defender]'s contribution was the material financial contribution. [The defender] issued a letter to [the pursuer] on 14 April 2006. There is an acknowledgement from [the pursuer] who signed using her former married name 'Fillens'. [The pursuer] was asked and advised to take independent advice. She did not wish to do so and she would sign a letter so confirming. Of itself that would validate [the defender]'s actings. It cannot be said there was any substantial commercial benefit flowing to [the defender] personally. This is asserted on the basis that the ground on which the dwellinghouse would be built had little or no material value as at 2003 and no significantly greater value in 2006 even with Planning Permission obtained. [The defender] would have to expend substantial sums of money to build the house in which he and [the pursuer] intended to live as man and wife. [The pursuer] remained an established client. She was been [*sic*] advised that the proper course was that she should take independent advice. [The pursuer] accepted receipt of that letter as I understand it, and signed the letter of declinature in respect of independent advice. Whilst I note that the letter from [the defender] makes reference to the executed Disposition being enclosed and [the pursuer] signed using the name 'Fillens' as opposed to 'Barr' my conclusions are based and premised upon the matrix of facts as known to me and based on the limited documentation provided to me. There is no strict liability offence so far as a solicitor forming a sexual relationship with a 'client'. There may be a risk of breach of fiduciary duty and a risk of no longer being able to give independent advice free from external influence in certain circumstances but a relationship between solicitor and client of a sexual nature does not of itself prohibit the solicitor from acting subject to a solicitor such as [the defender] being able to demonstrate he was free from influence and that his client, in this case [the pursuer], obtained his utmost trust and confidence.

Summary and Conclusion

1. [the defender] may have been in breach of the 1986 Practice Rules in failing to issue conflict of interest letters to [the pursuer's father] and [the pursuer] relating to the 2003 Disposition. However, both parties were established clients and whilst there may have been a technical breach that of itself may not amount to professional misconduct.

2. I do not consider that [the defender] breached any fiduciary duty to [the pursuer's father] relative to the 2003 Disposition given his then 'budding' relationship with [the pursuer]. That relationship would not amount to professional misconduct. CF The Law Society of Scotland –v- Solicitor B SSDT decision 29 April 2015.

3. In relation to the 2003 Disposition I do not consider that [the pursuer's father]'s actings would amount to professional negligence applying the *Hunter –v- Hanley* tests.

4. In respect of the 2006 Disposition [the defender] did advise [the pursuer] to obtain independent advice, see letter of 14 April 2006 and her acknowledgement

that she did not insist upon getting independent legal advice. In my view that does not amount to professional misconduct and in my opinion does not amount to professional negligence when applying the *Hunter –v- Hanley* test.

5. Even if there were, as admitted by both [the pursuer] and [the defender], an intimate sexual relationship, that of itself did not prohibit [the defender] from acting in connection with the 2006 Disposition unless it can be demonstrated that [the defender]'s ability to act was impaired by the personal relationship. This is not a case involving family law. This is a case involving property where a father gifted to a daughter some three years previously a plot of ground with no Planning Permission. The intention to build a dwellinghouse required [the defender]'s involvement, expertise and financial contribution.

6. The letters of 14 April 2006, if considered valid, amount to providing advice to [the pursuer] to take independent legal advice. She declined to do so."

Examination in chief

[108] The defender's expert had qualified in 1976. He had developed a professional expertise in acting for solicitors in all matters concerning professional discipline and conduct. He had been a chairman of the Legal Defence Unit. He had over 30 years' experience in dealing with, and appearing before, the SSDT. He knew Mr Reid. He was chairman of a very well established firm. He had known him for many years and readily acknowledged his "great expertise" in property law. He accepted that Mr Reid had more experience in property law then he did. He also accepted that he, Mr Macreath, had more experience on disciplinary matters and appearing before the tribunal. So far as he was aware, Mr Reid had never appeared before the SSDT.

[109] He adopted the terms of his report.

[110] Mr Macreath explained that there was a great difference between allegations of negligence and of breach of fiduciary duty. It appeared that Mr Reid viewed the issue of a solicitor having a relationship with a client as a "strict liability" matter, which was not his opinion.

[111] The Advice and Waiver letters were put to him. He was aware that Allan Findlay, then in the employ of the defender, had prepared these. He confirmed the terms of the letters, namely that the author was instructed in relation to transfer of title; that the title was to be in the name of the pursuer and the defender and the survivor. The Advice letter suggested the disposition was enclosed and it stressed that that deed had final and legal consequences, and it asked the pursuer to get professional legal advice. In relation to the Waiver letter, there was no particular style for letters of this type. There was guidance on a 5.2 letter and in regulation 7. It was put to him that these letters were clear in their terms, to which Mr Macreath assented. He observed they were expressed in very great detail including block capitals; normally such letters were short and to the point. The point of such a letter was that the individual was being encouraged to take legal advice and if they did not, to obtain a waiver. He was asked if, as at 2006, the Waiver letter sufficed. In his view it did so long as the solicitor was satisfied that the addressee had signed it and understood its terms.

[112] Under reference to a passage in his report (at page 5) he explained the purpose of conflict of interest letters, being where a solicitor acted for both parties and, if a conflict arose, would have to withdraw from acting for one or both of them.

[113] He was asked if, in the circumstances, notwithstanding the Advice and Waiver letters, there had been a breach of fiduciary duty on the part of the defender. In his view, the answer was no. He referred by way of illustration to a recent case (7/93 of process) which concerned a solicitor being involved in a personal relationship and the question of whether this was a breach of fiduciary duty being addressed. He drew attention to this case to illustrate that a non—professional (ie personal) relationship between a solicitor and client could give rise to significant problems for the solicitor, his independence, and the fiduciary

duties owed to the client. This was the most recent decision in relation to that issue and where proper findings by the SSDT had been made. He explained that in that case, there had been sexual relations between the solicitor and a vulnerable client. While the solicitor had withdrawn from acting, the finding of the SSDT had been against the solicitor. He distinguished that case on its facts, stressing that the client in that case had clearly been vulnerable. He also emphasised the observations of the Tribunal that the solicitor's conduct in those circumstances did not import a "strict liability". He referred to the observation that there was no "absolute prohibition" on a sexual relationship between a solicitor and client, but the solicitor must be cautious that his independence was not imperilled and that the fiduciary duty owed to the client was not impaired. He also confirmed that, in his understanding, there was no suggestion that the pursuer in this case was vulnerable. He also narrated his researches in the US and elsewhere, but Scotland maintained a distinctive position on this issue. He confirmed the case dated from 2010 and that there was no change in standards between 2002 and 2010.

[114] When referred to the 2002 Code, he explained the history of their development and adoption in this jurisdiction. The impetus for this had been contact with the European bars and the CCBE. The terms of paragraph 2 of the 2002 Code was put to him (see paras [59] and [60], above). He stressed the significance of the words "where appropriate". In his opinion, these words appeared for good reason and reflected the articulation in Scotland of the test for professional misconduct by Lord President Emslie in the case of *Sharp* v *Council of the Law Society for Scotland* 1984 SC 129. This case was significant, as it was the first time authoritative guidance had been given as to what could be professional conduct and the standards to be expected of solicitors. The question to be answered was the same and the

test was conjunctive: it must be serious and reprehensible conduct. This test had subsequently been followed in England and adopted by the Inns of Court.

[115] It is now prohibited, since 2009 or 2010, for a solicitor to prepare a will in which he had an interest. He was asked what his position would be if the defender had prepared the disposition but had contributed nothing, he responded by asking why should a solicitor get such a benefit for no consideration? It was a question of equivalent consideration. A different hypothesis was put to him, namely, that if the pursuer had no savings, no capital and no income and if the defender had funded all or most of the costs of the house, would this be a relevant factor. Mr Macreath accepted this "absolutely". In his opinion it must be relevant. He had based his opinion on the premise that the defender bore the costs, other than the supply of a few acres of pasture land and which, until planning permission had been obtained had, no or minimal value; in other words the defender had spent his own funds. He expanded on this by contrasting the position of a solicitor acting for the testator in the grant of a will and under which the solicitor obtained a benefit. He asked, what interest was there in having a solicitor draft a will and receive a significant legacy? This was prohibited. Similarly, if property was transferred and the person transferring the property was bearing all the costs, that person must obtain independent advice. But if the other person, ie the transferee, was bearing all of the building costs this was different.

[116] Under reference to the Advice and Waiver letters he was asked whether these letters would have sufficed in 2006 to discharge any fiduciary duty owed. He stated they would not suffice if someone was making over an asset for no value, even if granted for "favour and affection". The defender would be duty-bound not act. However, he stressed, everything must be assessed according to circumstances and culpability. If there had been a

personal relationship between the pursuer and the defender, and if the intention had been that the subjects were to be a family home and the defender had paid, these letters sufficed.

[117] A few passages in Mr Reid's report were put to him. It was put to him that Mr Reid had softened his position, namely if there had been consideration or significant contribution on the part of the defender, then his opinion was closer to Mr Macreath's.

Cross examination

[118] Mr Macreath was first challenged that not all of the papers supplied to him had been produced. In relation to the factual narrative set out at the beginning of his report, he had this material on file but had not produced it. (He was not challenged that any part of his factual narrative was incorrect.)

[119] He acknowledged that Mr Reid had a great expertise in property, whereas his experience and expertise was in representing those who appeared before the SSDT. His expertise related to the conduct of solicitors across the whole gamut of professional practice. He also appeared for other professionals, such as doctors and nurses.

[120] Returning to the background narrated in his report, he was asked the source of certain statements. These statements put to him included,

(i) that Mr Barr and the pursuer had agreed that the 2003 disposition would not be registered unless and until planning permission for a dwelling house was obtained with the appropriate building warrant;

(ii) that the defender met the attendant costs in connection with the planning advice and other specialist services;

(iii) that Mr Barr, the pursuer and the defender had agreed that the 2003 disposition be registered; and

(iv) that the title to the land would be taken in the names of the pursuer and the defender and the survivor, when planning permission had been obtained.

Mr Macreath confirmed that this information came from the defender or from the instructing solicitors.

[121] Notwithstanding that there is no challenge to (or conclusion or plea in law directed to) the 2003 disposition, Mr Macreath was asked a number of questions about this, to ask if there was an impropriety on the part of the defender in also acting as solicitor in relation to that deed. As I understood his evidence, Mr Macreath effectively rejected that proposition or that any criticism was justified, even if there were a personal relationship between the pursuer and the defender at that time. The defender had acquired no interest under the 2003 disposition; it conferred no consideration or benefit on him and therefore there was nothing to prevent his acting. He did not accept the proposition that there was "an indirect benefit" by reason of the defender's relationship with the pursuer. The title under the 2003 disposition was in the sole name of the pursuer.

[122] In relation to the 2006 disposition, and the duties owed by the defender to the pursuer, he was asked about the importance of the equivalence of consideration. He considered this to be a relevant factor. The hypothesis put to him was, if there was no consideration passing from the defender to the pursuer, whether there was a breach. Mr Macreath would consider whether the client was vulnerable or not, and he explained that the solicitor would have to be mindful that if there were a benefit to him, ie beyond a token one, and no equivalence in his financial input, then he would have to suggest that the other person take independent legal advice. But on the facts and circumstances, if the solicitor was funding the planning and funding the construction of the house, it would not be deemed to be unreasonable in a professional sense. He accepted that the consideration

would be the value of the benefit conferred, as opposed to outlays and expenditure. He understood the defender was funding the planning permission exercise, and to large extent the funding of the building and its fitting out. Otherwise this was simply agricultural land. In those circumstances, both parties benefited and the property could be taken in joint names and the survivor.

[123] In respect of the question as to how to relate a breach of fiduciary duty and the *Hunter* v *Hanley* test, Mr Macreath confirmed that these were very different. The test for professional misconduct was that set out by Lord President Emslie in the case he had explained earlier. A case of professional negligence was completely different and he explained the three – limbed test which the pursuer needed to prove. It was a very high test to demonstrate negligence in the exercise of professional judgement. He stressed that these were really two very different areas. A solicitor could be guilty of professional misconduct but not be found negligent. One example would be a breach of the accounts rules, giving rise to professional misconduct but not involving any negligence. The question of breach of fiduciary duty was very different. He acknowledged that there was confusion about this, even in the regular regulatory context. Misconduct did not satisfy the test for professional negligence in *Hunter* v *Hanley*. That is why he looked at the matrix of facts with such care.

[124] There was no re-examination.

Parties' submissions

[125] Parties lodged written submissions in advance of their oral submissions at the end of the proof. I have taken those into account. I need not set these out for the purposes of this Opinion.

Discussion

Grounds for reduction relied upon by the pursuer

[126] As noted above, it has not always been easy to discern the legal ground or grounds relied upon by the pursuer in this action of reduction. There is a degree of confusion in the pleadings (which refer to misrepresentation, negligent actings and breach of fiduciary duty). On the first morning of the proof, the pursuer's solicitor advocate, Mr Stevenson, endeavoured to clarify the pursuer's position and to focus matters by amendment to his first plea in law. In particular, he deleted the reference to "negligent actings" and inserted instead the phrase "breach of fiduciary duty". The case was thereafter conducted on the understanding that this was the essential ground of challenge relied upon by the pursuer. Notwithstanding this, in Mr Stevenson's written submissions at the end of the proof he introduced the topic of undue influence and reintroduced the topic of negligence and undue influence, in addition to that of breach of fiduciary duty. When I asked him to confirm what grounds he relied upon, he identified breach of fiduciary duty, negligent misrepresentation and negligence.

[127] Even on a benign reading of the pleadings, it is difficult to find relevant and specific averments or pleas-in-law for all of these. On a fair reading, the averments about misrepresentation are more apt to play a supporting role for the case of breach of fiduciary duty rather than to constitute a free-standing ground. They bear to relate to the circumstances by which the pursuer came to sign the disposition.

Issues of credibility and reliability

[128] Each party challenges the credibility and reliability of the other. I will deal separately with the challenges to the parties' respective expert witnesses, Mr Reid,

Mr Donnachie and Mr Macreath. I consider first the credibility and reliability of the other factual witnesses, apart from the parties themselves.

Allan Findlay

[129] There was no challenge to the credibility or reliability of Allan Findlay. I have no hesitation in accepting him as an entirely credible and reliable witness in the essentials of his evidence. Given the passage of time, it is not surprising that he had little active recall of the precise dates or dealings with the documents with which he was concerned. I accept his evidence in its entirety concerning the drafting, sending, receipt and recording of the disposition and the Advice and Waiver letters.

Morag Hill

[130] While Mr Stevenson sought to challenge her reliability on the basis that she could not recall a single sentence in an affidavit provided by her nearly two years before she gave her evidence in court, I do not accept this criticism. She readily accepted that she had forgotten about the brief statement made to her by Mr Barr (whom she was quoting in her affidavit). She was otherwise a very precise, clear and careful witness and I have no hesitation in accepting her evidence.

Mr and Mrs Barr

[131] The evidence of these witnesses was taken on commission over two days in January and April earlier this year. The Commissioner expressed concerns about their lack of credibility and reliability. Having read their evidence, it is difficult to discern what direct relevance it had to the subject matter of this action (once properly focused). Most of their

evidence concerned an inchoate challenge to the 2003 disposition. As Mr Stevenson accepted that the averments concerning the 2003 disposition were irrelevant, I need say little more about their evidence. In light of the Commissioner's comments, I would be reluctant to place any weight on their evidence particularly if unsupported by other credible and reliable evidence or by agreed documents.

The pursuer

[132] The pursuer accepted she was not good with dates and there is, therefore, a question about her reliability. Given that she was at times talking about events 10 or 12 years ago, this itself would not be a cause for concern. However, there are very serious issues concerning her credibility. It suffices to narrate five bases of concern:

1) In the first place, she admitted improperly claiming income support for a number of years, even although she knew she was not entitled to this by reason of the substantial cash provided to her by the defender. It is likely that these cash payments began in about 2003 or 2004. Nonetheless, she remained on income support for some years (either to 2006, when she moved into the house, or until 2011 when she resumed employment).
2) As quoted above, the pursuer's case on Record is essentially predicated on her having signed the disposition, but this having been procured by a combination of the defender's alleged misrepresentation as to its terms coupled with the fact that she did not read it at the time. (See para [8(5)], above, and the passages underlined.) By the time of her oral evidence, however, she departed radically from this version of events and asserted that she had never seen the disposition and that either the signature was a forgery, or, at least, had been appended

fraudulently to the disposition. It is difficult to envisage evidence that could be more at odds with a party's written case than this. She could not explain the departure from the case pled on her behalf.

3) However, it is not just a question of a disjunction between the pursuer's evidence and her pleadings. As was explored with her in her evidence, she had consulted solicitors from as early as 2010 or 2011. This was at the time that there was a possible challenge by her father, John Barr, to the 2003 disposition, and, latterly, there was the defender's action for division and sale. What is striking about the file note entries of her then solicitor, are the matters now relied upon in these proceedings but which were never raised with her solicitor. At that time, for example,

    (i) There was no suggestion that the disposition did not reflect her dispositive intention. In other words, what she understood she was trying to save from her father's threatened action to challenge the 2003 disposition, was her *one–half* interest in the subjects. At no point did she apparently say to Lynn Collingham that, contrary to the terms of the disposition, she was entitled to the *whole* of the subjects.

    (ii) There was no suggestion that the defender made any specific representation, or (as the pursuer would now have it, as averred in article 5), any misrepresentation anent the effect of the disposition. Further, there was no suggestion that this (mis)representation deflected her from reading the disposition. (Cf para [8(5)], above.)

    (iii) Rather, the pursuer's position at that time was that she had not read the disposition: this was the subject matter of the advice Lynn Collingham

gave at the time (see paras [36] and [39]ff, above), but that she had simply signed it. (Cf. para [8(5)], above, and the passages underlined and in bold.

(iv) There was no assertion at that point that she had not signed the disposition or that the signature thereon was a forgery.

(v) Further, there was no suggestion that the disposition was not the deed she had actually signed or that it was several pages shorter than some other document said to have been signed.

By implication, the pursuer's position is that she was deflected from defending the defender's action for division and sale by reason of what she would argue was incorrect legal advice she received at the time. In substance, that advice was to the effect that, having signed the disposition, even though she had done so without reading it, she was bound by its terms. The difficulty with this position is that it is irreconcilable with the assertion in her oral evidence that she had not signed the disposition. Had her position at that time been that she had not signed the disposition, such advice would have been incomprehensible and, at the very least, would have prompted her to explain to Lynn Collingham what she now asserts (namely, that she didn't sign the disposition).

4) In her evidence the pursuer maintained that she had only ever signed one deed intended to have legal effect and that the defender "kept all of the paperwork", meaning all of the legal documentation. Notwithstanding that assertion, amongst the documents produced on *her* behalf was a will in her name and signed by her in 2002. Inexplicably, by the time the pursuer came to give evidence, she denied having seen or signed this, or having ever instructed the

defender to prepare a will. She went so far as to maintain that her signature on the will was a forgery. This evidence sits uncomfortably with the fact that she produced the will as part of her own productions.

5) In her oral evidence, the pursuer also maintained that her signature on the Waiver letter was a forgery. On Mr Findlay's evidence, he drafted, sent out and received the Waiver letter. Furthermore, in relation to the disposition, at points in her evidence the pursuer maintained that it was not her signature. At other points, she maintained that, if it were her signature on the disposition, she herself had not appended it to that document. There is an inherent improbability in having one's signature forged on a variety of documents (the will, the Waiver letter, the disposition), at least where these were not all handled or controlled by the same person. In the light of the evidence of Mr Findlay and Mrs Hill, and the fact that the pursuer herself produced the will, I find the pursuer's evidence on this matter to be improbable.

[133] For these reasons, I find the pursuer to be a largely incredible and unreliable witness and I place no reliance on her evidence, unless it is also supported by a witness whom I have accepted as credible and reliable.

Has it been proved that the pursuer signed the disposition?

[134] The pursuer's case in record is premised on the fact that she signed the disposition. Her essential ground of challenge is that she was duped by the defender into signing this deed. As recorded above, the pursuer's oral evidence constituted a complete *volt face* from her written case. I am obliged to consider the consequence for the pursuer of this feature of her evidence. Had matters rested with her evidence, she would have failed to prove the

factual premise upon which her whole case was based and which was the basis upon which her expert gave his report. (I raised this issue with Mr Stevenson before the evidence of Mr Reid was resumed on the third day of the proof. He accepted the offer of time to consider his position and to take instructions. Having done so, he did not seek to amend. It was at that point that he tendered the suggestion, apparently just discussed with the pursuer, about the substitution of new or other pages.) However, there is also the evidence led by the defender from Morag Hill and Allan Findlay whose evidence I accept. In other words, on this issue and in the light of the evidence of these other witnesses, the defender has proved that the pursuer did indeed sign the disposition, which had been drafted and sent by Mr Findlay, witnessed by Morag Hill, and sent for registration to the GRS by Mr Findlay. Accordingly, my finding that the pursuer was lacking in credibility and reliability is not fatal to this part of her case.

The disposition

[135] Given the pursuer's oral evidence and the faint suggestion made by Mr Stevenson in his submissions that the disposition lodged might be incomplete, I require to address this matter. As I understood it, Mr Stevenson advanced such a submission in an attempt to reconcile the pursuer's pleaded case with her oral evidence of having been presented with and having signed a deed which began with references to 14th century property law. Mr Stevenson never put to any witness that the disposition was in some manner incomplete or that, as suggested by Mr Stevenson (again, only in submissions), it had different front pages which had been produced to the pursuer but which somehow had been subsequently removed. Indeed, Mr Stevenson went so far as to suggest in his submissions that the only inference was that this was what had been done. What Mr Stevenson did not address was

Mr Findlay's evidence, in which he expressly confirmed that the disposition was complete and that he had typed it himself, as he had the Advice and Waiver letters. There was absolutely no evidence to support Mr Stevenson's somewhat extraordinary suggestion and I have no hesitation in rejecting it as having no foundation in the evidence.

Advice and Waiver letters

[136] I next turned to consider the conflicting evidence about these letters. The pursuer maintains that she never received these and that her signature on the Waiver letter was a forgery. For the reasons already explained, I accept Mr Findlay's evidence on this chapter in preference to that of the pursuer. I also accept the short passage of the defender's evidence that the pursuer had mentioned these letters to him. I therefore accept that the pursuer received these letters and that she returned the Waiver letter. It follows that I reject the pursuer's assertion that the latter was a forgery.

Other chapters of evidence

[137] Before turning to consider the expert evidence led in this case, it is convenient next to consider the other, ancillary chapters of evidence.

Has the pursuer proved any misrepresentation on the part of the defender?

[138] On record, the pursuer avers that the defender misrepresented the substance and effect of the deed she said she signed. In her oral evidence, she spoke to having been presented with a document commencing with references to 14th century land law, which she described as "gobbledygook". It was in this context that she asserted that the defender advised her not to worry and that this deed related to her father's disposition of the land to

her (ie as effected by the 2003 disposition). I have already rejected her evidence that there was, in effect, a sleight of hand in relation to the number of pages and presentation of the disposition to her. Given the very substantial concerns about her credibility and reliability, I do not accept this chapter of her evidence. In particular, I do not accept that the defender made the kind of representation asserted in relation to the disposition.

[139] It will be recalled that the 2003 disposition was not immediately presented for registration but that this was done only once planning permission for construction of a dwelling house on the land was secured. It may well be the case that the pursuer has confused in her own mind an explanation of the 2003 disposition with the 2006 disposition, which were presented at the same time to the GRS for registration. This is also consistent with Morag Hill's evidence that the pursuer was not particularly learned.

[140] In any event, as I find there was no misrepresentation as to the import of the disposition, it matters not whether this was advanced as a free – standing case of negligent misrepresentation (as Mr Stevenson sought to argue) or whether this was simply allied to the pursuer's case for breach of fiduciary duty.

Did the pursuer refuse to obtain independent legal advice?

[141] I have already held that the pursuer received the Advice and Waiver letters. In her oral evidence the pursuer readily accepted that she could understand the terms of these letters. I have also accepted the defender's evidence that the pursuer had mentioned receiving these letters to him. In the light of this evidence I find, albeit as a matter of inference, that the pursuer declined to take separate and independent legal advice and that she signed the Waiver letter to that effect, and in full knowledge of the consequences of doing so.

[142] This is reinforced by the parties' evidence that their common intention at that time had been to build a house on the land with a view to starting a life together. While the pursuer presented as somewhat embittered in her evidence, it was apparent from the defender's presentation in evidence that he had genuinely been in love with the pursuer at the material time. This provides an explicable context for the pursuer's grant of the Waiver letter.

[143] Whether the Advice and Waiver letters were sufficient to exonerate the defender from any breach of fiduciary duty or negligence, this question remains to be determined in the light of the parties' expert evidence, to which I shall turn shortly.

The delay in registering the 2003 disposition until registration of the 2006 disposition

[144] The 2003 disposition was not presented for registration in the GRS until 2006, when it was presented at the same time as the disposition. Mr Stevenson appeared to advance a criticism for delay in presentation of the 2003 disposition. It is notable that neither Mr Reid nor Mr Macreath commented adversely on this matter. The defender explained that registration of the 2003 disposition was held back until planning permission was secured. Mr Macreath regarded this explanation as entirely reasonable, given that the small parcel of agricultural land without any planning permission had in his view little value: see paragraph [113], above. The pursuer had also referred to these arrangements as "making the house legal". In my view, there is no basis for criticism arising from the gap in time between the signing of the 2003 disposition and its presentation for registration.

[145] The grant of planning permission to build a dwellinghouse on the land was subject to a number of conditions, including a planning condition which imposed a restriction on

the class of persons entitled to occupy the subjects. The planning condition was in the following terms:

> "Occupation of the dwelling shall be limited to a person solely or mainly employed or last employed in the locality of [the farm] and as identified on the enclosed plan, in agriculture as defined in Section 277(1) [of] the Town & Country Planning (Scotland) Act 1997 or to a widow or widower, spouse, ascendants, descendants and those living in family with such persons." (Emphasis added.)

The local authority's reason for imposing the planning condition stated that the subjects were within an area identified in the development plan "as being inappropriate for new residential development unless related to the essential needs of agriculture". The planning condition therefore restricted occupation of the subjects to someone "employed or last employed" in "agriculture" (as defined) or to a specified relative "living in family" with such a person. On the evidence led at proof, it is questionable whether the pursuer herself would have complied with this condition at the time of the application for planning permission. This may be a further reason why the 2003 disposition could not be registered at the GRS until after planning had been secured and the house built, and why it was only presented for registration at the same time as the disposition.

The parties' respective contributions toward the subjects

[146] I have recorded above the somewhat curious passage in the pursuer's pleadings, averring that the defender was without resources. (See para [8(4)] above.) The pursuer also averred that she made a substantial financial contribution to the construction of the dwelling house. These averments have not been proved. They are inconsistent with the unchallenged evidence that the pursuer was on income support and was not working at the material time. The uncontested evidence was that the defender was a man of wealth. On the pursuer's own evidence, from about the early 2000's the defender was regularly

providing her with bundles of cash in substantial amounts (the sums of £1000, £5000, and £10,000, were mentioned). The dispute between the parties is whether these were unqualified gifts (as the pursuer contends) or were provided to the pursuer to spend on materials and labour for the construction of the house. The pursuer also referred to gifts of jewellery and a limited edition Saab from the defender. On this evidence he was no doubt a generous man, but I do not accept the pursuer's evidence that the sums were provided to her for her to do with as she wished. Rather, these payments were described as having been made in the context of a budding relationship and where the longer term plan was to build a house together, even though the location for that had not yet been identified or agreed.

[147] There was a confusing passage in the evidence of the pursuer's father, taken on commission, to the effect that he may have paid for or contributed to the first payment (of £47,000) toward a timber kit. (At two points on the first day of the Commission, Mr Barr stated that he had received a cheque of £47,000 from the defender and had applied this toward purchase of the timber kit: at pages 16 and 89 of the notes from the Commission.) There was also some evidence that he or his sons had assisted in digging the foundations. This is the only evidence that supports any contribution having been made by the pursuer or her family, apart from the disposition of the 1.4 ha parcel of agricultural land. Otherwise, there was unchallenged evidence that the defender used his expertise and resources to secure planning permission to erect a dwelling house, and thereafter to obtain a building warrant. The defender's position, not seriously challenged, was that he had contributed all or substantially all of the costs to the construction and fitting out of what became a two-storey five-bedroom modern house. The pursuer conceded that he had "contributed a lot". The pursuer was living at the family farm, had a dependent child and had no income or capital. Such evidence as there was about the relationship between the pursuer and her

family, was suggestive of tensions, at the very least, and of enmity amongst her siblings and a subsequent falling out of the pursuer with her whole family. It was not suggested that the pursuer's family was otherwise a family of means or one with disposable capital. While the pursuer's father provided the 1.4 ha of agricultural land, in the light of the whole evidence I find that the defender contributed all or substantially all of the costs of the construction and fitting out of the house. I also find that through his efforts and expenditure planning permission for a dwelling house was secured which thereby materially increased the value of the parcel of land disponed by the pursuer's father to the pursuer. I will deal with the question of the value of the subjects when I consider the evidence of the pursuer's chartered surveyor.

[148] In submissions Mr Stevenson suggested that it was improbable that the pursuer would "give away her only asset", namely the 1.4 ha parcel of agricultural land. However, such evidence as there was tended to show that agricultural land, without the benefit of planning permission (if it could be secured in respect of land of that character), had very little worth. It might be considered equally improbable for the defender to expend effort and considerable resources to secure planning permission and to build a dwellinghouse for him and the pursuer to begin their life together without, at least, taking title in both parties' names. The evidence I have accepted most naturally supports the inference that, as both parties had made a contribution, title to the subjects was to be taken in both names.

Mr Donnachie's evidence as to the valuation of the subjects

[149] The principal purpose of this evidence was to support the pursuer's third conclusion, which sought the sum of £375,000 as half of the market value of the subjects. (Neither party

addressed me on the relevant date at which the subjects fell to be valued, if the pursuer's third conclusion were to be granted.)

[150] In submissions, Mr Sanders sought to challenge Mr Donnachie's evidence. It is not entirely clear on what basis he sought to do so. There was no comparable expert led by the defender. There was no challenge to Mr Donnachie's qualifications, experience or methodology. I found him to be a careful and measured witness. It is entirely to his credit and his professionalism, that he readily acknowledged the limits of his expertise (eg in reply to questions concerning agricultural land values) and I do not regard this as a basis to discount his evidence in any way. I also accept his evidence that the effect of the restriction contained in the planning condition would materially reduce the market value of the subjects, and which he had calculated to be a reduction by half of its market value. I have no hesitation in accepting Mr Donnachie's evidence in its totality. For aught yet seen, the fact that it is a large house situated on land adjacent to a disgruntled former owner, in the form of Mr Barr, may have a further depressive effect on the value of the subjects or, at least, their marketability.

[151] The valuation may also assist on the question of ascertaining the quantum of parties' respective contributions. As noted above, the valuation also stated the reinstatement value of the subjects. Conventionally, this is the costs of rebuilding in the event the physical structures on the land (in this case the dwelling house) are destroyed. The land value does not generally form part of this figure, for the obvious reason that the land subsists. Accordingly, a rough estimation of the value of the land itself (with the benefit of planning permission) can be made by deducting the reinstatement figure of £545,000 from the market value of £750,000. (There is an obvious coherence in comparing reinstatement and construction costs.) In arithmetical terms, this attributes a value of about £205,000 to the

land itself (with planning permission). This is broadly in accordance with Mr Donnachie's evidence that the land may contribute about a third of the value to the subjects. While Mr Donnachie was unable to say what the value of the land was without planning permission, Mr Macreath's evidence was that this would be of very little worth.

[152] In light of this evidence I find that the defender's efforts, especially in securing planning permission, materially increased the value of the land itself. Furthermore, even allowing for digging the foundations and a payment in the order of the figure claimed by Mr Barr (£47,000), and about which the evidence was equivocal at best, it is clear that the defender's contribution was the most substantial in relative terms, and was very substantial in absolute terms. Having regard to the figures in the valuation, in broad terms, the total of the defender's contribution may have equated to nearly 90% of the construction costs whereas the pursuer's contribution was about 11%. (The latter ratio is obtained by taking c £60,000 as the contribution from the pursuer's family (ie the payment of £47,000 towards the timber kit and rounding this up to reflect some work on the foundations), as a proportion of the reinstatement figure of £545,000. Having ascertained the percentage of the pursuer's contribution, namely of about 11%, by inference the defender contributed the remaining 89%.)

[153] This calculation, which is necessarily a broad estimate based on the available (and limited) evidence, can be crosschecked against the value of the land. The value of the land without planning permission was likely not to be a significant proportion of the estimated value of the land with planning permission at £205,000. (As noted above, the value of the land with planning permission may be ascertained, in general terms, by deducting the reinstatement costs (of £545,000) from the full market value (of £750,000).) If the value of the land with the benefit of planning permission was broadly £205,000 then, taking, say, 25% of

that figure, as representing the value of the land without planning permission would produce a value of c £50,000 for the parcel of agricultural land without planning permission. (This rough approximation may be generous, given Mr Macreath's evidence of the minimal value of a small parcel of agricultural land without planning permission.) When the figure of £50,000 (representing the value of the land without planning permission) is added to the estimated figure of the £60,000 (reflecting the contribution of the pursuer and her family), ie bringing about a total of c £110,000, this is still a very modest contribution relative to the defender's own. Whether the correct figure for comparison purposes is the full market value of the subjects with the planning permission (ie of £750,000), or also taking into account to the planning condition (reducing market value to the figure of £375,000), it is evident that the contribution of the pursuer's family was no more than 1/7th to 1/3rd of the full or reduced market value. For present purposes, it suffices to note that this was significantly less than half of the reduced market value of the subjects.

The expert evidence

[154] As noted above, the pursuer's oral evidence bore no relation to her case on record. Had matters rested with the pursuer's evidence there would have been an unbridgeable gap between that evidence and the premise of fact upon which her expert's opinion was predicated. On the evidence of some of the defender's witnesses, I have nonetheless found that the pursuer signed the disposition. In those circumstances, notwithstanding my rejection of the pursuer's own evidence, there is a basis in fact to which her expert's evidence could meaningfully be related.

The experts' respective areas of expertise

[155] There was no challenge to the credibility or reliability of either Mr Reid or Mr Macreath. Rather the reverse, in that each readily acknowledged the standing and expertise of the other. Mr Reid's expertise was principally in the field of property and conveyancing whereas Mr Macreath was pre-eminent in the field of disciplinary and conduct matters. Their respective areas of expertise did not entirely coincide. However, as is apparent from their evidence, their views converged considerably on certain matters.

The convergence of the experts' opinion

[156] While Mr Reid initially took a more stringent view, he accepted that his overall impression had been that the defender *qua* solicitor had obtained something for nothing: see paragraph [54], above. In other words, in those circumstances he would have found the solicitor to be in breach of fiduciary duty or negligence, notwithstanding the terms of the 2002 Code. However, he accepted that, on the hypothesis that there had been full consideration provided by the solicitor, and so the transaction did not result in a gift or disposal at an undervalue, a solicitor who had conducted himself in such circumstances was not necessarily culpable or in breach of any relevant duty. Similarly, Mr Macreath would not have sought to exonerate a solicitor who obtained a disposition in similar circumstances to the grant of the disposition, if no equivalent value had been transferred. At the heart of it, both experts took into account as a highly material factor whether the solicitor who was in a relationship with his client and who transacted with her, benefited from the transaction at his client's expense. In short, both would have censured a gratuitous disposition; neither would have done so if there was no such financial advantage to the solicitor at the expense of the client. While parties did not approach the matters in this way, on the evidence, what the pursuer obtained in exchange

for the grant of the disposition of the land (even giving her credit for the figure c £60,000 (from her family's physical labour and financial contribution, and therefore constituting a total contribution of c £110,000 from the pursuer), was a one-half share in subjects worth either £750,000 (at full market value) or £375,000 (taking into account the effect of the planning condition). In short, she acquired more (or, if the full market value were relevant, significantly more) in value than she contributed. This evidence is problematic, to say the least, for the pursuer's action, regardless of the particular legal ground or grounds founded upon.

Breach of fiduciary duty

[157] As I understood it, the pursuer's essential criticism was that the defender placed himself in a position where he had an interest in the pursuer's grant of the disposition and he had failed to insist that the pursuer obtain separate legal advice. (Mr Macreath characterised this as a "strict liability" approach.) Mr Reid did not maintain his position, if the defender had demonstrably given full value. On the evidence, I have found that the defender did not obtain a financial benefit to the disadvantage of the pursuer. Rather, assessed in the round, the pursuer benefited from the disposition when viewed in the context of the defender's financial contribution and his role in securing the requisite planning and other permissions. In the light of the common position of the two experts, there was scope for permissible conduct on the part of the defender consistent with this evidence.

[158] Does this nonetheless constitute a breach of fiduciary duty?

[159] Mr Sanders relied on *Aitken* v *Campbell's Trustees* 1909 SC 1217 ("*Aitken*"). In that case, which also concerned a solicitor contracting with his own client, the Court held that where a solicitor acted in a transaction outside a solicitor's ordinary business (ie involving

self-dealing with a client), then such transactions were to be subjected to the "closest scrutiny" (at p 1225, *per* Lord President Dunedin) and the question posed: "would another law-agent have advised it, or if the proposition had been made by a third party, would this same law-agent have advised it to his own client?" (*ibid*, at p 1227). It must be noted that Mr Stevenson did not address this case in his submissions (nor did he cite any other case as providing the test for breach of fiduciary duty in the context of a civil action). Further, neither of the experts was referred to or asked about this formulation. They were asked, in effect, whether the circumstances would have constituted misconduct, although neither was asked to comment on the different standard of proof (of beyond reasonable doubt) applicable in the SSDT. Notwithstanding this, in the circumstances I have found proved, and applying the test in *Aitken*, which is binding on me, the pursuer's case for breach of fiduciary duty is bound to fail. There is no evidence to support a finding that the *Aitken* test was met; the convergence of views between Mr Reid and Mr Macreath pointed strongly away from such a finding.

[160] For completeness, I did not find the evidence about other conflicts of interest (ie where a solicitor acts for both parties in a transaction) to be of assistance. Nor did I find the discussion about the test for misconduct, spoken to by Mr Macreath under reference to the case of *Sharp* (or the more recent SSDT decision) to be of assistance. It respectfully seems to me that the test in *Aitken* for misconduct (which is within the jurisdiction of the SSDT), is not to be assimilated to that of breach of fiduciary duty although, of course, the same factual basis may support both types of characterisations (in the respective *fora* of this Court and the SSDT).

Negligence

[161] I must now deal with the presentation of this case as one of professional negligence. The evidence concerning this was very thin. The circumstances do not readily instruct a case for professional negligence, which is more typically concerned with the exercise of professional skill which is said to have fallen below an established standard and to amount to conduct which no reasonably competent professional exercising due skill and care would have done. Typically, such cases involve proof of the three limbs of the *Hunter* v *Hanley* test. (To the extent that there was a conflation by Mr Reid of the distinctive features of a case for negligence and one for breach of duty, this flowed from questions posed by Mr Stevenson assuming or inviting such a conflation. Mr Stevenson appeared to proceed on the basis that the obligations in the 2002 Code were interchangeable with the test in *Hunter* v *Hanley*.) Such evidence as there was in this case, militated against the test of negligence being met. I have in mind the terms of the 2002 Code, quoted at paragraph [59], above. The presence of the words "where appropriate" and "should" are necessarily inconsistent with a contention that no reasonably competent solicitor exercising due skill and care would have failed to insist that the pursuer should have got separate legal advice and was otherwise obliged to refuse to act. To the extent that Mr Reid's evidence was to be understood as adhering to the initial view expressed in his report (eg as recorded at para [48], above), I prefer Mr Macreath's evidence on this matter. Mr Reid's evidence was not entirely consistent with the 2002 Code and, to the extent there was a basis for his stricter view, this was founded on his *ipse dixit* but unsupported by reference to other any cases or examples. It is likely to be the case that what Mr Reid commended was in accordance with good or best practice, but departure from that does not necessarily instruct a case of negligence. I prefer the more

nuanced evidence of Mr Macreath, which was supported by reference to his understanding of practice in the profession.

[162] It follows that the pursuer's case on negligence also fails.

Misrepresentation or negligent misrepresentation

[163] I have already determined that as a matter of fact there was no misrepresentation, as the pursuer contended. Properly analysed, what the pursuer was seeking to prove was an intentional misrepresentation. It is in my view inapt to characterise that as a "negligent misrepresentation", as Mr Stevenson sought to do in his submissions. In any event, there was no evidence to support this contention, no analysis of the relevant case law and no considered submission to support this. I also find that this ground of challenge, even if available as a free-standing ground on the pursuer's pleadings, fails.

The third conclusion

[164] Mr Stevenson also moved for the third conclusion in the alternative to that for reduction. As the pursuer's case was presented, the same matters were founded upon for both conclusions. It follows that the pursuer has failed to establish any basis for the third conclusion, and this also falls to be refused.

Reduction as an equitable remedy

[165] Both parties accepted that the remedy of reduction is an equitable remedy and that the court may take into account facts and circumstances not directly related to the merits or subject-matter giving rise to the parties' action. So, for example, the acquisition of rights by a third party in good faith and for value in the subjects (eg such as a heritable creditor), had

this occurred, is likely to have been a relevant factor in the exercise of the court's discretion to grant or refuse reduction. It is therefore appropriate that I indicate the factors I would have taken into account in considering whether or not to grant the remedy of reduction, had I found that the pursuer established a basis for the same.

[166] What follows proceeds on the hypothesis that the pursuer had established a breach of fiduciary duty. In considering whether or not to grant reduction, I would have had regard to the following:-

1) *The parties' respective contributions to the subjects*: The pursuer's rhetorical plea in her evidence was to ask: "why would I give away half my land?". In truth, on the evidence, this would not have been to give away very much. The import of the available evidence was that a small parcel of agricultural land without the benefit of planning permission was worth very little. The pursuer led no evidence to the contrary, that is, to prove that the land conveyed by the disposition had any substantial value, even absent any planning permission. I refer to the findings I have made about the parties' respective contributions to the value of the subjects. Accordingly, had it been established that there was an absolute restriction on the defender acting for the pursuer in respect of the disposition where he was also one of the disponees, and that that constituted a breach of fiduciary duty, I would nonetheless have regarded it as inequitable to grant reduction, given the very substantial contribution the defender made to the increase in the value of the subjects (by obtaining the requisite consents and funding substantially the whole of the construction costs). Putting it another way, the effect of breach of any such fiduciary duty had not, on the evidence I have accepted, resulted in any financial disadvantage to the pursuer. Indeed, the effect of the reduction would in effect

be to grant the pursuer a windfall, to the extent that the value of what she received exceeded her contribution. In those circumstances, any such breach was technical rather than prejudicial in character. (I am not to be understood as suggesting that the latter feature is a necessary element to establish breach of fiduciary duty or that its absence proves there was no breach. I do regard the question of prejudice to be a relevant circumstance to which regard may be had at the stage of considering the grant of the remedy of reduction.)

2) *The impermissibility of these proceedings constituting a de facto undermining of the 2015 decree*: The defender holds a decree in his favour, confirming his right (which is available to any common owner of subjects) to sell the subjects and divide the proceeds according to the parties' respective rights thereto. That decree was a decree *in foro* in proceedings in which the pursuer was legally represented throughout. Moreover, the pursuer's appeal was refused, and the 2015 decree is final. On the authorities, a party must demonstrate "exceptional circumstances" to reduce a decree *in foro*. If granted, the decree of reduction of the disposition would render the 2015 decree otiose, but without meeting this high test. It respectfully seems to me that these proceedings are being used as an impermissible means to elide the 2015 decree and to deprive it of its efficacy. Mr Stevenson's only answer, when the matter was raised with him on the first morning of the proof, was to suggest that the decrees wouldn't be inconsistent: the defender could no longer sell the subjects if he had no title. In my view, this fails to appreciate or address the fundamental objection of this aspect of the pursuer's case.

3) *The undesirability of inconsistent decrees*: Separate from the factor just noted, I would have regarded it as legally repugnant for there to be inconsistent decrees pronounced by two courts in the same jurisdiction. This, it respectfully seems to me, undermines the virtues of finality and certainty that should attend a final decree, such as the 2015 decree.

4) *The unexplained and irreconcilable differences between the pursuer's positions in the defender's action and in these proceedings*: In any event, it is deeply troubling that the pursuer could participate in the defender's action (with the benefit of legal aid), assert a certain state of affairs in those proceedings and permit decree to pass and thereafter raise separate proceedings (again, with the benefit of legal aid) on a factual premise that is radically inconsistent with the position she adopted in those earlier proceedings. (Had this been disclosed to or appreciated by the Scottish Legal Aid Board, it is questionable whether she would have received legal aid to raise these proceedings.) In respect of these proceedings, her pleaded case was that she had been deflected by the defender's misrepresentation from reading the disposition and that it was never her intention to dispone a one-half share to the defender (the evidence about the inconsistency between that stance and her position in the defender's action has been noted above, at paras [35] and [37] to [41]). Her oral evidence, to the effect that her signature on the disposition was either a forgery or fraudulently appended, presented an even more radical departure from her stance in response to the defender's action. This *volte face* was never explained. (It was not suggested that the first solicitor, Lynn Collingham, had laboured under a mistake of fact.) I would have regarded this as a very

material factor in the exercise of the court's discretion to refuse the remedy of reduction.

In the light of these factors, viewed individually and collectively, I would have refused to grant decree of reduction had the pursuer established breach of fiduciary duty.

Prescription

[167] In the light of my findings, I do not need to address the question of prescription in any detail. Mr Stevenson conceded that if his case were based on negligence, then the pursuer's action had prescribed by reason of the expiry of the five-year negative prescriptive period. Mr Sanders elicited evidence from the pursuer, noted above at paragraph [42], to the effect that the pursuer had been aware of a claim against the defender and a loss sustained by his conduct, more than five years before the raising of this action. This would have sufficed to refuse the pursuer's third conclusion based on this ground.

[168] In relation to characterisation of the defender's conduct as a breach of fiduciary duty, I did not have the benefit of full submissions under reference to the case law or of considered analysis of the provisions of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). Mr Sander's position was that a breach of fiduciary duty was subject to the 5-year negative prescription. (He referred to para 1(d) of schedule 1 to the 1973 Act and he produced the case of *Khosrowpour* v *Taylor* [2018] CSOH 64.) Mr Stevenson hazarded that as this was a disposition under reduction, this may be an obligation "relating to land" to which the twenty-year long negative prescription applied. (He referred to para 1(2)(e) of schedule 1 to the 1973 Act, to para 6 of *JAL Fish Ltd Small Self-Administered Pension Scheme, Trustees Law & Others* v *Robertson Construction Eastern Ltd* [2018] CSIH 24, to the effect that this phrase was

apt to cover a wide range of obligations, and to the example in para 2.54(i) of the Scottish Law Commission Discussion Paper 160 (on prescription) of 2016.) Other than Mr Sanders' brief reference to schedule 3 of the 1973 Act (specifying imprescriptible obligations), which he rejected out of hand, neither party addressed the possibility of the fiduciary obligations owed by the defender *qua* solicitor as falling within one of the classes of imprescriptible obligations.

[169] The characterisation of the obligation in question for the purposes of the 1973 Act is a question of some subtlety. I am not persuaded that either Mr Sanders or Mr Stevenson is correct in his submissions on this issue. It suffices for present purposes to observe that the meaning of "reparation", where it appears in schedule 1(1)(d) of the 1973 Act, has been authoritatively construed by the First Division in *Miller* v *Glasgow DC* 1988 SC 440, a case which is binding on me but which neither party cited. In *Miller,* the court confirmed the technical meaning of "reparation" in Scots law (*per* Lord President Emslie at p 444: "From the authorities to which we were referred it is apparent that the word is used in the sense of *reparatio injuriarum*, and is a pecuniary remedy which the law of Scotland affords for a loss caused by a wrong") and it held that that word was not given any special or wider meaning in the 1973 Act. In other words, "reparation" is confined to payment of damages. It does not include specific implement (see *Miller*) and, by a parity of reasoning, it would not include reduction. Insofar as the pursuer's action is predicated on the remedy of reduction, it does not fall within paragraph 1(d) of schedule 1 to the 1973 Act. Accordingly, Mr Sanders is wrong in his principal submission that the pursuer's case for reduction has prescribed by operation of the short negative prescription. The defender's plea to prescription falls to be repelled *quoad* the pursuer's first conclusion. However, in the absence of considered submissions and full reference to the relevant authorities, I refrain from expressing any view

on the question of the characterisation of the obligation in question or the provision within which it falls in the 1973 Act. In the light of my other findings, this view would in any event be *obiter*.

Decision

[170] In the light of the foregoing, the pursuer's action fails and decree will be pronounced to give effect to this decision. As requested, I reserve meantime the question of expenses.