SHERIFF APPEAL COURT

[2019] SAC (Civ) 4
DNF-A162-16

Sheriff Principal D C W Pyle
Sheriff Principal R A Dunlop QC
Sheriff P J Braid

OPINION OF SHERIFF PRINCIPAL DEREK C W PYLE

in causa

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

and

CHARLES HENRY SANDS, CHARTERED ACCOUNTANT AND INSOLVENCY PRACTITIONER, having a place of business at 64 Allardice Street, Stonehaven, AB39 2AA, in liquidation thereof

Pursuers and Respondents

against

FIRST SCOTTISH SEARCHING SERVICES LIMITED, a company incorporated under the Companies Acts and having a place of business at St David's House, St David's Drive, Dalgety Bay, Fife, KY11 9NB

Defenders and Appellants

Pursuers and Respondents: McKinlay;
Defenders and Appellants: Reid;

4 February 2019

[1] I concur with the conclusions reached by Sheriff Braid and his reasoning. I also agree with his proposals for the disposal of this appeal. I do however have some observations to

make, both on the general approach to be adopted in cases such as this and the particular circumstances which here arise.

[2] In an article published in 2009 ('The Strange Habits of the English', *The Stair Society, Miscellany Six*, p 309ff), Lord Hope of Craighead wrote at length about the considerable contribution to Scots Law of the late Professor Bill Wilson. Alumni (of a certain age) of Edinburgh University remember him with great respect and affection. Lord Hope described the professor's lectures on delict and recalled his memorable conclusion on the law of negligence: "There is no real law here, beyond that which is to be found in the actual cases." That was in 1963. It seems to me that little has changed. Indeed, as Lord Hope pointed out (p 318), Lord Hoffmann declared 36 years later that no-one can pretend that the existing law of negligence is founded upon principle (*White* v *Chief Constable of South Yorkshire Police* [1999] 2 AC 455).

[3] In the same article (p 317), Lord Hope drew the distinction between the Scots use of the term "delict" in the singular as part of the law of obligations outside contract and the English use of the term "torts" in the plural and which has grown up by the use of precedent. He continued:

> "Nowhere has the influence of the English approach been more keenly felt than in the development of the law of negligence. Had its development been left in the hands of Scottish jurists it might have been directed to issues of principle. But, as Bill Wilson pointed out in his valiant attempts to make sense of the authorities, the English approach has been to develop new categories of negligence incrementally and by analogy with established cases… This approach leads to decisions which are influenced not by principle but by policy."

And of course the majority of the Supreme Court in *Robinson* v *West Yorkshire Chief Constable* [2018] AC 736 followed that same approach (Lord Reed, p 746 *et seq*). But there are it seems to me two dangers in it.

[4] First, it raises the spectre of the law of negligence being no more than a conglomeration of individual decisions on individual facts. (In *Customs and Excise Commissioners* v *Barclays Bank plc* [2007] 1 AC 181, at p 192, Lord Bingham of Cornhill described it as "a morass of single instances".) That might bring succour to a modern day Oliver Wendell Holmes and other American realists, but it also might lead to practical commercial difficulties. Underwriters of professional indemnity insurance require to assess and predict the level of risk before deciding whether to insure and, if so, the level of premium to be fixed. Doubtless, they are accustomed to uncertainty, but not knowing whether a particular event will result in liability as a matter of common law merely increases it.

[5] Secondly, there is the danger that in the absence of the law of negligence being based upon principle, rather than precedent, judges are tempted (because of what Lord Goff described in *White* v *Jones* [1995] 2 AC 207, at p 259, albeit in a different context, as "the impulse to do practical justice") to force the facts and circumstances of a present case to fit in with the facts and circumstances of a previous case when in truth there is little in each of them which can be said to be the same. The House of Lords and the Supreme Court have been careful not to have any test of principle treated as, in the words of Lord Rodger of Earlsferry in *Custom and Excise Commissioners* (p 204), a "single touchstone" – what Lord Bridge of Harwich in *Caparo Industries plc* v *Dickman* [1990] 2 AC 605, at p 618, described as "little more than convenient labels". But, the history of the case law since Lord Atkin's question, "Who is my neighbour?", in *Donoghue* v *Stevenson* 1932 SC (HL) 31 shows that uncertainty (and sometimes confusion) is reflected in judicial opinion. An obvious example is *Anns* v *Merton London Borough Council* [1978] AC 728. Another, at least for some judges and commentators, is *Junior Books Ltd* v *Veitchi Co Ltd* [1983] 1 AC 520. And even after

Caparo, which on one view might be thought to have settled the law, it has since proved necessary for the Supreme Court to explain its true meaning in *Robinson* – and even then with Lord Mance expressing reservations (p 764).

[6] There is in my opinion still an inherent tension between the incremental case law approach and the policy approach (based on the *Caparo* three stage test). Better legal minds than mine have grappled with this problem for decades. Some may say that lawyers, Scottish lawyers in particular, have an oversentimental attachment to the story of the snail in the bottle. For it may well simply be that Lord Atkin's question is so wide in its scope that no solution is possible. But at least to this Scottish lawyer trained to understand that the common law (in this case the law of obligations) ought to be primarily based on principle, not precedent, it is uncomfortable.

[7] The English approach, which must now be regarded as the law of the United Kingdom, is, as Hobhouse LJ said in *Perrett* v *Collins* [1999] PNLR 77, p90-91 (and quoted by Lord Reed in *Robinson* at p 746), the taking into account of the circumstances of the case and then deciding whether those circumstances "comply with established categories of liability". Lord Reed describes it thus (*ibid*):

> "… the characteristic approach of the common law in such situations [where "established principles do not provide the answer"] is to develop the law incrementally and by analogy with established authority. The drawing of the analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned."

But, as Lord Reed goes on to point out, even then policy issues arise:

> "The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case. It is the exercise of judgement in those circumstances that involves consideration of what is "fair, just and reasonable"."

The question for me – and it is one to be asked of Lord Hope – is "If the development of the law of negligence had been left in the hands of Scottish jurists how might it have been "directed to issues of principle"?"

[8] In the instant case, I was struck by the many references by counsel to the facts, or the differences between the facts, of the cases upon which each relied. That is understandable, not least because the incremental approach, as set out most recently in *Robinson*, requires it. But it might be that the better approach would have been to identify the broad principle or principles in each case and then to decide whether it or any of them applied to the factual circumstances of this appeal. It is easy to identify similarities between this case and *Custom and Excise Commissioners.* But it is also just as easy to identify differences. The same could be said about *Ministry of Housing* v *Sharp* [1970] 2 QB 223. Happily, in this appeal, as Sheriff Braid sets out, it is possible to follow the incremental approach without in any sense having to force the analogy between *Sharp* and this appeal. But looking at it from Lord Hope's approach of principle it is not as straightforward.

[9] In *Sharp* two principal questions were asked: 1, When the certificate of a search in a local land charges registry omits a charge which is clearly entered in the register, and a person interested in the charge suffers damage as a result of the omission, is the register liable in a civil action for breach of statutory duty? 2, If the clerk who made the search was negligent in omitting the charge, and a person interested in the charge suffers damage as a result of his negligence, are his employers liable in damages for negligence? The first question is irrelevant to this appeal. There is no question here of the appellants, as professional searchers, being under any statutory duty. On the second question, the case is useful to the extent that it clarified that the court in *Hedley Byrne & Co Ltd* v *Heller & Partners Limited* [1964] AC 465 was not saying that the obligation to take reasonable care depends

upon a voluntary assumption of responsibility (Salmon LJ at p 279) and held that the principle in that case could apply to circumstances other than one involving misstatements. But, that apart, there is in my view no underlying new principle which emerges.

[10] While I do of course accept that their Lordships in *Custom and Excise Commissioners* discuss whether there was liability in tort by way of the concept of reliance and the fair, just and reasonable test, it seems to me that the primary principle which emerges is that where a scheme for protective remedies in the course of litigation (in this case a Mareva injunction) is contained in statutory form (Supreme Court Act 1891 and subordinate legislation) and provides for enforcement through the court's power to punish by way of contempt of court, it does not provide a remedy other than by way of a finding of such contempt. As Lord Bingham of Cornhill put it (p 195),

> "This regime makes perfect sense on the assumption that the only duty owed by a notified party is to the court."

Lord Rodger of Earlsferry made the same point (p 207-208):

> "The policy of the law is that a third party, such as a bank, which is notified of a freezing order, must not knowingly undermine the court's purpose in granting the order. If this is all that the court which makes the order can demand, it would be inconsistent to hold that, by reason of the selfsame notification, the applicant could simultaneously demand a higher standard of performance by the bank – and then claim damages for the bank's failure to achieve it."

The case is therefore an example of a circumstance where a statutory regime is entire in itself and does not leave open the possibility of additional duties, particularly where they would run contrary to the regime's express terms or its underlying policy. That is not of direct assistance for this appeal. But I do consider that the case is indirectly so, in that it considers the application of the law of negligence within a statutory (or part statutory) scheme.

[11] Any system of law for land requires to develop sophisticated mechanisms for its transfer. But the mechanisms are not just about transfer of heritable property. They also

provide for security for lenders and, of relevance to this case, rights to exercise diligence to protect pecuniary rights of action or to enforce rights under court decrees. Prior to registration of title, conveyancing law and practice developed to secure effective methods for land transfer and security. In all transactions, the purchaser had to be satisfied that the seller had a clear title to the land and that there was no legal impediment, personal to the seller, which would prevent the transfer being valid in law. The seller's solicitor prepared a draft memorandum for search (or more commonly a memorandum for continuation of search) which he sent to the purchaser's solicitor. The memorandum was for a search in the Register of Sasines, to determine that the seller had a valid and marketable title to the land, and in the Register of Inhibitions and Adjudications, to discover whether or not the seller, or any previous heritable proprietor within the last five years, was under any incumbrance which would prevent him transferring the title. The purchaser's solicitor checked that the draft covered the prescriptive periods for landownership and for inhibitions and adjudications. If the purchaser intended to grant a heritable security over the property his solicitor, *inter alia*, added the purchaser as a party to be searched against in the Register of Inhibitions and Adjudications. On return of the revised draft, the seller's solicitor instructed professional searchers, including, incidentally, the option to instruct professional searchers employed by the Keeper of the Register. The professional searchers carried out the searches in accordance with the memorandum and immediately prior to settlement of the transaction provided to the seller's solicitor an interim report. That report was exhibited to the purchaser's solicitor and settlement of the transaction was made by delivery of the disposition in favour of the purchaser in exchange for payment of the price and delivery of a personal letter of obligation by the seller's solicitor to deliver clear searches in due course provided the disposition was recorded within seven or fourteen days. The professional

searchers were well aware of this system and, in particular, were well aware that the purchaser would be relying upon the interim report. For present purposes, the significance of all of that is that the professionals involved, both the solicitors and the searchers, understood the system and their individual roles in it. Without that understanding the system would not work. The same applied to the solicitors who acted for the intended heritable creditor of the purchasers. (It was commonplace for the same solicitor to act for the purchaser and the lender.) And, significantly for this appeal, the same applied to litigation solicitors acting for creditors of the seller. Thus, if the creditor's solicitor commenced court proceedings he was aware that he could exercise the creditor's right under the warrant granted on the signetted summons for inhibition or arrestment on the dependence of the action. He did this by lodging in the Court of Session Letters of Inhibition with a corresponding Notice, registering the Notice, serving the Letters upon the debtor and then registering the Letters in the Register of Inhibitions and Adjudication. In doing that, the solicitor was aware that the seller would be unable to grant a valid and marketable title without in some way addressing the fact that he could not deliver to the purchaser a clear search in the register. Thus, the system for transfer of heritable property, the granting of security and the enforcement of rights, or pending rights, of creditors was dependent upon both the law and practice in each area fitting into that system and each professional link in the chain understanding such law and practice, his individual role and, significantly for present purposes, the consequences of any failure to fulfil that role. As set out in the written pleadings, the system has changed since the introduction of registration of title, but the basic principles of the old system have been replicated. In particular, the system for the obtaining of searches has survived, albeit by way of statutory forms, as has the system for diligence on the dependence of an action. As Sheriff Braid explains, the consequences of an inhibition

have changed where a purchaser has acquired the property in good faith and for value, but the essential role of the solicitors and the searchers has remained the same.

[12] Not for the first time, the Supreme Court in *Robinson* commented that the court is not the Law Commission (eg, Lord Reed at p 758; Lord Mance at p 764). Counsel for the appellants forcefully submitted that it was for Parliament, not the court, to provide a remedy in this case. Indeed, he went further in submitting that if Parliament had intended that the respondents should have a remedy it would have provided for one in the Act. But in making these points, he did not refer us to any government publication or parliamentary debate or committee proceedings in which the issue was discussed. Doubtless, this is not the first time that such a submission had been made to dissuade a court from extending the law of negligence to novel circumstances. But that might sometimes proceed upon a fiction that in such cases Parliament considered the potential for civil suits when drafting the legislation. In the absence of evidence to the contrary, it is surely much more realistic to accept that Parliament never gave a thought to it. For present purposes, I am content to go along with Sheriff Braid's suggestion that perhaps in this case Parliament decided to leave the matter for the court to decide. But what I think can be said with more certainty is, first, that Parliament must have been aware of the law and practice of both the transfer of heritable property and of diligence and, secondly, that Parliament would expect the court in its decisions not only not to do anything which would undermine the statutory regime but also to buttress it when necessary to do so. That, in my opinion, is the principled position which could be taken in this appeal. It is one of the roles of the law of delict to provide a remedy where, for want of a better word, an actor in the performance of his duties within the system of law and practice, as set out in whole or in part by statute, is negligent and causes foreseeable damage to a party who relies upon that system operating in its intended

manner. Whether it is necessary to define that as an example of the application of the concepts of reliance or proximity or the *Caparo* fair, just and reasonable test or even, as Lord Mance expressed it, an issue of policy, I do not believe matters; although in my opinion it does all of these things. But for me, echoing Lord Hope's words, it also readily fits into a principle which is that the common law of negligence should dovetail with the intention of Parliament. That, in my opinion, is in the public interest – a matter which is always a concern for the court.

[13] In making these observations, I have been careful not to discuss in detail what actually might have occurred in this case by way of the operation of the law and practice under registration of title, except insofar as I underline general consistency with the old law. I accept that there might be further twists and turns in determining whether on the particular facts liability falls upon the appellants – or indeed the extent, if any, of loss. These matters will be resolved only after proof.

SHERIFF APPEAL COURT

[2019] SAC (Civ) [Citation No]
[Case No]

Sheriff Principal D C W Pyle
Sheriff Principal R A Dunlop QC
Sheriff P J Braid

OPINION OF SHERIFF PRINCIPAL RA DUNLOP QC

in causa

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

and

CHARLES HENRY SANDS, CHARTERED ACCOUNTANT AND INSOLVENCY PRACTITIONER, having a place of business at 64 Allardice Street, Stonehaven, AB39 2AA, in liquidation thereof

Pursuers and Respondents

against

FIRST SCOTTISH SEARCHING SERVICES LIMITED, a company incorporated under the Companies Acts and having a place of business at St David's House, St David's Drive, Dalgety Bay, Fife, KY11 9NB

Defenders and Appellants

Pursuers and Respondents: McKinlay;
Defenders and Appellants: Reid;

[Date of Issue]

[14] I have had the opportunity of reading the opinion of Sheriff Braid. I am in complete agreement with it and have nothing to add. I agree that the appeal should be disposed of in the manner proposed by him.

SHERIFF APPEAL COURT

[2019] SAC (Civ) [Citation No]
[Case No]

Sheriff Principal D C W Pyle
Sheriff Principal R A Dunlop QC
Sheriff P J Braid

OPINION OF APPEAL SHERIFF PETER BRAID

in causa

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

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Introduction

[15] This case raises a question of considerable importance to conveyancers, searchers and inhibiting creditors alike: does a firm of professional searchers, instructed by the seller

of heritable subjects to carry out a search in the Register of Inhibitions and Adjudications, owe a duty of care to a creditor who has registered an inhibition in that register?

[16] The reason this question is of such importance is down to section 159 of the Bankruptcy and Diligence (Scotland) Act 2007, which is in the following terms:

> "**159 Termination of inhibition when property acquired by third party**
> (1) Notwithstanding section 160 of this Act, an inhibition ceases to have effect (and is treated as never having had effect) in relation to property if a person acquires the property (or a right in the property) in good faith and for adequate consideration.
> (2) For the purposes of subsection (1) above, a person acquires property (or a right in the property) when the deed conveying (or granting the right in) the property is delivered to the person.
> (3) An acquisition under subsection (1) above may be from the inhibited debtor or any other person who has acquired the property or right (regardless of whether that person acquired in good faith or for value).
> (4) For the purposes of subsection (1) above, a person is presumed to have acted in good faith if the person—
> (a) is unaware of the inhibition; and
> (b) has taken all reasonable steps to discover the existence of an inhibition affecting the property."

[17] The effect of that provision on an inhibiting creditor is stark. Where section 159 is engaged, and an inhibition is, as the headnote somewhat brutally puts it, terminated, the creditor irrevocably loses such rights and remedies as the inhibition conferred upon him. The inhibition is not only no more, but is treated as never having been. The impact of this change is difficult to overstate. Prior to section 159, if a property was disposed of in contravention of an inhibition, an inhibiting creditor was entitled to reduce the disposition *ex capite inhibitionis*, which in effect meant that he was entitled to pursue the remedy of adjudication as if the property still formed part of the debtor's estate. He retained the same remedies after the disposition as he had before. By virtue of section 159, where it is engaged, he now has no remedy in relation to the property disposed of. Unless he has a remedy

against the searchers, the inhibiting creditor will therefore be denuded of any remedy against anyone for the deprivation of the rights conferred by the inhibition.

[18] The position of the appellants is that Parliament must have been aware of this fundamental change in the law when enacting section 159. It could have chosen to impose a duty of care on searchers but did not do so. That may have been deliberate or there may simply be a *lacuna* in the law. If so, they say, it is a *lacuna* which only Parliament can fill. The respondents, on the other hand, say that a common law duty of care is owed by searchers to creditors, and indeed they say that such a duty has always existed albeit it has only become of practical significance since the 2007 Act. Which party is correct in their respective contentions is the principal issue for this court to resolve.

[19] A subsidiary issue is whether, if a duty of care is owed, an inhibiting creditor must aver and prove good faith on the part of the purchaser in order to establish that section 159 is indeed engaged.

Factual background

[20] The following background is uncontroversial. On 6 December 2011, the respondents obtained decree against Ian Donald Gardiner ("Mr Gardiner") for payment of the sum of £50,000. Mr Gardiner then lived at 6 Arbirlot Place, Arbroath ("the property"). He has never made any payment in whole or part satisfaction of the decree. In February 2012 the pursuers served and then registered an inhibition ("the inhibition") against Mr Gardiner. The inhibition was effective against the property. Since August 2010 the property had been marketed for sale, initially being advertised at offers around £160,000 and from November 2011 at offers over £124,950. In or around March 2012 it was removed from the market. In July/August 2012 the house was sold to Paul Gardiner and Louise Jones ("the purchasers").

Paul Gardiner is Mr Gardiner's son. The purchasers and Mr Gardiner (together with his wife: "the sellers") were represented by separate firms of solicitors. The appellants were instructed to carry out a search of the Register of Inhibitions and Adjudications. That search was exhibited to the purchasers. It did not disclose the inhibition. Accordingly, the inhibition was not discharged before the sale and the purchasers' title was registered in the Land Register without qualification.

[21] It is also relevant to have regard to what the respondents do not offer to prove. In particular, they do not offer to prove that the appellants were aware of their existence when they undertook the search; that the appellants undertook or otherwise assumed any responsibility towards the respondents for the content of their search and subsequent report; that the respondents ever received a copy of the appellants' report; that the respondents otherwise relied upon the appellants' report; or that the respondents ever paid the appellants a fee in relation to their report. Indeed, one can go further and note that the respondents accept that the appellants were unaware of their existence, that they never received a copy of the report and never relied upon it, and that no fee was paid by them to the appellants. The question of assumption of responsibility is perhaps a little more complicated but it can be said that it is accepted that since the appellants were unaware that the respondents existed, no specific responsibility was undertaken to them.

[22] It should be noted, lest it be lost sight of, that the appellants do not admit that they breached any duty of care that they owed to the respondents. In relation to the subsidiary issue, neither party has averments about good faith, or the lack thereof, on the part of the purchasers.

The sheriff's decision

[23] In relation to whether or not a duty of care is owed, the sheriff held that it was. In reaching that view, he applied a variety of tests, but the nub of his reasoning is perhaps found at paragraph [81] of his note, where he states:

> "Following *Sharp*[1] it appears to me that the [appellants] have a duty to use reasonable care in respect of the [respondents] in the preparation of a search report, not by any voluntary assumption of responsibility to the [respondents] on their part, but if they knew or ought to have known that others being their neighbours and in proximity, namely the [respondents] as inhibitors on the Register, which the [appellants] were searching , would be injuriously affected by a mistake such as the [appellants] admit to making in the present case. The [appellants] have failed in the exercise of that duty".

Having reached that view, the sheriff then opined that there were adequate averments of loss. Having previously expressed the view, at paragraph 76 of his judgment, that the purchasers were unaware of the inhibition (mistakenly referred to by the sheriff in that paragraph as the disposition) and that, having taken all reasonable steps to discover its existence, they were therefore presumed to have acted in good faith, the sheriff went on to repel the appellants' plea in law as to the relevancy of the respondents' pleadings, and to sustain the respondents' plea as to relevancy and also their third plea in law – that they had suffered loss through the appellants' fault. He therefore allowed a proof.

[24] Against that factual background, I now turn to the parties' submissions:

Appellants' submissions

[25] Counsel for the appellants submitted that the sheriff erred in his approach. The law was changed by *Robinson* v *Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] 2 WLR 595. That case was decided after the debate before the sheriff had taken place but

[1] *Ministry of Housing and Local Government* v *Sharp* [1970] 2 QB 223, referred to more fully below

before he issued his judgment. However the sheriff did not allow parties the opportunity to make further submissions, and then misapplied *Robinson*. The correct approach, following *Robinson*, in considering a novel situation, was: (a) to consider the analogous case law and ask whether there was an established line of authority; if there was, the situation was not novel and the line of authority should be followed; if the situation was novel (as here) then the court should (b) consider the overall coherence of the law; and (c) consider whether it was just and reasonable to impose a duty of care. Accordingly, in *Robinson* the Supreme Court had laid down an incremental approach, sweeping away the need to apply other tests such as the assumption of responsibility test (*Hedley Byrne* v *Heller & Partners* [1964] AC 465) and the tripartite test (*Caparo Industries Plc* v *Dickman* [1990] 2 AC 605). Those tests could however be used as a cross-check. The closest case to the present was *Customs and Excise* v *Barclays Bank Plc* [2006] UKHL 28. The House of Lords in that case held that no duty of care was owed to a creditor by a bank on which a freezing injunction had been served. In that case the bank knew of the creditors' existence. In the present case, the appellants did not know of the respondents' existence. There was no relationship of any sort between the parties in the present case. To hold a duty of care to exist would not be an incremental development of the law. *Ministry of Housing and Local Government* v *Sharp* [1970] 2 QB 223, the case which the sheriff found to be most analogous, was not in fact analogous and did not support the imposition of a duty of care. Rather, it simply decided that *Hedley Byrne* was not of more general application, and the recognition of a duty in that case was also based upon the statutory scheme that was in place and the public interest that was to be served. Further, to hold a duty of care to exist in the present case would undermine the coherence of the law. No duty would be owed by the sellers' solicitor. It would be arbitrary to find that a duty was owed by the searchers. There was no basis for giving the respondents rights under the

contract between the sellers and the purchasers. It was not just and reasonable to impose a duty. It was impossible to exclude or limit liability; the respondents would obtain premium-free insurance (and it was no answer to that point to say that the searchers could insure against the risk). Imposition of a duty would secure payment to the creditors, which the inhibition itself could not achieve. At the root of the respondents' claim was a complaint that the system simply did not work, but if there was a *lacuna* in the law that was for Parliament to resolve, not the courts. Applying the *Hedley Byrne* and *Caparo* tests as a cross-check reached the same result. There had been no assumption of responsibility and there could be no duty. There had been no reliance in a *Hedley Byrne* sense. There was no proximate relationship between the parties.

[26] As far as the subsidiary issue was concerned, counsel's main criticism of the sheriff's approach was that he had repelled the appellants' preliminary plea when he ought not to have done so. At the very least there ought to be a proof before answer in relation to whether the respondents had suffered loss. At the root of this was the question of good faith and whether or not the respondents were entitled to assume that the purchasers had the protection of section 159 with the consequence that the inhibition had ceased to exist; or whether they had to prove a lack of good faith. It could not simply be assumed that the purchasers were in good faith. The respondents had to aver and prove that section 159 was engaged, such that they had lost the protection conferred on them by their inhibition. Not having done so, the action should be dismissed.

Respondents' submissions

[27] Counsel for the respondents accepted that the case was novel and that there was no precedent which established that a searcher owed a duty of care to an inhibiting creditor.

Further, the respondents did not take issue with the approach which the court should adopt following *Robinson*, as set out by counsel for appellants, but counsel submitted that the closest analogous case was *Sharp*. The only distinction between that case and the present was that there a public official had carried out the search, as opposed to a business operating for profit in the present. To find that a duty existed in the present case would be a small increment. *Customs and Excise* was distinguishable because, unlike the appellants in the present case, the bank had not assumed responsibility for a task. They had no say in whether or not the injunction was served on them whereas the appellants had accepted an instruction to search the register. They had done so in the knowledge that the economic well-being of any creditor whose inhibition was registered depended on that inhibition being discovered by the searchers carrying out their task carefully. As *White* v *Jones* [1995] 2 AC 207 illustrated, there did not always require to be reliance, in a *Hedley Byrne* sense, for a duty to be held to exist. It was just and reasonable to impose a duty. The appellants were professional searchers who had been instructed to carry out a search in the register in which the respondents featured. Their task, indeed their only task, was to discover the existence of an inhibition. There was no other reason for their searching the register. Further, by virtue of section 159 of the 2007 Act, they knew that if they did not disclose an inhibition, the inhibiting creditor would suffer loss. That gave rise to sufficient proximity of relationship and to foreseeability. Notwithstanding the change in the law effected by section 159, a duty of care had always existed. It simply now had more practical effect.

[28] Counsel for the respondents agreed with counsel for the appellants that the *Hedley Byrne* and *Caparo* tests could be used as a cross-check although in her submission, those tests pointed towards there being a duty of care. There had been an assumption of responsibility. The proximity arose from searching in the register in which the respondents had registered

an inhibition, coupled with the fact that they were tasked to find that inhibition. Standing the existence of section 159 of the 2007 Act, it was just and reasonable to impose a duty otherwise the creditors would have no alternative remedy. The imposition of a duty would not lead to limitless numbers of claims.

[29] As regards averments of loss, the respondents had averred all that they could. They were not in a position to know whether or not the purchasers were in good faith. The effectiveness of the inhibition was to trigger discussions between the purchaser and seller. The respondents had lost the opportunity to be paid. That all said, counsel accepted that the sheriff had possibly gone too far in allowing a proof, as opposed to a proof before answer.

Discussion

[30] The starting point is *Robinson.* In that case, the Supreme Court held that there is no single test and, in particular, that the so-called *Caparo* test should not be applied in every case in which the courts must decide whether or not a duty of care is owed. At paragraph 29, Lord Reed eschewed the idea that *Caparo* established a tripartite test. Rather, he said, the correct approach is to ask whether the court is dealing with a situation where it has been clearly established that a duty of care is or is not owed: para. 26. If so, it is unnecessary and inappropriate to reconsider whether the existence of the duty is fair, just and reasonable (subject only to the exception that the Supreme Court may be invited to depart from an established line of authority). Normally, only in a novel type of case, where established principles do not provide an answer, does the court need to go beyond those principles to decide whether a duty of care should be recognised: para. 27. Following *Caparo*, that should be done incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features with which the

earlier authorities were concerned. In a novel type of case, the court has to exercise judgment, which involves consideration of what is "fair, just and reasonable". As Lord Reed put it at paragraph 29:

> "Properly understood, *Caparo* thus achieves a balance between legal certainty and justice. In the ordinary run of cases, the courts consider what has been decided previously and follow precedent…in cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability in order to decide whether the existence of a duty of care would be just and reasonable."

[31] I take from this that the task for a court, faced with a question as to whether or not a duty of care exists, is as follows. First, the court should, by identifying the legally significant features of the case before it, and of previous cases, ask itself whether the case is novel. If the answer to that is no, then, second, the court should decide the case in accordance with established principles, without resorting to *Caparo.* However, if the case is novel, then, third, the court must consider which of the previous cases provides the closest analogy. Having done that, then, fourth, the court must decide whether to extend the law, so as to provide for a duty of care in the case before it, taking care to maintain the coherence of the law and to avoid inappropriate distinctions. In carrying out this task, the court must weigh up the reasons for and against imposing liability and ask whether the imposition of a duty of care would be just and reasonable.

[32] With that in mind, there were three cases to which the court was referred as analogous or potentially analogous: *Sharp; Customs and Excise* v *Barclays Bank;* and (prompted by us) *White* v *Jones.*

[33] The first task is to consider whether the court is faced with a novel situation or whether the case can be decided simply by following established principles. While parties

agreed that the case is novel, the court nonetheless requires to be satisfied that they are correct in so agreeing. The first point to make is that the claim is one for pure economic loss. It is well established that a duty to avoid such loss arises where there is an assumption of responsibility and reliance thereon: *Hedley Byrne* v *Heller*. Further, it is established that, where there is a relationship between the parties, assumption of responsibility by one party to the other may suffice, even where the other party did not rely on what was said or done. However, in the present case the respondents argue for a duty of care where there was no reliance (in the sense of A doing something in reliance upon something said by B) and no relationship between the parties, at least not one of which they were aware. That in itself is novel. Although there is authority that reliance is not always necessary (*Sharp* and *White* v *Jones* both being examples of cases where a duty was found to exist notwithstanding the absence of reliance), there is no case (with the possible exception of *Sharp*, discussed more fully below) of a duty of care being found to be owed where there has been both an absence of reliance and of a relationship of some sort between the parties, of which at least one party is aware[2]. However, *Sharp* is not directly in point, and moreover can hardly be regarded as an established line of authority. So, there is no authority which has decided the core issue in this case which is whether a private firm of searchers searching in a public register – here, the Register of Inhibitions and Adjudications – owes any duty to a creditor who has registered an inhibition therein. I therefore proceed on the basis that this is a novel situation where precedent does not provide the answer. The case cannot be decided in accordance with an established line of authority, so it is necessary to move to the third stage of the process described above at paragraph 17 and to consider the potentially analogous cases.

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[2] I express it in this way since in the present case I have come to the view that there is a relationship, viewed objectively: see para. 31; however, that does not detract from the novelty of the case.

[34] In carrying out this exercise, I am acutely aware that the parties have chosen their respective preferred battle grounds carefully. If the appellants are correct that the closest analogous case is *Customs and Excise*, then it may indeed be difficult to hold that an incremental approach could result in the imposition of a duty of care, given that in that case, the bank was aware of the creditor's existence, whereas here, the appellants were unaware of the respondents. On the other hand, if the respondents are correct that the closest analogy is *Sharp*, then it may be easier to hold, on an incremental approach, that they were owed a duty of care by the appellants.

[35] Looking first at *Customs and Excise* v *Barclays Bank PLC*, the facts in that case were that the bank failed to prevent its customer, in respect of whom a freezing injunction had been obtained (and served on the bank) from withdrawing sums in breach of that injunction. The bank was held to owe no duty to the creditor who had obtained the injunction (HM Customs and Excise). The judges in the House of Lords did not give the same reasons for finding that no duty was owed, but common themes were: a reluctance to impose a duty which would have wider implications for persons other than banks who might have a freezing order served upon them; the absence of any voluntary assumption of responsibility by the bank; and the existence of the "remedy" of contempt of court, in the event of a wilful refusal to observe the injunction.

[36] As regards similarities, the obvious factual one, perhaps, is that both cases involve the loss, in some way, of rights conferred by a protective remedy: a freezing injunction in the one case, an inhibition in the other. As regards the legal concepts which arise, the main similarity is perhaps that the party contending for the existence of the duty claims to have suffered loss due to the act or omission of a person with whom he has no prior relationship, and on whom he cannot be said to have relied in the sense that he acted differently because

of a representation made (see Lord Bingham of Cornhill at p 194, para. 14). Customs and Excise relied on the bank only in the sense that they expected the bank to observe the injunction by not allowing sums to be withdrawn from its customer's account. So, here, it could be said that the respondents relied upon the appellants to discover and include in its report, their inhibition, (and perhaps had an expectation that they would do so), but, like Customs and Excise, there was nothing that they did differently as a result of that expectation. As far as differences are concerned, the first is that, on closer analysis, the facts of *Customs and Excise* are not particularly analogous. Although both cases involve the loss of a protective remedy, the circumstances giving rise to that are very different. In *Customs and Excise*, the assets which ought to have been frozen by the injunction were made over to the debtor in breach of the injunction, whereas in the present case the loss has arisen because the appellants failed to report on the existence of the remedy, enabling the property to be disposed of. However, there are other differences. The starting point in any discussion of those is perhaps to note that Lord Rodger distinguished the Bank's position from that of an arrestee in Scots law, who would be liable for paying out in breach of an arrestment (and so Scots law would in fact afford a remedy to an arresting creditor in the position of Customs and Excise. I do not suggest that this is of any particular significance other than, perhaps, to illustrate that the two cases are not particularly analogous). Other obvious differences include that the duty in the present case is not said to arise out of a statutory scheme and that there is no other remedy or sanction available against the searchers (as there was against the bank) but the most significant difference is that the bank (and other persons on whom a freezing injunction might potentially be served) had no choice in the matter, simply being persons who happened to have control or possession of assets belonging to the debtor;

whereas in the present case, the appellants have chosen to trade as professional searchers, and as such can be taken to have a certain degree of skill in carrying out that function.

[37] Turning next to *Sharp*, the facts of that case were that the Ministry of Housing had paid compensation of £1,828 to the proprietor of land. A Compensation Notice was duly registered in the register of Local Land Charges. Planning permission was subsequently granted so that the £1,828 became repayable by any future purchaser to whom notice was given. A clear search was given by the registrar, pursuant to a search negligently carried out by a clerk. To that extent, the Ministry was in the same position as that of a creditor who has registered an inhibition in the Register of Inhibitions and Adjudications, the clear search in that case being the equivalent of the clear search report provided by the appellants in the present case. However, the consequence of the clear search in *Sharp* was that the £1,828 became irrecoverable, whereas the respondents' debt in the present case remains extant. There were two issues as regards liability: (1) whether the registrar, as keeper of the register, was under a duty towards the Ministry (and if so, whether that was an absolute duty or one of reasonable care); and (2) whether the searcher, for whom the local authority was vicariously liable, owed a duty in tort to the Ministry. The judge at first instance found neither the registrar nor the local authority liable. The majority of the Court of Appeal allowed the appeal only insofar as it related to the local authority, but refused it insofar as it related to the registrar. When one studies the reasoning closely it seems to have been based upon *Hedley Byrne* rather than on the fact that the search was carried out by a public official tasked with a public duty. That said, Lord Denning's reasoning is not easy to follow. He said at page 268E to F that the case came "four square" within the principles approved by the House of Lords in *Hedley Byrne*, but went on to say, at 268G to H, that the duty to take care arose not from any voluntary assumption of responsibility but from the fact that the

person making it knows or ought to know that others, being his neighbour in this regard would act on the fact of the statement being accurate. The duty, according to Lord Denning, was owed not only to the person to whom the certificate was issued and whom he knew was going to act on it, but to any person whom he knew would be injuriously affected by a mistake. Lord Salmon referred to *Donoghue* v *Stevenson* before going on to say, at page 279D to F, that he did not accept that in every case a voluntary assumption of responsibility was required for a duty to arise but, even if it was, he was not persuaded that the local authority had not voluntarily assumed responsibility. Further, Lord Salmon "did not think it matters" that the search was made at the request of the purchaser and the certificate was issued to him: page 279F to G. Rather, it would be "absurd" if a duty of care were owed to a purchaser but not to an incumbrancer, but no explanation of that is given by reference to principle.

[38] Perhaps *Sharp* is best viewed through the prism of the House of Lords and Lord Mance's explanation of it at para 110 of *Customs and Excise*, as follows:

> "The closest case to the present …is [*Sharp*]. But the statutory scheme there was aimed at protecting persons in respect of property purchases and so far as necessary for that purpose, overriding other proprietary interests. Again, it would have been incongruous if a person relying on such a certificate to his detriment could have a claim because of the closeness of the situation to *Hedley Byrne*, but the minister whose cause of action for reimbursement was extinguished had none (cf per Lord Denning MR at p 268H and Salmon LJ, at p 278F-H. I consider that …*Sharp…* was rightly decided. It was referred to without disapproval in the speeches of both Lord Templeman and Lord Griffiths in *Smith* v *Bush* [1990] 1 AC 831…The result reached was eminently fair, just and reasonable. The role of land registrar was established as a public service to keep accurate records and provide reliable information. The information was to enable buyers to be secure in the property rights they acquired but concomitantly to override other property interests in the public interest in order to achieve this, even though such security and overriding occurred through negligence of the registrar or a clerk fulfilling his function. It would be unjust if no compensation could be obtained for the adverse consequences on property rights of negligence of an official performing such a service in the public interest."

[39] This explanation by Lord Mance is the most detailed judicial explanation of *Sharp* to which we were referred. The views of Lords Templeman and Griffiths (in *Smith* v *Bush)* were that *Sharp* was simply authority that an assumption of responsibility was sufficient but not necessary for a duty of care to arise. The appellants submitted that the key feature of *Sharp*, in Lord Mance's eyes, was the fact that the search was carried out by an official performing a service in the public interest. That is not strictly correct, of course, since the search in *Sharp* was actually carried out by a clerk in the employment of the local authority and, as I have pointed out, the actual official charged with conduct of the register was found not to be liable. Beyond that, parallels can be drawn between the features present in *Sharp*, to which Lord Mance drew attention, and those present here. So, while the system for registering inhibitions cannot be described as a statutory scheme, it is nonetheless now governed by the 2007 Act and is therefore, in the modern era, at least to some extent regulated by statute. To the extent that that Act provides for an inhibition to cease to exist upon the acquisition of property subject to an inhibition in good faith and for value, it, too, provides for an interest in property purchased to be over-ridden in the public interest. There are also points of difference – were it otherwise, then the present case would not be novel. One difference is that it is perhaps hard to describe a private firm of searchers as fulfilling a function, when carrying out a search. Rather, that is a task which they offer to provide to sellers and purchasers (and lenders), for profit. It is also difficult to describe them as providing a service to inhibiting creditors and one should bear in mind that when they are instructed to carry out a search, which instruction is usually given by the seller's solicitor, it cannot be said that the purpose of the search is to benefit an inhibiting creditor. However, as was pointed out during the debate before us, the value of the search does not arise when it discloses an inhibition the existence of which has already been disclosed by the

seller to the purchaser. The value comes about when it discloses an inhibition which the seller (who can generally be presumed to be aware of inhibitions against him) has not disclosed, and there is therefore a sense in which an inhibiting creditor does benefit from the search. A consequence of an inhibition being disclosed is, in practice, that any property affected by the inhibition may not be disposed of without the inhibiting creditor's consent.

[40] The third case to which I wish to refer is *White* v *Jones*. There, a firm of solicitors was held to owe a duty of care to an intended (but, due to the carelessness of the solicitors, disappointed) beneficiary with whom it had no contractual relationship (but of whose existence it was aware). Lord Browne-Wilkinson at page 271 took three points from the case law: first, that special relationships can be held to exist between parties, from which a duty to be careful can arise in circumstances where, apart from such a relationship, no duty would arise; second, a fiduciary relationship is one such relationship; and, third, it is not the only such relationship. He went on to discuss in more detail the salient features of cases where there was a fiduciary relationship, observing that reliance was not always a requirement (since the person to whom the duty was owed may be unascertained or not yet in existence) and concluding that what was important was not that "A knows that B is consciously relying on A, but A knows that B's economic well-being is dependent upon A's careful conduct of B's affairs." At page 274 he went on to say that a special relationship could be held to arise where there was a fiduciary relationship, and where the defendant has voluntarily answered a question or tendered skilled advice or services in circumstances where he knows or ought to know that his advice or services will be relied upon. He then turned to consider the facts in *White* v *Jones*, of a solicitor retained by a testator to draw a will in favour of an intended beneficiary, which he considered did not fall within either of the two categories of special relationship, but reached the view that the category of special

relationships was not closed. Taking into account that the solicitor knew that the beneficiary's economic well-being was dependent upon the proper discharge of his duty, and that the solicitor had accepted instructions to act and therefore assumed responsibility for the task, and also taking into account policy considerations, he reached the view that a duty of care was owed.

[41] Lord Goff, for his part, at page 259G to H, referred to the "impulse to do practical justice" and to the "extraordinary" fact that if a duty were not recognised in that case, the only person who might have a claim (the testator) had suffered no loss; and the only person who had suffered a loss (the beneficiary) had no claim. Later in his speech, at page 269E to F, he placed reliance on the fact that the ordinary case was one where the intended beneficiaries were a small number of identified people.

[42] The facts in *White* v *Jones*, of course, are very different, to the extent that there the contract between the testator and the solicitors had the intention of benefitting the beneficiary. However it is interesting to note, in the speech of Lord Browne-Wilkinson, the recognition of special relationships which need not be fiduciary which can lead to the imposition of a duty of care even where there has been no reliance, and the reference to the economic well-being of the beneficiary. Although in the present case, it cannot be said that the contract between the appellants and the sellers was entered into with the intention of benefitting the respondents, the appellants did voluntarily undertake the task of searching the register, and can be taken to have been aware that the economic well-being of any inhibiting creditor was dependent on their carrying out their task carefully. It can also be said in the present case that if no duty of care is owed, the only person to have suffered a loss (the respondents) have no claim, and the only person with a claim (the seller, and perhaps the purchaser) have suffered no loss. Further, it is always likely to be the case that

the number of inhibiting creditors is likely to be small and is always identifiable (assuming a careful search of the register is carried out). Putting it another way, they are there to be found.

[43] Having considered the three cases to which reference has been made, I must now decide, following *Robinson,* which provides the closest analogy. It seems to me that the case which provides the closest analogy is *Sharp,* given the similarity in circumstances and the fact that there, as here, the person doing the search was unaware of the existence of the creditor whose charge was not disclosed. For the reasons given above in paragraph [22], I consider that *Customs and Excise* is not particularly analogous to the present case, certainly less so than *Sharp,* since in my view the differences in that case outweigh the similarities, the most legally significant one being that the bank in *Customs and Excise* had no choice in having the injunction served on them, whereas here the task of searching the register was voluntarily undertaken by the appellants. Finally, as regards *White* v *Jones*, while it contains certain helpful passages, I do not consider that it can be said to be the closest analogous case.

[44] The next task is to consider whether *Sharp* should be extended incrementally by holding that a duty is owed not only by the keeper of the register (or a clerk to whom the search function has been entrusted) but by a private firm of searchers. Before embarking on that task, I observe that although *Sharp* is the closest analogy, that does not mean that the other cases referred to become irrelevant. They must still be considered in the context of considering the overall coherence of the law, and the need to avoid arbitrary distinctions. With that in mind, I make the following observations. Reliance, in a *Hedley Byrne* sense, is not always required, hence the absence of such reliance does not mean that the court is bound to hold that no duty of care is owed. Assumption of responsibility to the person to whom the duty is owed – or the absence thereof – has been held to be the defining factor.

So, in *White* there was an assumption of responsibility to the disappointed beneficiary, but in that case the solicitors were aware of the existence of the beneficiary and there was an intention to benefit him. Conversely, the absence of an assumption of responsibility in *Customs and Excise* was one of the factors taken into account in holding that there was no duty. As I have already commented, one also sees, in *White* v *Jones*, the notion of the economic well-being of the recipient of the duty as a factor which may be relevant in holding a duty to exist.

[45] The court was not referred to any textbooks but I have noted that in *Charlesworth and Percy on Negligence* (13th Edition) at paragraph 2-94 it is stated that:

> "taking on or starting a task can give rise to a duty to persons who are sufficiently closely and proximately affected by a failure properly to carry it out. There must be an assumed responsibility for a particular activity or task in relation to a particular person or class. In addition, the cases tend to indicate that the claimant should in some sense be dependent upon the defendant acting or intervening or otherwise vulnerable to the risk of harm."

This passage thus focuses on assumption of responsibility *for a task* as distinct from assumption to a particular person, albeit taking on a task is said to give rise to an assumption of responsibility to a particular class affected by it. *Customs and Excise* is given by the authors as an example of a case where no duty was held to arise from a failure to comply with an externally imposed rule or requirement as opposed to an undertaking by a person to perform a task followed by a failure to perform it. *White* is given as an example of a case where there was a vulnerable claimant. If that analysis is correct, it tends to support the view that it would not be an unjustifiable leap to impose a duty in the present case. Rather, the imposition of a duty of care would maintain the coherence of the law, since the respondents were entirely reliant, for the efficacy of their inhibition, on a searcher of the register finding it and reporting its existence to a potential purchaser. Additionally, the

appellants could be said to have voluntarily taken on the task of searching the register (for profit), and, as such, to have assumed responsibility to the class of persons affected by that task, namely, inhibiting creditors whose inhibition were on the register. The only real impediment to the existence of a duty of care remains the absence of any known relationship between the appellants. However, when it is remembered that the respondents were in fact on the register which the appellants were to search, and that the appellants' task was to find them, coupled with the fact that the number of persons in that position is by definition restricted to creditors who had registered an inhibition against the seller, that perhaps becomes less of an issue. Put another way, viewed objectively, there was in fact a relationship between creditors who had registered an inhibition, and the searchers tasked with finding them. The fact that, subjectively, the searchers were unaware of that relationship, because they did not carry out the search with care, does not mean that there was no relationship as a matter of law. As I have pointed out, the very function of the search was to discover the existence of inhibiting creditors who were there to be found, and having regard to the fact that the appellants voluntarily undertook the search, in my view that does give rise to the sort of special relationship mentioned by Lord Browne-Wilkinson, being a relationship of sufficient proximity as to give rise to a duty of care.

[46] Accordingly, I consider that the application of the incremental approach, and of established principles, to the facts here, could justify the imposition of a duty. Having reached this stage, the crucial question to decide is that at the last stage of the *Robinson* approach: is it fair, just and reasonable to impose a duty on the appellants? Or, to paraphrase Lord Mance, in his discussion of *Sharp*, would it be unjust if no compensation could be obtained for the adverse consequences on property rights of negligence of a private firm of searchers, undertaking that task for profit? This brings us full circle to the issue

foreshadowed at the outset of this opinion, namely, that the 2007 Act brought about a change whereby Parliament decided that an inhibiting creditor should lose his inhibition where a purchaser acquired a property in good faith and for value. Should the imposition of a duty be a matter for Parliament, as the appellants contend? The fact that Parliament did not legislate for a duty of care to be owed to creditors does not, of course, mean that no duty exists. Parliament may simply have been of the view that it was unnecessary to do so because there was already a duty of care owed (as contended by the respondents) or, more likely, simply ducked the issue and left the question for the courts to resolve. In this regard, parties did not refer us to any Scottish Law Commission report or any other papers which might have shed light on what Parliament intended. It may be assumed that it was not intended that creditors would lose the protection of inhibitions, lock stock and barrel. Rather, there is an inherent assumption in the 2007 Act (and in conveyancing practice) that inhibitions will be disclosed, at the point of sale, by properly instructed and conducted searches. It is a fact that such searches are in practice carried out by firms such as the appellants. The system therefore relies on such searches being carried out with due care. If no duty of care is owed by the appellants to the respondents, then not only do Lord Goff's comments in *White* v *Jones* apply, but there would in fact be little incentive on searchers to carry out searches with care. Failure to find, and disclose, an inhibition would not result in any party (other than the creditor) suffering loss. Conversely, if a duty of care is owed, searchers are in reality in no worse a position, as far as exposure is concerned, than they were in before the passing of the 2007 Act, since their liability can never exceed the value of the property being searched against, whether that liability is owed to the purchaser or the inhibiting creditor. Further factors which are relevant to the imposition, or otherwise, of a duty are the ability of searchers to insure against the risk, and the inability of an inhibiting

creditor to do likewise. I acknowledge that the searcher cannot exclude or limit liability, but I consider that this factor is outweighed by the other factors including the ability to insure, and the fact that the extent of the risk must always be limited by the value of the property being searched against.

[47] In summary, where the task of searching has been undertaken voluntarily, for profit in circumstances where the economic well-being of inhibiting creditors is known to be dependent on searches being carried out with care, in my view it is just and reasonable that a duty of reasonable care is incumbent upon the searcher.

Conclusion on principal issue

[48] Accordingly, my view is that in holding that the appellants owed the respondents a duty of care, the sheriff reached the correct decision on the principal issue, and I would refuse the appeal to that extent.

Other issues

[49] That said, the sheriff did, I think, go too far in fixing a proof and in repelling the pleas that he did. He appears to have proceeded on the basis that there was admitted breach of duty on the part of the appellants, whereas that remains to be established. On the subsidiary issue of whether the respondents have averred sufficient in relation to good faith, I have sympathy with their contention that they simply do not know whether or not the purchasers were in good faith. They are certainly unable to aver that they were not.

[50] I should also record that the appellants have an argument available to them as to the relevancy of the averments of loss. Stated shortly, assuming negligence is established, are the respondents entitled to recover from the appellants the entire net sale proceeds

attributable to Mr Gardiner's half share in the property (which is more than their inhibition could have entitled them to in a ranking on insolvency) or is their claim better categorised as one of loss of a chance? As I have recorded earlier, counsel for the respondents acknowledged that the sheriff had perhaps gone too far in repelling and sustaining the pleas that he did and assigning a proof on quantum. I consider that the remaining questions of law as regards good faith and loss are best resolved after a proof before answer. Accordingly, I would proceed as invited to do by the appellants' counsel in the event of the appeal failing on the principal issue. I would recall the sheriff's interlocutor; thereafter repel the appellants' third plea-in-law and the respondents' second plea-in-law; and *quoad ultra* appoint the cause to a proof before answer on the remaining pleas.

[51] As regards expenses, recognising that the appellants have, to a small extent, been successful, I consider that the parties should be invited to lodge written submissions. I would sanction the appeal as suitable for the employment of junior counsel.