SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2025] SC GLA 7

GLW-CA66-23

JUDGMENT OF SHERIFF S REID

in the cause

SAGIR SARWAR

Pursuer

against

CLEARWATER INVESTMENTS SCOTLAND LIMITED

First Defender

and

LIAQUAT ALI

Second Defender

Act: Mr K Lang, Mellicks; Glasgow
Alt: Mr I Burke, Burke Legal, Galashiels (Second Defender)

Glasgow, 10 February 2025

The sheriff, having resumed consideration of the cause Makes the following FINDINGS-IN-FACT:

(1) Prior to 14 March 2017, the pursuer owned the heritable subjects forming 134/134A Fleming Way, Hamilton ("the Property").

(2) The Property was subject to a standard security in favour of a third party.

(3) In the period leading up to 14 March 2017, the pursuer was suffering significant financial difficulties

(4) He was also facing the threat of repossession of the Property by the third party secured creditor.

(5) As a result, the pursuer entered into a transaction with the defenders whereby he agreed to sell the Property to the first defender but with a separate collateral personal agreement allowing the pursuer to repurchase the Property within an agreed timescale, and on certain conditions, thereafter.

(6) In order to purchase the Property, the first defender obtained a loan in the sum of £221,000 from a lender called Assetz SME Capital Limited (as agent for various lending syndicate members) ("Assetz"); the loan was secured by a first-ranking standard security over the Property, a floating charge over the assets of the first defender, and a personal guarantee granted by the second defender; and the loan was to be repaid within 5 years of being drawn down.

(7) On 14 March 2017 the pursuer sold the Property to the first defender.

(8) On the same day, the parties executed a separate written agreement, collateral to the sale, entitled "Buy Back Agreement", of which item 5/1 of process (item 1, pursuer's first inventory of productions) is a true copy.

(9) In terms of clauses 2, 3 & 5 of the Buy Back Agreement, the parties agreed that (i) the pursuer had a right to repurchase the Property within the first 4 years of the 5 year term of the Assetz Loan ("the buy-back period"), provided that the Assetz Loan, "personal debts" owed to the defenders, and "expenses" of the buy-back were thereby discharged; (ii) in the event that the pursuer failed to exercise his right to purchase, the defenders would be entitled to sell the Property to clear any outstanding loans on the Property and personal debts owed to them by the pursuer; (iii) in that latter event, the pursuer was entitled to receive from the defenders "any surplus monies" from the sale, less expenses "and other borrowing personal or business".

(10) The buy-back period expired, at latest, on 14 March 2021.

(11) On various occasions between November 2020 and August 2021, the pursuer advised the second defender orally of his desire to buy back the Property.

(12) Throughout the buy-back period, the pursuer was unable to obtain funding to purchase the Property.

(13) Throughout the buy-back period, the pursuer made no specific offer to the defenders, written or oral, to purchase the Property.

(14) In the event, the pursuer failed to purchase the Property within the buy-back period.

(15) By letters dated 9 March 2022 from the pursuer's solicitors to the first and second defenders, the pursuer intimated to the defenders in writing his purported intention to purchase the Property but, again, no specific price was offered by the pursuer.

(16) By 14 March 2022, the 5 year term of the Assetz Loan had expired, and the full balance thereof was due and payable by the first defender.

(17) By July 2022, the defenders were under increasing pressure from Assetz to repay the outstanding balance of the Assetz Loan, which was by then overdue.

(18) On or about 20 July 2022, absent a formal offer from the pursuer to purchase the Property, or proof of funding to vouch his ability to do so, the second defender arranged for the first defender to sell the Property to third parties (Aisha Ali and Saqid Deen) in exchange payment of a price of £300,000.

(19) The sale of the Property to the third parties was effected by private bargain, without prior marketing or advertisement of the Property on the open market.

(20) As a result of the sale to the third parties, the first defender was able to discharge the Assetz Loan and the second defender was able to free himself of personal liability under the personal guarantee granted by him to Assetz.

(21) The net free proceeds of the sale to the third parties, after deduction of the expenses of the sale, was £87,347.31, as shown in the document entitled "Cash Statement" forming item 3 in the second defender's third inventory of productions.

Makes the following FINDINGS-IN-FACT AND IN-LAW:

(1) The pursuer failed timeously to exercise his right to purchase the Property, in terms of clause 2 of the Buy Back Agreement.

(2) By July 2022, the defenders were entitled to sell the Property in order to clear the then outstanding balance of the Assetz Loan, together with any expenses of the sale and any debts due by the pursuer to the defenders.

(3) Upon the sale of the Property in July 2022, the pursuer was entitled to receive, and the defenders were obliged to pay to the pursuer, any surplus monies from the sale of the Property, less the expenses of the sale and any debts due by the pursuer to the defenders.

(4) The surplus monies from the sale of the Property (after settlement of the secured loan thereon and the expenses of sale) comprises the sum of £87,347.31, in terms of clause 5 of the Buy Back Agreement.

(5) The defenders are obliged to account to the pursuer for the said sum of £87,347.31, being the surplus monies due to the pursuer from the sale of the Property, in terms of clause 5 of the Buy Back Agreement.

(6) The second defender has failed to prove the existence or extent of any "other borrowing personal or business" owed by the pursuer to the defenders (or either of them) to be deducted from the said surplus monies, in terms of clause 5 of the Buy Back Agreement.

(7) A sum of £79,000 (being a deposit of the purchase price originally due to be paid by the defenders to the pursuer) was paid to the pursuer on or about 3 October 2016; on or about 27 October 2016, the pursuer confirmed to his then solicitor (Alan Macpherson of Macpherson Maguire Cook) that he had indeed received this deposit in full; and, to the pursuer's knowledge and with his instructions, by email dated 27 October 2016 the pursuer's said solicitor confirmed to the defenders' then solicitor that the pursuer had indeed received payment of this deposit in full;

Makes the following FINDINGS-IN-LAW:

(1) The defenders being obliged to account to the pursuer for the sum of £87,347.31, decree for payment thereof should be granted as first craved;

ACCORDINGLY, Repels the pursuer's objections to the second defender's account (item 3, second defender's third inventory of productions); Sustains the fourth plea-in-law for the pursuer, whereby, *quoad* crave 1, Grants decree against the defenders jointly and severally for payment to the pursuer of the sum of EIGHTY SEVEN THOUSAND THREE HUNDRED AND FORTY SEVEN POUNDS AND THIRTY ONE PENCE (£87,347.31) STERLING with interest thereon at the rate of eight per cent (8%) per annum from 27 April 2023 until payment; meantime, Reserves the issue of expenses.

SHERIFF

NOTE

[1] In around 2017, the pursuer was in financial difficulty. A secured creditor was threatening to repossess commercial premises owned by him at 134/134A Fleming Way, Hamilton. So he entered into an arrangement to sell the premises to the defenders, in order to clear his liability to the secured creditor.

[2] The arrangement was this. He agreed to sell the premises to the first defender (a company, of which the second defender was the sole director) for the sum of £300,000. The parties were aware that the first defender would itself require to take out a 5 year secured loan to fund the purchase. A critical part of the arrangement was that the pursuer would have the option to buy back the premises within 4 years of the sale (or, more correctly, within four years of the loan being drawn down by the first defender). If the premises were not bought back by the pursuer within the 4 year deadline, it was agreed that the defenders would be entitled to sell the premises to clear the outstanding secured loan (and any personal debts owed to them by the pursuer). However, in that latter event, "any surplus monies" from the sale were to be paid to the pursuer, less expenses and any other "borrowings" due by the pursuer to the defenders. The agreement is set out in a "Buy Back Agreement" dated 14 March 2017 (item 5/1 of process). It is a peculiar document, badly drafted (without legal assistance, apparently), but tolerably intelligible.

[3] In this action, the pursuer seeks an accounting and payment from the defenders of the "surplus monies" due to him from the sale. Only the second defender has entered appearance.

[4] The existence of an obligation to account has already been determined in favour of the pursuer. An account has been lodged by the second defender (item 3, second defender's

third inventory of productions), together with Objections and Answers thereto. The action called before me at a proof on the disputed elements of the account.

[5] For the reasons set out below, I have concluded that the defenders are obliged to pay to the pursuer the sum of £87,347.31, being the surplus monies due to the pursuer from the sale of the premises less the secured loan thereon and the expenses of sale, all in terms of clause 5 of the Buy Back Agreement. The second defender has failed to prove the existence or extent of any other indebtedness owed by the pursuer to the defenders (or either of them) to be deducted from these surplus monies.

The evidence

[6] I heard evidence from four witnesses: the pursuer, the second defender, Police Constable Robert Bryers, and Nadeem Tahir. The testimony of all but Mr Tahir comprised notarised affidavits supplemented by oral testimony in court. Mr Tahir's testimony was parole only. By agreement, an affidavit of John McKissock dated 30 May 2024 was also received in evidence without the necessity of being spoken to by the deponent.

Sagir Sarwar

[7] The pursuer (55) adopted the terms of his affidavit dated 28 May 2024. In his written testimony, he explained that he had been "struggling financially", he had defaulted on a bridging loan, so he approached the second defender, whom he knew, and agreed to sell the premises to the first defender (of which the second defender was the sole director) for £300,000, funded by borrowing of £221,000 from Assetz. This was subject to an agreement that the pursuer would repurchase the premises once a separate project (in Broomhouse) was complete. After the sale, the pursuer became "preoccupied" with caring for his mother.

She died in 2020. He attempted to contact the second defender to exercise the buy-back option, but to no avail. By this stage, the Broomhouse project had collapsed and the pursuer was "left with nothing" (affidavit, paragraph 14). The pursuer then discovered a bank statement in his solicitor's file bearing to record that the pursuer had allegedly received a payment from the second defender of £71,000, supposedly paid into the pursuer's account with Bank of Scotland. The pursuer insisted this bank statement was a forgery. He denied ever having received from the defenders the original £79,000 deposit for the purchase of the premises (being the difference between the agreed purchase price of £300,000 and the loan obtained by the first defender from Assetz). He denied ever having received the (lesser) sum of £71,000 from the defenders, being the sum recorded on the bank statement recovered from the pursuer's solicitor's file. He disputed a transfer of £30,000 to a third party called Allied Contracts UK Ltd from the proceeds of sale of the premises. He also asserted that the defenders' subsequent sale of the premises in 2022 to third parties (Aisha Ali and Saqib Deen) was at an under-value. The price paid (of £300,000) did not represent an "open market price". In August 2016, the premises had been valued (for Assetz) at £340,000; when he had tried to buy back the premises in March 2022, he was told by the second defender that he required to pay £330,000; the defenders then sold the premises to the third parties in July 2022 purportedly for only £300,000; but the pursuer claimed that a separate payment had allegedly been made to a "middle man" (Tahir Nadeem) and that the true purchase price for the 2022 sale was £380,000..

[8] In his supplementary oral testimony, the pursuer testified that he was merely "entrusting" the premises to the defenders in 2017. He insisted he never received any money from the defenders for the 2017 sale. After the sale, he received rent from one part of the premises (then occupied by R.S. McColl) until 2021, but payments ceased thereafter. He

had "tried" to buy back the premises but had been thwarted from doing so because the second defender would not deal with him. He denied ever having received the balance of the purchase price (of £79,000) or the lesser sum of £71,000 referred to in the forged bank statement, in cash or otherwise, though he testified that he "never intended" to receive it anyway because he would have had to pay it back to the defenders when he re-purchased the premises from them. With reference to an email between the parties' solicitors (item 6/3 of process, defenders' first inventory, page 46), the pursuer denied telling his solicitor that the £79,000 balance of the purchase price had been received by him. Instead, the pursuer testified that he would have told his solicitor that that sum had not been received, but that the sale to the first defender could "go through" in any event. He criticised the defenders' subsequent sale of the premises for £300,000. He considered it was worth "a lot more than that". He said the fixtures and fittings in the takeaway shop alone (forming part of the premises) were worth £100,000.

[9] In cross-examination, the pursuer acknowledged that he had met the second defender when they were both serving prison sentences: Mr Sarwar was serving a sentence for the supply of cocaine; Mr Ali was serving a sentence for assault. He also testified that he knew of the second defender through family connections. In 2015, he had travelled with Mr Ali on a business trip to Gambia. He denied that Mr Ali had funded the pursuer's travel expenses for that trip. He had "tried" to buy back the premises sooner but was unable to do so because the second defender "wouldn't give it me back". The March 2022 letter from his solicitor was the first "official" written intimation of the pursuer's wish to buy back the premises. He claimed he had been trying to buy the premises back for over a year prior to then but that "Covid was going around". He insisted that the earliest date he had sought to exercise the buy-back option was in January 2021; this was "the beginning of the

conversation to buy [the premises] back"; but, on further cross-examination, he testified that his first conversation with the second defender to buy back the premises was in 2020, not 2021. He conceded he "didn't know how to go about" submitting an offer to the second defender. He said his family was "going to put the funds together" to allow him to re-purchase the premises. He had no documentary evidence to vouch the open market value of the premises other than the 2016 survey from Allied Scotland. He said that his former solicitor had sent the email (item 6/3 of process) to the defenders' agents against the pursuer's instructions and knowing it to be false. In re-examination, he claimed that the sale of the premises to the defenders in 2017 was "only a paper exercise".

Robert Bryers

[10] Constable Roberts Bryers (44), a police constable of six years' experience with Police Scotland, adopted the terms of his witness statement. He had investigated a complaint by the pursuer of an alleged fraud involving the forgery of a Bank of Scotland statement in his name. He claimed to be the victim. He had reported to Constable Bryers that he had been "hoodwinked" into handing over his business premises and that fraudulent bank statements had been used to procure a loan to achieve this. Constable Bryers had concluded that a bank statement (recovered from Assetz) (item 5/4 of process) was "not genuine" and that a statement covering the same period (recovered from Bank of Scotland) (item 5/3 of process) was "genuine". The discrepancy comprised an alleged credit of £71,000 in the pursuer's account, as shown in the statement (item 5/4) recovered from Assetz Capital; no such credit appeared in the statement (item 5/3) recovered from Bank of Scotland. The police had been unable to establish who had submitted the "non-genuine" bank statement to Assetz with "the false entry of £71,000". The investigation is now complete.

Liaquat Ali

[11] Mr Ali (55) adopted the terms of his (undated) affidavit. In his written testimony he stated that he first met the pursuer in 2005 when they were both prisoners in HMP Saughton. Their next contact was in 2009 when the pursuer proposed a business deal to him. They did no business together until a further approach by the pursuer in around 2015 with a business opportunity in Gambia involving the importation of rice. Both men travelled to Gambia to explore the deal, at a cost of £11,000 funded by Mr Ali. In 2016, the pursuer contacted Mr Ali again because the pursuer was "suffering financial difficulties"; his family had refused to help him; his personal trainer had refused to help him; so Mr Ali agreed to buy the premises through the vehicle of the first defender, of which he was the shareholder and director at the time. The purchase was to be funded partly by cash and partly by way of a 5 year loan from Assetz. Mr Ali paid £71,000 in cash directly to the pursuer so that the pursuer could settle various personal debts; £8,000 was paid by Mr Ali to his then solicitors (Inksters); and the first defender expended further miscellaneous sums for the pursuer's benefit (a survey fee of £1,200 to Assetz; further legal costs of £3,300 to Inksters). Reference was made to an email dated 27 October 2016 from the pursuer's solicitor to the defenders' solicitor (item 6/3 of process) which records that the pursuer had indeed received the full "deposit" of £79,000. The parties' intention was that the pursuer would buy the premises back after the pursuer had "sorted out his financial position". Mr Ali did not want his company "burdened" with the secured Assetz Loan. This was the rationale for the four year buy-back period. If the pursuer had failed to buy back the premises within that deadline, Mr Ali would have to sell the premises himself to clear the debt. From 2017 onwards, he repeatedly chased the pursuer to buy back the premises, but to no avail. By March 2021, the pursuer had still not re-purchased the premises. Various

excuses were given by Mr Sarwar (including, on one occasion, that he was going to Pakistan to sell land and, on another, that he had been arrested for the alleged abduction of one of his tenants). By March 2022, Mr Ali was "very concerned" because the Assetz Loan was due to expire. He concluded that the pursuer "simply wasn't able to meet his financial obligations to buy it back". Neither "proof of funds" nor a formal offer was ever forthcoming. With Assetz "continually" pressurising him to redeem the loan, the defenders sold the premises for £300,000 to arms-length third parties. The purchasers had obtained a survey of the premises; this disclosed a value of £340,000; but the valuation assumed full occupancy, whereas, in fact, one of the units was vacant, there was "considerable uncertainty" as to the financial viability of the other (R.S. McColl) (which had gone into administration), and market conditions were volatile. The sale price was the best obtainable to clear the secured loan and debts.

[12] In supplementary oral testimony, Mr Ali testified that the pursuer had explicitly requested that the deposit (of £71,000) be paid to him in cash because, if it was paid into his bank account, it would have been "swallowed up by [the pursuer's] overdraft". The point of the buy-back arrangement was "to keep [the pursuer's] creditors from his door". He spoke to the settlement statement from his solicitors following the 2022 sale (item 3, second defender's third inventory): this disclosed a sale price of £299,006.45 (being just short of £300,000 due to a mid-month apportionment of rent); £208,857.34 was paid to Assetz to discharge the secured debt; various sale expenses were then deducted, resulting in a net "balance" to the defenders of £87,347.31. He also spoke to the settlement statement prepared by his solicitors (Inksters) following the 2017 sale (item 2 second defender's third inventory of productions).

[13] In cross-examination, Mr Ali was questioned on the discrepancy between his averments on record (of the payment of a cash deposit of £79,000), and his written and oral testimony that he had paid only £71,000 to the pursuer, with an additional £8,000 being paid to solicitors. He explained he had only discovered the discrepancy when recently checking his bank statements. He adhered to his written testimony. He denied having exhibited a false bank statement (item 5/4 of process) to Assetz. He explained that he had sold the premises in 2022 to third parties for less than the sum sought from the pursuer because the third parties did not owe any other debts to Mr Ali.

Nadeem Tahir

[14] Mr Tahir (37) is a delivery drive and spouse of Aisha Ali. He had found out about the premises from discussions at the Mosque; he had approached Mr Ali and asked to view the premises for his wife. Neither he nor his wife had had any prior dealings with, or knowledge of, Mr Ali. On viewing the premises, the take-away business was closed though there was a chip fryer inside; and the adjoining RS McColl shop was closed. His wife then bought the premises for £300,000. He denied that his wife's brother had been involved in the transaction. He denied that an extra £80,000 had been paid for the premises. Mr Tahir's role was limited to showing his wife the premises.

John McKissock

[15] In his affidavit dated 30 May 2024, Mr McKissock (55), a practicing solicitor since 1998, stated that, during 2017, he had acted as solicitor for the first defender in the purchase of the premises from the pursuer. (At that time, he was a consultant for Inksters.) He

considered himself bound by client confidentiality in respect of the transaction. He had subsequently acquired the practice of Macpherson Maguire Cook (which had acted for the pursuer in the 2017 transaction). During 2022, he received a mandate from agents seeking delivery of the pursuer's file in relation to the 2017 transaction. The mandate was fully implemented.

Closing submissions

[16] Written submissions were lodged for the pursuer and second defender, for which I am grateful. The pursuer invited me to sustain his objections to the second defender's account and to decree against the defenders for payment of the sum of £117,347.31, being the balance said to be due to him, with interest from 20 July 2022. For the second defender, I was invited to conclude that "no profit" was made from the defenders' sale of the premises.

Reasons for decision

[17] This ought to be a relatively simple claim. In 2017, the pursuer sold the premises to the first defender, subject to an option to buy it back within four years (clause 2). If the pursuer failed timeously to buy back the premises, the defenders were entitled to sell it (clause 3). If the defenders sold it, any "surplus monies" from the sale were to be paid to the pursuer less "expenses" and "other borrowing personal or business" (clause 5).

[18] The existence of an obligation to account was previously determined in favour of the pursuer, following a debate before the sheriff (Cubie). The sheriff observed that it was difficult to see on what basis the second defender could properly avoid such an accounting (paragraph [16], note to interlocutor dated 20 October 2023).

[19] The second defender was ordained to produce an accounting for both the purchase of the premises in 2017 (by the first defender) and the subsequent sale in 2022 (per interlocutor dated 6 November 2023). On 14 December 2023, accounts in respect of both transactions were lodged by the second defender (items 2 & 3, respectively, second defender's third inventory). Objections to the 2022 sale account, and Answers to the Objections, were subsequently lodged and adjusted. The matter then called before me for proof.

[20] It ought to have been relatively straightforward to identify both the "surplus monies" due from the 2022 sale and any "expenses" and "other borrowing" to be deducted therefrom. In the event, the disputed issues took an unexpected turn.

Did the pursuer exercise his option to purchase?

[21] In averment and evidence, much time was taken up on whether the pursuer had exercised his option to purchase the premises. In my judgment, this was an irrelevant and futile distraction. Plainly, he had not done so.

[22] Clause 2 of the Buy Back Agreement states:

> "[The pursuer] has the right to purchase the [premises] within 4 years of its 5 year loan term clearing any loan amounts and personal debts along with any expenses incurred due to by back" [*sic*].

On a proper interpretation, read in the context of the known factual matrix of the Assetz Loan, the pursuer had a right to buy back the premises within the first four years of the 5 year term of the Loan. The option was lost if the premises were not purchased by the pursuer within that 4 year period. It is not enough for the pursuer, within that 4 year period, merely to have intimated a desire or intention to purchase them. Therefore, the evidence of alleged repeated "attempts" to purchase the premises are irrelevant. The

incontrovertible truth is that the pursuer failed timeously to buy them back. The various disputed reasons for that failure – none of which are proved in the miasma of competing counter-allegation – are nothing to the point.

[23] That said, it is correct that a line of authority exists in contract law which, in certain circumstances, affords a remedy to a contracting party who has been impeded from purifying a potestative condition, or exercising a contractual right, by the action of the other contracting party (*Gloag, Contract*, 276-281). In such cases, in order to do justice between the parties, the law may imply the purification of the condition, or it may provide a remedy in damages for breach of an implied obligation not to impede performance. But no such case is averred by the pursuer or made out in the evidence. The pursuer has done no more than express a vague "intention" to re-purchase the premises. He has never been able to translate that intention into anything more concrete, still less a written offer to purchase at a specific price. Nor was he in a financial position to do so. Earnest expressions of intent to purchase during the four year buy-back period are of no legal consequence. The first formal written intimation to purchase the premises appears in the letters dated 9 March 2022 from the pursuer's agents to the defenders (items 5/5 & 5/6 of process). But these letters were sent almost one full year after the buy-back option had already lapsed. Besides, they do no more than formally repeat that the pursuer "intends" to purchase. No price was offered. No funding was available. There is no evidence of any actual impediment or obstruction by the defenders. The pursuer has simply failed timeously to exercise the buy-back option.

Did the defenders sell at an under-value?

[24] The next question raised in the evidence was whether the sale of the premises in July 2022 was at an under-value.

[25] Two discrete issues are conflated here. In the first place, clause 3 of the Buy Back Agreement states that, if the pursuer fails to exercise his buy-back option, Mr Ali shall have the right to "advertise the property on the open market". In fact, the premises were not so advertised. They were sold in a private bargain to the third parties, without general advertisement. This failure to "advertise" on the "open market" is characterised by the pursuer as a breach of the Agreement. In the second place, this alleged breach is then directly linked to the pursuer's more fundamental complaint that the July 2022 sale was at an "under-value" (pursuer's note of objections, para 1).

[26] The first issue to consider is the proper interpretation of clause 3. The Agreement is oddly written. It does not bear the hallmarks of professional draftsmanship. I take that into account when approaching its construction. That may explain why, strangely, clause 3 makes no reference to "sale" at all. Instead, it purports to confer merely a right to "advertise" the premises. Construed literally, that would achieve very little for the defenders when faced with the imminent expiry of the 5 year secured Assetz Loan: they could "advertise", but not sell, which would be absurd in the context of this particular transaction. Instead, the natural and commercially sensible construction is that, in clause 3, the phrase "to advertise the property on the open market" means no more than "to sell the property". I do not read the words "advertise… on the open market" as being prescriptive of a *mechanism* of sale. It is simply a non-legalistic description of a general power of sale. If anything, it underscores the breadth of the defenders' authority to sell. On the logic that the greater includes the lesser, the conferral of a right to "advertise the property on the open market" implicitly empowers the defenders to sell by other means (including by private bargain, auction, or the like).

[27] Secondly, I am fortified in this conclusion by the textual and contextual matrix in which the right to sell exists. Clause 3 records the specific purpose for which the defenders are entitled to sell the premises, namely "in order to clear any outstanding loans and personal debts". That is their only interest. At this latter stage of the parties' transaction, the pursuer having failed to buy back the premises, the object is not to maximise a return for the pursuer; the object is to clear the indebtedness due by (and to) the defenders. It might well happen that a sale to a private purchaser, of good covenant, with minimum delay and expense, would allow the defenders to achieve that objective more quickly, more cheaply, and with greater assurance than by entrusting a sale to advertisement to all and sundry on the open market. There is no cogent reason, at this stage, to restrict the mechanism of sale.

[28] Thirdly, the Agreement contains no express obligation on the defenders to attain "best market value", or "best price obtainable", or any such qualitative standard. It would therefore be necessary to imply a term to that effect. However, the pursuer has neither averred nor proved the component elements necessary for the implication of such a term (*Marks & Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* 2016 AC 742). The defenders' express permitted purpose in selling the premises is to clear their own liabilities and recoup their indebtedness. To imply a more onerous obligation on the defenders (such as to achieve "best price obtainable" or "best open market price" or the like) sits uneasily with that express limited purpose. Besides, if clause 3 were to be interpreted as imposing some such more onerous obligation, there would be little incentive for the pursuer to exercise the buy-back option at all. He could simply sit back, do nothing, leave it to the defenders to carry all the risk (including of market fluctuation) during the 5 year term of the Assetz Loan, comfortable in the knowledge that the defenders are obliged to maximise the return on sale, and to account to him for all the profits. In the context of this transaction,

where the defenders were in effect merely holding the title temporarily and at some considerable risk to themselves, it seems unlikely (and certainly not obvious) they would have agreed to assume this further obligation on disposal. In any event, the Agreement is perfectly workable without the implication of a duty to obtain "best price", or "best open market value", or other maximised return from the sale. It is sufficient that "any surplus monies" (per clause 5) are to be disgorged to the pursuer, after clearance of the secured Assetz Loan and indebtedness owed to the defenders. Lastly, the precise scope of this higher duty is uncertain. Is the duty to obtain the best price obtainable; or a fair open market price; or a reasonable price; or to take reasonable steps, or all practicable steps, or to use reasonable or best endeavours to achieve the desired result? There are many possible formulations. Which is it to be? The necessary implied term for this particular contract is neither obvious nor definable with sufficient precision.

[29] *Esto* a term is to be implied that the defenders are obliged to sell the premises to some prescribed standard, the pursuer has singularly failed to prove that it was sold at an "under-value". His evidence is threadbare. In August 2016, the premises were valued by Allied Surveyors at £340,000 for a commercial lender (Assetz), the valuation being predicated upon certain assumptions; in March 2017, the premises were sold for £300,000; five years later (in March 2022), the second defender asked the pursuer to pay £330,000 for the premises; and in July 2022, the premises were sold by the defenders for £300,000. All of this is proved, but none of it is sufficient to establish a sale at an under-value in July 2022. The Allied Surveyors valuation (of £340,000) in August 2016 is wholly out of date. Besides, that valuation was predicated upon various assumptions, notably that the premises enjoyed the benefit of two sitting tenants, each of good covenant, paying market rent. By July 2022, at least one of the units (the take-away) within the premises was vacant and there was

considerable uncertainty as to the security of tenure of the other tenant (R S McColl), which had gone into administration. That apart, it is within judicial knowledge that, in the intervening period, the pandemic had introduced a degree of economic uncertainty to the local commercial property market. Further, the price at which the pursuer agreed to sell to the first defender (in 2017) and the price demanded by the first defender from the pursuer (in 2022) are not reliable indicators of the true value of the premises. The pursuer adduces no qualified, independent expert evidence on which to reliably conclude that the July 2022 price was anything other than a reasonable price in the circumstances.

[30] For all these reasons I repel the pursuer's objection to the sale price as being allegedly "under value".

Did the defenders ever pay the balance of the purchase price?

[31] A further objection to the second defender's account is that, of the original £300,000 purchase price in 2017, a balance (or "deposit") of £79,000 was never paid.

[32] In his pleadings, the second defender disputes this. He avers that £79,000 was paid in cash to the pursuer. However, in his written and oral testimony, his position changed to an extent. He testified that £71,000 was paid in cash direct to the pursuer and the balance of £8,000 was allegedly paid to Inksters (the first defender's solicitors) to meet certain expenses of the purchase.

[33] Into this confusion, the pursuer then lobbed a grenade in the form of a forged or falsified bank statement. He produced what bears to be a copy of his Bank of Scotland statement for the period from 1 October 2016 to 7 October 2016 purportedly to verify that no payments (of £79,000 or £71,000) were ever paid into that account by the defenders (item 5/3 of process). In contrast, he also produced a document bearing to be a copy statement for the

same account, covering the same period, but disclosing a credit of £71,000 on 3 October 2016 from the second defender (item 5/4 of process). One of the documents is plainly false. On the simple logic that item 5/3 was obtained direct from the Bank itself, I am satisfied that item 5/4 (which was recovered from Assetz) is indeed the false document. This was also Constable Bryers' conclusion.

[34] There was much speculation as how this false document came to be in the possession of Assetz, and who was the most likely culprit to have supplied it to them. But there is no need to resolve that puzzle.

[35] Instead, on the issue of the payment (or non-payment) of the £79,000 deposit, I prefer the contemporaneous written evidence emanating from the file of the pursuer's own solicitor, Mr Alan Macpherson of Macpherson Maguire Cook, Glasgow. In an email dated 27 October 2016 from Mr Macpherson (now deceased) to the defenders' former solicitor (John McKissock), Mr McPherson stated:

> "I have now received instructions from my client Sagir Sarwar that payment of the deposit in relation to the sale of 134 Fleming Way, Hamilton to your clients Clearwater Investments Scotland Limited was received. The deposit was paid directly to Mr Sarwar on 3 October 2016. The payment made was £79,000, the purchase price being £300,000 and the amount of loan from Assetz was £221,000. Can you advise the lenders accordingly?..."

Faced with this contemporaneous communication from his own solicitor, the pursuer testified that he had never given any such "instructions" to Mr McPherson; he insisted that Mr McPherson had deliberately misrepresented the position to the defenders' agent; and he testified that he would have told Mr McPherson that, notwithstanding the non-receipt of the deposit, he was happy for the transaction to proceed. On this issue, I reject the pursuer's testimony as neither credible nor reliable. His denial appeared opportunistic and contrived. It was also implausible and illogical. It makes no sense for the pursuer to have allowed the

transaction to proceed without payment of the deposit. It is also inherently unlikely that his solicitor would have deliberately misrepresented the factual position to his counterpart, in direct defiance of the pursuer's instructions, all for no apparent reason. Instead, the contemporaneous email from the pursuer's own solicitor verifying receipt of the £79,000 deposit is the best reliable evidence available to me. The pursuer cannot now deny receipt of the deposit, standing the unqualified admission to the contrary made on his behalf by his solicitor.

[36] Besides, the reliability of this contemporaneous written acknowledgement is itself fortified by the conspicuous failure of the pursuer, over a period in excess of five years, to make any mention of the alleged non-payment of the balance of the purchase price. His silence on the issue speaks volumes. He was plainly in a dire financial pickle at the time. It is fatuous to suggest that he would not have complained or objected about a missing £79,000 deposit due to him from the sale, if he had not already received the benefit of it in one form or another.

[37] The drama of the forged bank statement is a side-show. If the deposit was indeed received in cash by Mr Sarwar, it may well never have been deposited in his bank account, so the absence of a credit entry on item 5/3 of process proves nothing. As for the forged statement (item 5/4), I observe that both Mr Sarwar and Mr Ali were directly (perhaps equally) interested in ensuring the draw-down of the loan from Assetz in 2017. Beyond that, nothing more can be said.

[38] Lastly, I attach no material significance to the inconsistency in the second defender's averment and testimony as to the breakdown of the deposit payment. From his perspective, the deposit was paid. That is also consistent with Mr McPherson's contemporaneous email. The clarification in testimony as to the precise breakdown and mechanism of the payment is

of less importance. It does not detract from my conclusion, verified by the contemporaneous communication from the purser's own solicitor, and fortified by the pursuer's prolonged silence on the issue, that the deposit was indeed paid. Accordingly, this objection to the second defender's account is repelled.

What are the "surplus monies" from the sale?

[39] In terms of clause 5 of the Agreement, the pursuer is entitled to "any surplus monies" from the sale of the premises "less expenses and other borrowing personal or business".

[40] The "surplus monies" are easily ascertained. According to the account lodged by the second defender (item 3, second defender's third inventory), the sale price in July 2022 was £299,006.45, from which the secured Assetz Loan of £208,857.34 was deducted, together with twenty undisputed expenses of sale. This produced a net "balance" due to the first defender of £87,347.31. This sum represents the "surplus monies" from the sale. The position could not be simpler.

[41] The only remaining question, therefore, is whether, on the evidence, any "expenses and other borrowing personal or business" (per clause 5) fall to be deducted from those "surplus monies". Logically, the onus must fall on the second defender to aver and prove such a deduction. The pleadings are silent on the issue. In any event, no credible or reliable evidence was adduced by the second defender to establish any such deduction from the "surplus monies". The second defender's testimony was sprinkled with suggestions of indebtedness due to him by the pursuer, but it was all rather vague and unvouched. There were references to a business trip to Gambia in 2015. Both parties claimed to have funded the trip. But neither produced any vouching. The second defender referred to an alleged

indebtedness of around £15,000 owed to him by the pursuer. No explanation was given as to its nature, when it arose, how it was constituted. Again, no vouching was produced.

[42] One issue caused me to ponder. This was the issue of the "facilitating fee" referred to in the Agreement. In clause 6, the parties agreed that if, at the time of the buy-back or sale of the premises (whichever came first) there were no other business activities between the parties, then a sum of £50,000 (referred to as a "facilitating fee") was to be paid by the pursuer to the second defender. This would appear to be the essential monetary consideration (and motivation) for the second defender to have entered into this transaction in the first place. On one interpretation, this facilitating fee might not fall within the meaning of an "expense" or "borrowing" at all, for the purposes of clause 5. However, that technical issue apart, the more significant difficulty for the second defender is that there is no foundation on record for any such claim within in this process. There is also no mention of the "facilitating fee" in the second defender's account (item 3, second defender's third inventory). An oblique reference is made to a potential indebtedness of some sort in paragraph 3 of the second defender's witness statement, but it is plainly inadequate to give fair notice to the pursuer of that claim. The statements reads:

> "I should also note in passing that Mr Sarwar was also supposed to pay me various sums in relation to the agreement and he hasn't paid any of those. To be frank I haven't so far considered pursuing them because I don't believe that he has any money…"

For these reasons, it came as no surprise when the pursuer's agent objected to an attempt by the second defenders' agent to elicit evidence at proof from the second defender, in the course of his supplementary oral testimony, regarding the "facilitating fee" under clause 6. The objection was made timeously; quite properly, the line was not pursued by the second defender's agent; and nothing of substance emerged from it. As a result, there are no

pleadings to support the deduction of any such fee from the surplus monies, and there is no evidence to support it.

[43] That said, it is unfortunate that it did not feature in the action. At first blush, it would appear to be due to the second defender. If it had featured as a contra-claim and deduction in the second defender's account of the "surplus monies", it might perhaps have allowed a final line to be drawn under the parties' mutual claims so far as deriving from the Buy Back Agreement.

[44] In summary, the second defender has failed to prove the existence or extent of any "expenses" or "other borrowing personal or business" to be deducted from the surplus monies, in terms of clause 5 of the Agreement.

The payment of £25,000 by Allied Contracts

[45] The final objection taken by the pursuer relates to an apparent payment to the defenders of £25,000 from "Allied Contracts" in March 2017.

[46] To be clear, this objection (in paragraph 3 of the pursuer's note of objections) relates to the (separate) account of the purchase of the premises from the pursuer in March 2017 (item 2, second defender's third inventory). The logic of the objection seems to be that, according to this account, £25,000 bears to have been contributed to the £300,000 purchase price by a third party called Allied Contracts. Mr Sarwar says no such contribution to the purchase price was made by Allied Contracts.

[47] I confess I am perplexed by the objection. The purpose of this action of accounting is to compel the defenders to account for the "surplus monies" allegedly received from the (later) sale of the premises by the first defender in July 2022. The source of the funds for the first defender's (preceding) purchase of the premises back in March 2017 is irrelevant. The

pursuer received the benefit of his £300,000 purchase price by March 2017, made up of various component elements. How, and from whom, the defenders ingathered that purchase price is irrelevant. Accordingly, the objection, being misconceived in principle, is repelled.

Conclusion

[48] All of the pursuer's objections to the second defender's account are repelled. The account itself discloses the "surplus monies" from the sale of the premises, namely £87,347.31. There is no reliable and credible evidence to support the conclusion that any further sums fall to be deducted from those "surplus monies". The true balance due to the pursuer by the defenders under clause 5 of the Buy Back Agreement is £87,347.31.

[49] There are no pleas-in-law for the second defender. Accordingly, I shall sustain the pursuer's fourth plea in law (inserted by amendment at proof) and grant decree against the defenders for payment to the pursuer of the sum of £87,347.31 with judicial interest from the date of citation. Expenses are reserved meantime.